SELECTIVE PROSECUTION, SELECTIVE ENFORCEMENT, AND REMEDIAL VAGUENESS

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The Supreme Court has explicitly decided not to specify the remedy a criminal defendant proven to be the victim of selective prosecution or selective enforcement should be granted, if any. This Article includes a theoretical analysis of the possible ramifications of the Court's decades long approach, which it refers to as "remedial vagueness."

The analysis shows that under the situation of remedial vagueness, criminal courts handling selective prosecution or selective enforcement claims may have various incentives to refrain from ruling on the proper remedy question themselves. Consequently, courts may have an increased incentive to reject such claims on the merits, even when they have reason to believe that a violation has in fact occurred. In turn, there may be a lower incentive for prosecutors and law enforcement officers to refrain from engaging in selective prosecution or selective enforcement and a higher incentive for criminal defendants to avoid raising such claims in court, instead agreeing to a favorable plea offer. The analysis also suggests that remedial vagueness may have contributed to the fact that claims of selective enforcement fail not only in criminal proceedings, but also in civil suits for damages against police officers.

Dispelling remedial vagueness by adopting dismissal of criminal charges or suppression of evidence as remedies can be expected to increase the incentive for courts to accept selective prosecution or selective enforcement claims and therefore improve the deterrence of such violations.

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INTRODUCTION

The Supreme Court has long recognized that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice"[1] and that "racial discrimination within the criminal justice system is particularly abhorrent."[2] Racially selective prosecution and racially selective policing are widely considered

1. *Rose v. Mitchell*, 443 U.S. 545, 555 (1979).
2. *McCleskey v. Kemp*, 481 U.S. 279, 346 (1987) (Blackmun, J., dissenting).

especially repugnant.[3] Indeed, the Supreme Court established that prosecutors are constitutionally prohibited from intentionally predicating their charging decisions on race,[4] and that law enforcement officers are constitutionally forbidden from making racially motivated enforcement decisions.[5]

Despite the nearly universal denunciation of selective prosecution and selective enforcement as both unconstitutional and deeply immoral, the Supreme Court has never set a price for such violations within the criminal process. Simply put, the Court has continuously elected not to decide on a remedy for selective prosecution or selective enforcement.

For a long period, many courts and scholars had taken almost for granted that a successful selective prosecution claim should result in dismissal of the criminal charges against the defendant.[6] But in 1996, the Court noted in *United States v. Armstrong*[7] that it has "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."[8] Since this remark—which is widely considered to apply with equal force to selective enforcement claims[9]—the Supreme Court has passively kept the remedy question open. Meanwhile, most criminal courts around the country have operated in the absence of any precedent concerning the proper remedy for a successful

3. *See, e.g.*, *United States v. Armstrong*, 48 F.3d 1508, 1520 (9th Cir. 1995) (en banc) ("There are few claims as serious as the charge . . . that the government has selected [individuals] for prosecution because of their race."), *rev'd*, 517 U.S. 456 (1996); *Commonwealth v. Long*, 152 N.E.3d 725, 735 (Mass. 2020) (cautioning that racially selective law enforcement is "particularly toxic" and "cause[s] great harm" to its victims).

4. *See, e.g.*, *Wayte v. United States*, 470 U.S. 598, 608 (1985); *Armstrong*, 517 U.S. at 464.

5. *Whren v. United States*, 517 U.S. 806, 813 (1996). The doctrines of selective prosecution and selective enforcement do not apply to situations of individuals who have been discriminated against because of a prosecutor's or a law enforcement officer's unconscious bias. Rather, to prevail, claimants of these violations are required to prove that they were discriminated against by an official with a discriminatory purpose or pursuant to a policy driven by such a purpose. *See infra* Section I.A.

6. *See, e.g.*, Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 653 n.144 (1998) ("Those few cases at the state and federal level finding [selective prosecution] have dismissed the indictment or conviction."); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After* United States v. Armstrong, 34 AM. CRIM. L. REV. 1071, 1076 n.17 (1997) ("Courts have generally assumed that the sanction for improper selective prosecution is dismissal."); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 736 (1997) ("Courts have assumed that the remedy for selective prosecution is dismissal.").

7. 517 U.S. 456 (1996).

8. *Id.* at 461 n.2.

9. *See* discussion *infra* Section I.B.

claim.[10] This Article refers to the uncertainty surrounding the remedies for selective prosecution and selective enforcement as "remedial vagueness."

Despite remedial vagueness, criminal defendants claiming selective prosecution or selective enforcement have repeatedly moved to dismiss criminal charges or suppress incriminating evidence against them.[11] The fates of such motions are important not only for the defendants filing them but also for the struggle against selective prosecution and selective enforcement more broadly: the probability that a court will accept these claims and reward criminal defendants with dismissal or suppression can be expected to affect the incentives for prosecutors and police officers to comply with the Constitution.[12] Therefore, understanding the potential influence of remedial vagueness on the adjudication of selective prosecution and selective enforcement claims is paramount.

Part I describes the doctrines of selective prosecution and selective enforcement, chronicles the creation of the Supreme Court's remedial vagueness policy and its doctrinal implications, and presents the split among academics concerning the proper remedy.

Part II includes a theoretical analysis of remedial vagueness's potential influence on the incentives for criminal courts to accept or reject claims of selective prosecution or selective enforcement. It shows that remedial vagueness may increase the incentive for courts to reject such claims on the merits or to resolve them under the radar, even if they have reason to believe that a violation occurred. As a result, there may be a lower incentive for prosecutors and police officers to refrain from engaging in selective prosecution or selective enforcement. In addition, there may be a higher incentive for criminal defendants to avoid raising such claims in court and instead agree to favorable plea offers.

Part III includes a theoretical analysis of the interactions between the requirements for proving selective enforcement in the criminal and civil processes. It shows that remedial vagueness in the criminal context may indirectly constrain the ability of selective enforcement victims to recover monetary damages from discriminating police officers in the civil process.

Part IV concludes that dispelling remedial vagueness by adopting dismissal or suppression as remedies can be expected to increase the incentive for courts to accept selective prosecution or selective enforcement claims, and consequently to strengthen the disincentive for prosecutors and police officers to engage in such violations. It also addresses two possible objections to these conclusions.

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10. *See id.*
11. *See infra* note 87 and accompanying text.
12. *See infra* Section II.B.

I. THE REMEDIAL VAGUENESS SURROUNDING THE DOCTRINES OF SELECTIVE PROSECUTION AND SELECTIVE ENFORCEMENT

This Part describes the Supreme Court's practice of keeping the remedy for successful selective prosecution and selective enforcement claims vague (i.e., remedial vagueness). Section I.A outlines the requirements for proving these violations—discriminatory effect and discriminatory purpose—and the many hurdles criminal defendants must overcome to satisfy them. Section I.B chronicles the creation of the remedial vagueness policy by the Rehnquist Court and describes its possible drivers and doctrinal implications. It also describes the tendency of most circuit courts to refrain from ruling on the remedy question themselves. Section I.C presents the split among academics as to whether powerful remedies (particularly dismissal of criminal charges or suppression of evidence) should be adopted.

A. The Doctrines of Selective Prosecution and Selective Enforcement

Prosecutors and law enforcement officers are constitutionally forbidden from intentionally predicating their professional decisions on race, ethnicity, or other impermissible factors.[13] Dictated by the Fourteenth Amendment's Equal Protection Clause and the Fifth Amendment's equal protection component,[14] selective prosecution and selective enforcement are considered among the most repugnant constitutional violations in the criminal process.[15] But in reality, criminal defendants who raise selective prosecution or selective enforcement claims in court virtually always lose.[16] Scholars usually attribute these failures to the strict requirements

13. *See, e.g.*, *Wayte v. United States*, 470 U.S. 598, 608 (1985); *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Whren v. United States*, 517 U.S. 806, 813 (1996). In this Article, I will focus on race-based discrimination, but my conclusions apply, with the necessary modifications, to other kinds of unconstitutional discrimination as well.

14. U.S. CONST. amend. XIV, § 1; *id.* amend. V; *see also Wayte*, 470 U.S. at 608 & n.9.

15. *See supra* note 3.

16. *See, e.g.*, Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 1002–03 (2021) ("Since the Court established *Armstrong*'s demanding discovery standard [in 1996], there has not been a single successful selective prosecution or selective law enforcement claim on the merits. What is more, the last successful 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)].") (footnote omitted); 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."); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 970 n.37 (2009) ("The last successful claim of racially selective prosecution appears to have been *Yick Wo v. Hopkins* . . . ."). As I explain in Section I.B,

for these doctrines, which are consistent with equal protection claims in almost all legal contexts: discriminatory effect and discriminatory purpose.[17]

First, the Supreme Court has required that defendants claiming that they were selectively prosecuted because of their race prove discriminatory effect. "To establish a discriminatory effect in a race case," the Court explained, a defendant arguing selective prosecution "must show that similarly situated individuals of a different race were not prosecuted."[18] Scholars have observed that the "similarly situated" component of this requirement is vague, and its flexible contours are susceptible to judicial manipulation to achieve a certain desired outcome.[19] But more importantly, under any definition of this component, proving the existence of such similarly situated individuals "may be sensible [only] if combined with a workable discovery standard."[20] However, per the Court, to be granted discovery of relevant prosecutorial documents, the defendant must provide "a credible showing of different treatment of similarly situated persons."[21] As countless scholars have noticed, the requirement that defendants moving for discovery present evidence showing the same data whose existence they are seeking to prove has created a "Catch-22"

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even *Yick Wo* itself may not have been a selective prosecution case. At the same time, prior to *Armstrong*, there had been a handful of successful selective prosecution claims, which were not race-based. *See* McAdams, *supra* note 6, at 616 n.55; Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 395 n.16 (2008); Darryl K. Brown, Batson v. Armstrong*: Prosecutorial Bias and the Missing Evidence Problem*, 100 OR. L. REV. 357, 381–83 (2022).

17. *Wayte*, 470 U.S. at 608; *Armstrong*, 517 U.S. at 465. While both *Wayte* and *Armstrong* address selective prosecution, the Supreme Court emphasized that selective enforcement is no different from other equal protection claims. Therefore, discriminatory purpose and discriminatory effect requirements also apply to selective enforcement. *See Whren*, 517 U.S. at 813 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause . . . ."); *see also* Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 600 (1998) ("In an equal protection case . . . [the] defendant must prove that the officers acted with discriminatory intent and that similarly situated people had not been stopped.") (emphasis omitted) (citing *Armstrong*, 517 U.S. at 465); *Conley v. United States*, 5 F.4th 781, 789 (7th Cir. 2021) ("As equal protection claims, both selective prosecution and selective enforcement require proof 'that the defendants' actions had a discriminatory effect and were motivated by a discriminatory purpose.'") (quoting *Chavez v. Illinois State Police*, 251 F.3d 612, 635–36 (7th Cir. 2001)).

18. *Armstrong*, 517 U.S. at 465.

19. *See, e.g.*, Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2025–27 (1998); Carol S. Steiker, *Criminal Procedure*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 651, 664–65 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015).

20. McAdams, *supra* note 6, at 616; *see also* Steiker, *supra* note 19, at 665.

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

situation.[22] What is more, even discovery may not help selective prosecution claimants, as there may be no indication in the prosecutorial documents of similarly situated individuals who were "not arrested or prosecuted at all."[23]

Based on Supreme Court case law, it seems that defendants claiming selective enforcement are subjected to a similar requirement—namely, showing that they were treated differently by the police compared to individuals of another race.[24] That has long been the approach of many lower courts,[25] despite various justifications for adopting a more lenient standard. Notably, as Alison Siegler and William Admussen summarized succinctly, "it is impossible for a person of color to point to similarly situated white individuals who were not arrested because there is no record of such people."[26] For such reasons, some circuit courts have established less demanding requirements for discovery in selective enforcement cases.[27]

Second, defendants must prove discriminatory purpose; namely, that the decision to prosecute or to enforce the law against them was made by an official with a discriminatory purpose or pursuant to a policy driven by such a purpose.[28] Often referred to as a requirement for "smoking gun" evidence, the discriminatory purpose requirement is largely considered the principal reason why equal protection claims in general, and selective prosecution or selective enforcement claims in particular, nearly always fail.[29] Scholars criticizing the discriminatory purpose requirement have

22. *See, e.g.*, Steiker, *supra* note 19, at 665; Poulin, *supra* note 6, at 1098; DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 159 (1999); Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2097–98 (2016) (quoting WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 120 (2011)).

23. McAdams, *supra* note 6, at 617–18 (emphasis omitted).

24. *See supra* note 17.

25. Siegler & Admussen, *supra* note 16, at 1005 ("Every circuit to address the issue continues to use the same merits standard for both selective prosecution and selective law enforcement claims."); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 337 n.22 (1998) ("[L]ower court decisions subsequent to *Armstrong* and *Whren* have not read *Armstrong* narrowly, and have applied its strict evidentiary burden to claims of selective enforcement by the police.").

26. Siegler & Admussen, *supra* note 16, at 992; *see also* Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 206.

27. Siegler & Admussen, *supra* note 16, at 1008 ("Three courts of appeals have . . . recogniz[ed] the differences between prosecutors and the police and lower[ed] the *Armstrong* discovery standard in the selective law enforcement context.").

28. *See, e.g.*, *Wayte v. United States*, 470 U.S. 598, 608–09 (1985); *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

29. *See, e.g.*, Steiker, *supra* note 19, at 665; Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 865 (1997); David C. Baldus, George Woodworth, John Charles Boger & Charles A. Pulaski, McCleskey v. Kemp *(1987): Denial, Avoidance, and the Legitimization of Racial Discrimination in the Administration of the Death Penalty*, *in* DEATH PENALTY STORIES 229, 240 (John H. Blume & Jordan M.

contended that nothing would seem to satisfy it but an admission or unequivocal evidence of overt discrimination by the official or their department[30] (or perhaps "a remarkable racial pattern of prosecutions"[31] or police misconduct). What makes this evidentiary burden so formidable, as Michelle Alexander suggested, is that in the "era of colorblindness," officials in the criminal justice system are unlikely to explicitly voice any discriminatory sentiments, even if such motivations affect their professional conduct.[32] As for statistical evidence that may be striking enough to prove discriminatory purpose, access to it (if the relevant records are actually created and preserved)[33] usually depends on a grant of discovery, which, as mentioned above, is extremely difficult to obtain.

Given the formidable criteria for proving both discriminatory effect and discriminatory purpose, it is not surprising that scholars have described selective prosecution and selective enforcement claims as "impossible" or "virtually impossible" to prove,[34] and the requirements to be nearly "insurmountable."[35] Notably, the Supreme Court itself indicated that "a selective prosecution claim is a *rara avis*," and "the standard for

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Steiker eds., 2009); Siegler & Admussen, *supra* note 16, at 1002; *see also* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1312 (1995); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 103 (rev. ed. 2012).

30. *See, e.g.*, COLE, *supra* note 22, at 159; ALEXANDER, *supra* note 29, at 103; Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIA. L. REV. 425, 437 (1997); Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2454–55 (2017).

31. COLE, *supra* note 22, at 159. The statistical evidence must be so striking as to overcome the Supreme Court's requirement that the defendant "prove that the decisionmakers in *his* case acted with discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987); *see also* Note, *Constitutional Risks to Equal Protection in the Criminal Justice System*, 114 HARV. L. REV. 2098, 2100 (2001).

32. ALEXANDER, *supra* note 29, at 103 ("[E]vidence [of discriminatory purpose] will almost never be available in the era of colorblindness, because everyone knows—but does not say—that the enemy in the War on Drugs can be identified by race."); *see also* McAdams, *supra* note 6, at 605 ("Today, most discriminators strive to conceal their intent in order to avoid legal, social, and economic sanctions.").

33. *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, 185–86 (2017) ("[D]etailed information about *Terry* stops is often limited. Investigatory stops are often rapid and relatively informal; they do not generate the kind of extensive records produced for a nonconsensual search of a house, or for a wiretap.").

34. *See, e.g.*, ALEXANDER, *supra* note 29, at 109; Steiker, *supra* note 19, at 664–65; Siegler & Admussen, *supra* note 16, at 991; William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 791 (2006); COLE, *supra* note 22, at 159.

35. *See, e.g.*, Poulin, *supra* note 6, at 1092; Renée McDonald Hutchins, *Racial Profiling: The Law, the Policy, and the Practice*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 95, 116 (Angela J. Davis ed., 2017); Davis, *supra* note 30, at 427; AZIZ Z. HUQ, THE COLLAPSE OF CONSTITUTIONAL REMEDIES 122 (2021); Siegler, Miller & Zunkel, *supra* note 16, at 109, 113.

proving [selective prosecution] is particularly demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the presumption that a prosecutor has acted lawfully."[36] Unsurprisingly, therefore, scholars have advocated that this standard be different or more lenient.[37]

B. Remedial Vagueness

For many scholars, no critique of the selective prosecution and selective enforcement doctrines is complete without addressing another hurdle: The Supreme Court has not established a proper remedy within the criminal process and has explicitly left the remedy unspecified. In this Article, I refer to this judicial choice as "remedial vagueness."

Up until 1996, many courts and legal scholars around the country took almost for granted that a judicial finding that a prosecutor engaged in selective prosecution should result in dismissal of the criminal charges against the defendant.[38] Among these courts and scholars, some based their assumption on their reading of the Supreme Court's 1886 decision in *Yick Wo v. Hopkins*.[39]

In *Yick Wo*, the petitioners—"native[s] of China" who were "subject[s] of the emperor of China"[40]—were convicted of and imprisoned for operating a laundry business in a wooden building without the consent of San Francisco County's board of supervisors, as required by the board's ordinances.[41] The petitioners, in fact, had sought the board's consent, but just like "200 others who [had] also petitioned, all of whom happen[ed] to be Chinese subjects"—did not receive consent.[42] At the same time, the board did give its consent to "80 others, not Chinese subjects, [who were] permitted to carry on the same business under similar conditions."[43] The Supreme Court found that this pattern and the denial of consent to the petitioners represented nothing short of unlawful race- and nationality-based discrimination, and held that "the public administration which

36. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (quoting *United States v. Armstrong*, 517 U.S. 456, 463–65 (1996)).

37. *See, e.g.*, Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127, 147 (2003); Kristin E. Kruse, *Proving Discriminatory Intent in Selective Prosecution Challenges—An Alternative Approach to* United States v. Armstrong, 58 SMU L. REV. 1523, 1536 (2005); Siegler, Miller & Zunkel, *supra* note 16, at 109.

38. *See, e.g.*, McAdams, *supra* note 6, at 653 n.144; Poulin, *supra* note 6, at 1076 n.17; Clymer, *supra* note 6, at 736.

39. 118 U.S. 356 (1886).

40. *Id.* at 358.

41. *Id.* at 357–59.

42. *Id.* at 374.

43. *Id.*

enforces [this discrimination] is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution."[44] The Court therefore ruled that the petitioners were taken into custody unlawfully and ordered their release.[45] Oftentimes, as Gabriel Chin observed, *Yick Wo* has been "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."[46]

But in the Supreme Court's oft-criticized 1996 decision in *Armstrong*, the Court first erected the remedial vagueness policy, explicitly denying the common belief that dismissal of criminal charges was decided to be the proper remedy for selective prosecution.[47]

Armstrong is not famous (or infamous) for its establishment of the remedial vagueness policy. In fact, *Armstrong* is primarily known as the case where the Court set the precedent for "the showing necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race."[48] Deciding that "'some evidence tending to show the existence of the essential elements of the defense,' discriminatory effect and discriminatory intent," is required,[49] the Court found that the evidence presented by the defendants did not meet this requirement (and, implicitly, the requirements for proving selective prosecution on the merits).[50]

But for the purpose of this Article, the primary interest lies in *Armstrong*'s dicta. The District Court for the Central District of California, where the defendants were indicted, granted the defendants' motion for discovery, and later denied the Government's motion for reconsideration.[51] The Supreme Court, describing the events following these decisions, explained that "[w]hen the Government indicated it would not comply with the [district] court's discovery order, the [district] court

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44. *Id.*

45. *Id.*

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

47. *United States v. Armstrong*, 517 U.S. 456, 461 n.2 (1996). The Court also ignored a comment it made in 1986, in a case concerning "the rule requiring reversal of the conviction of any defendant indicted by a grand jury from which members of his own race were systematically excluded." *See Vasquez v. Hillery*, 474 U.S. 254, 255 (1986). Writing for the Court, Justice Marshall noted that, "[j]ust as a conviction is void under the Equal Protection Clause if the prosecutor deliberately charged the defendant on account of his race, a conviction cannot be understood to cure the taint attributable to a charging body selected on the basis of race." *Id.* at 264 (citation omitted).

48. *Armstrong*, 517 U.S. at 458.

49. *Id.* at 468 (quoting *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974)).

50. *Id.* at 470.

51. *Id.* at 459–61.

dismissed the case."[52] In a footnote, the Supreme Court addressed the potential remedial consequences of selective prosecution, and noted that the Court has yet to decide any appropriate remedies.[53] In Chief Justice Rehnquist's words, the Court has "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."[54] Chief Justice Rehnquist pointed out that "[h]ere, 'it was the government itself that suggested dismissal of the indictments to the district court so that an appeal might lie.'"[55] The Court, therefore, left the existence, nature, and scope of such a remedy vague. As I will discuss in Section I.C, despite the broad language used by Chief Justice Rehnquist to describe this remedial vagueness, it should be understood as applying to a narrower category of remedies, namely those remedies that are situated within the criminal process itself (such as dismissal of criminal charges). There is no question that victims of selective prosecution can—at least in theory—seek remedies that are external to the criminal process (such as direct sanctions against the prosecutor who violated their rights). What the Court suggested, therefore, is that it has yet to determine whether selective prosecution victims can also seek remedies that are internal to the criminal process, and if so, which ones.

What triggered the Court to make the completely superfluous remedial vagueness comment in *Armstrong*? The questions before the Court concerned nothing but the discovery standard, and the Court was not required to address the requirements for proving selective prosecution on the merits, let alone the remedy for such violations. There is reason to believe that Chief Justice Rehnquist's remedial vagueness comment originated with his concern—shared with other Supreme Court Justices—over remedies which could be a windfall for criminal defendants. The Supreme Court has long been hostile to strong remedies for procedural violations in the criminal process. This was particularly true of the Rehnquist Court.[56] Even during the oral argument in *Armstrong*, Chief Justice Rehnquist expressed some concern about dismissal—the remedy advocated for by Armstrong's counsel—commenting, "[s]o you say it results . . . in other words, the person simply 'walks.' . . . He goes scot[]-

52. *Id.* at 461.

53. *Id.* at 461 n.2.

54. *Id.*

55. *Id.* (quoting *United States v. Armstrong*, 48 F.3d 1508, 1510 (9th Cir. 1995)).

56. *See, e.g.*, Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996) ("[T]he Burger and Rehnquist Courts have accepted to a significant extent the Warren Court's definitions of constitutional 'rights' while waging counter-revolutionary war against the Warren Court's constitutional 'remedies' of evidentiary exclusion and its federal review and reversal of convictions.").

free."[57] Justice Scalia was more explicit, wondering almost angrily, "[l]et's sanction [the prosecutor], but why should the criminal defendant who's been guilty of the offense walk away?"[58] It should not be a surprise, therefore, that Chief Justice Rehnquist chose to note in *Armstrong* that dismissal or other strong remedies have not been settled as appropriate for selective prosecution.[59]

Another interesting question is why Chief Justice Rehnquist stated that the Court has never decided the proper remedy for selective prosecution, despite being fully aware of the Court's landmark decision in *Yick Wo*. The answer to this question, frankly, is not completely clear. Perhaps Chief Justice Rehnquist simply did not view *Yick Wo* as relevant precedent, and for good reason. Some scholars, such as Chin and Randall Kennedy, have convincingly argued that *Yick Wo*, despite the common perception, is actually not a selective prosecution case.[60] As Chin noted, "[f]or all that appears, the police and prosecutors [in *Yick Wo*] impartially charged all who violated a law that was discriminatorily administered by someone else."[61] If *Yick Wo* was not about selective prosecution, then clearly the Court could not establish therein a remedy for selective prosecution. While this explanation seems plausible, it does not align with the fact that Chief Justice Rehnquist, like other generations of Supreme Court Justices, did in fact consider *Yick Wo* to be a selective prosecution case, and even cited it in his decision in *Armstrong*.[62] Regardless of the exact reason, Chief Justice Rehnquist's remedial vagueness footnote may either reflect his (and the Court's) belief that *Yick Wo* did not dictate the remedy for a successful selective prosecution claim, or possibly, an attempt by him and the Court to move away from the remedy ordered in *Yick Wo*.

The Court's comment concerning selective prosecution's remedial vagueness has been largely understood as applying with equal force to selective enforcement, at least since *Whren v. United States*,[63] which was handed down just a few weeks after *Armstrong*.[64] In *Whren*, the Court

57. Oral Argument at 29:45, *United States v. Armstrong*, 517 U.S. 456 (1996) (No. 95-157), https://apps.oyez.org/player/#/rehnquist10/oral_argument_audio/20581 [https://perma.cc/HPC8-SJ3Y].

58. *Id.* at 24:43.

59. *Armstrong*, 517 U.S. at 461 n.2.

60. Chin, *supra* note 46, at 1359–72, 1390–91; RANDALL KENNEDY, RACE, CRIME, AND THE LAW 354–55 n.* (1997).

61. Chin, *supra* note 46, at 1365. The "someone else" being San Francisco County's board of supervisors.

62. *Armstrong*, 517 U.S. at 464–67; *see also* Chin, *supra* note 46, at 1391 ("[W]hen the Supreme Court decides a case about discriminatory prosecution, *Yick Wo* is usually a respected cameo player.").

63. 517 U.S. 806 (1996).

64. *See, e.g.*, GUY PADULA, COLORBLIND RACIAL PROFILING: A HISTORY, 1974 TO THE PRESENT 187 n.47 (2018) (explaining that while Chief Justice Rehnquist's remedial

stressed that claims of racially discriminatory law enforcement are irrelevant to the Court's "reasonableness" analysis of a search or seizure under the Fourth Amendment (therefore rendering the Fourth Amendment exclusionary rule inapplicable to selective enforcement claims).[65] Instead, the Court emphasized, "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause."[66] The temporal proximity of *Whren* to *Armstrong*, the many similarities between the doctrines of selective prosecution and selective enforcement, and the lack of clear remedial precedent have all indicated that, per the Supreme Court, there is still no Court-determined remedy for selective prosecution or selective enforcement within the criminal process.

The remedial vagueness entailed by *Armstrong* and *Whren* has been generally considered in the legal academic community as detrimental to defendants claiming selective prosecution or selective enforcement. Numerous scholars understood the Court in these cases as precluding—or leaning toward preclusion of—any remedies situated within the criminal process, particularly dismissal of criminal charges (for selective prosecution or selective enforcement) or suppression of evidence (for selective enforcement).[67] In other words, it is not the indeterminacy of

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vagueness statement in *Armstrong* was made in the context of selective prosecution and not selective enforcement, "judges and commentators alike have usually treated selective prosecution and selective enforcement as if they are synonymous terms. The Court has never sought to clarify this confusion, nor has it articulated what is the proper remedy for a selective enforcement victim").

65. *Whren*, 517 U.S. at 811–13 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 738–39 (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.").

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

67. For literature cautioning that an implication (or potential implication) of *Armstrong* or *Whren* is that claimants of *selective prosecution* and claimants of *selective enforcement* may seek neither *dismissal* nor *suppression*, see, for example, Karlan, *supra* note 19, at 2004 ("*Whren* and *Armstrong* raise the possibility that . . . exclusion and dismissal[] will be unavailable for claims of racial discrimination."); Maclin, *supra* note 25, at 338 n.22 ("[E]ven if a black defendant challenging a pretextual traffic stop is able to obtain discovery and prevail on the merits of an equal protection claim, there is the question of remedy. The Court has shown no sign that it interprets the Equal Protection Clause to embody an exclusionary rule remedy, or that the Clause even requires the dismissal of criminal charges in a case involving a race-based prosecution.").

For literature interpreting *Armstrong* as leaning toward preclusion of *dismissal* as a remedy for *selective prosecution*, see, for example, Barbara E. Armacost, *Race and Reputation: The Real Legacy of* Paul v. Davis, 85 VA. L. REV. 569, 626 n.236 (1999) ("[S]elective prosecution claims raised under the Equal Protection Clause in an attempt to quash an indictment are . . . unlikely to succeed.") (citing *Armstrong*, 517 U.S. at 461 n.2); 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, 1107 (1998) ("[I]n a footnote to its

remedies *per se* that has concerned many scholars. Rather, it is the interpretation that they have placed upon this remedial vagueness: that the Court has signaled that there is no—or that there may not be—any proper remedy within the criminal process for selective prosecution or selective

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opinion, the *Armstrong* Court implied that dismissal might not be the proper remedy for a claim of discriminatory prosecution.").

For literature interpreting *Armstrong* or *Whren* as precluding—or leaning toward preclusion of—both *dismissal* and *suppression* as remedies for *selective enforcement*, see, for example, Steiker, *supra* note 19, at 664 ("[O]nly the Fourth Amendment has an exclusionary rule that allows for suppression of unlawfully seized evidence. Hence, there simply is no remedy within the criminal process for police practices that violate the equal protection clause."); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 587–88 (1997) ("While a motorist arrested in the aftermath of a pretextual stop could raise a claim of selective enforcement as an affirmative defense to criminal prosecution, it is unclear what remedy a court would apply if the defendant were successful. Conventional interpretation of the Equal Protection Clause does not provide for either dismissal of an indictment or suppression of evidence upon a finding that a person was singled out by police on the basis of race.") (footnote omitted); Rohit Asirvatham & Michael D. Frakes, *Are Constitutional Rights Enough? An Empirical Assessment of Racial Bias in Police Stops*, 116 NW. U. L. REV. 1481, 1492 n.43 (2022) ("[T]he Equal Protection Clause does not provide a basis for excluding the fruits of an unlawful stop or impose some other penalty.").

For literature interpreting *Armstrong* or *Whren* as precluding—or leaning toward preclusion of—*suppression* or *dismissal* as a remedy for *selective enforcement*, see, for example, Paul Butler, *Race and Adjudication*, *in* 3 REFORMING CRIMINAL JUSTICE 211, 218 (Erik Luna ed., 2017) ("There is no exclusionary rule for equal protection violations."); 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, 1064 (2010) ("The Fourth Amendment's exclusionary rule bars the use of unlawfully seized evidence against a defendant; there is no counterpart in the Equal Protection Clause of the Fourteenth Amendment.") (footnote omitted); Lewis R. Katz, *"Lonesome Road": Driving Without the Fourth Amendment*, 36 SEATTLE U. L. REV. 1413, 1426 (2013) ("The U.S. Supreme Court has not conclusively decided whether the exclusionary rule under the Fourth Amendment applies in an Equal Protection claim for a racially motivated pretextual arrest, search, or seizure. The Court looks with disfavor upon the exclusionary rule as a remedy for Fourth Amendment violations; it is very unlikely to adopt the remedy in criminal cases for equal protection violations.") (footnote omitted); Leipold, *supra* note 17, at 571 & n.50 ("There are several problems with the *Whren* court's view. First, it is far from clear that the exclusionary rule applies to an equal protection violation . . . . [T]he Court has pointedly left open the issue of what remedy a defendant is entitled to in this context."); Hutchins, *supra* note 35, at 119 ("If the police violate your equal protection rights and discover drugs and a gun, you may ask for monetary damages or a declaration that the government was wrong, but you cannot ask for those drugs and gun to be kept out of a future prosecution."); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1417 & n.13 (2002) ("[T]he common Fourth Amendment remedy—suppression—may not be available for equal protection violations . . . ."); Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1252 (2004) ("Another drawback of invoking the Equal Protection Clause is the lack of a suppression remedy . . . ."); Nirej Sekhon, *Representative Defendants*, 81 OHIO ST. L.J. 19, 61 & n.334 (2020) ("[T]he Supreme Court has hinted that dismissal might not be an appropriate remedy for a selective enforcement claim brought under the Fourteenth Amendment in a criminal case.").

enforcement. According to this line of thought, the Court has rendered defendants' associated rights defunct—rights that only exist on the books, without any real judicial ability to enforce them in action, at least within the framework of the criminal process.

A recent concurrence in the Second Circuit shows that this line of thought is shared by at least one circuit judge. Judge Lohier, who offered a powerful critique of the Supreme Court's decision in *Whren*, interpreted *Whren* as ruling out suppression of evidence as an available remedy for selective enforcement.[68] Judge Lohier also provided a useful hypothetical example that illustrates the practical implications of the Supreme Court case law as he and many scholars interpret it—that claimants of selective enforcement may seek neither suppression nor any other remedy that is internal to the criminal process:

> Say a police officer pulled over a car for driving one mile-per-hour faster than the speed limit and then explicitly announced that he had stopped the driver because the driver was African American. And say that this particular racially motivated stop happened to lead to evidence of a federal drug crime. If criminal charges were later filed against the driver based on evidence obtained during the stop, *Whren* would prevent the driver from raising the officer's explicit racial bias in any attempt to suppress the evidence. *Whren* instructs that the driver has no recourse as far as his liberty is concerned, but that later on he may be able to sue for damages.[69]

As I mentioned above, the remedial vagueness policy entailed by *Armstrong* and *Whren* likely reflects the Supreme Court's distaste for, even aversion to, dismissal, suppression, and other strong remedies for procedural violations in the criminal process.[70] But I do not agree that *Armstrong* or *Whren* warrant the conclusion that dismissal or suppression are not (or are probably not) legally available as remedies for racially selective prosecution or selective enforcement.

In fact, nothing in the Court's remedial vagueness statement in *Armstrong* (that, as mentioned, was in dicta) precludes courts from

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68. *United States v. Weaver*, 9 F.4th 129, 159 (2d Cir. 2021) (en banc) (Lohier, J., concurring) (first citing *Whren*, 517 U.S. at 813; then citing Karlan, *supra* note 19, at 2010–14; and then citing Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 918 (2015)) ("Although a criminal defendant victimized by a racially biased pretextual stop can claim a violation of the Equal Protection Clause in a separate civil proceeding, any evidence obtained as a result of the racially biased stop could still be used against him in his criminal proceeding.").

69. *Weaver*, 9 F.4th at 159 (Lohier, J., concurring) (italics added).

70. *See supra* notes 56–59 and accompanying text.

ordering dismissal, suppression, or other remedies for such violations. The Court could have ruled out dismissal as a remedy for selective prosecution (or could have explicitly stated its uneasiness about it) in *Armstrong*,[71] but it chose not to do so. Likewise, the Court had the opportunity to state explicitly in *Whren* that neither dismissal nor suppression are the proper remedies for selective enforcement, but once again, avoided making such a comment. Instead, the Court left the remedy unspecified, and since *Armstrong* and *Whren* has passively maintained more than a generation-long policy of remedial vagueness surrounding both selective prosecution and selective enforcement. Therefore, the prevalent conclusion in the scholarship—that the Court's remedial vagueness equals no remedy—ignores the Court's avoidance of ruling exactly that.

And indeed, many scholars have made mention of the Court's remedial vagueness without concluding that the Court has precluded lower courts from ordering dismissal or suppression for selective prosecution or selective enforcement.[72]

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71. *See* McAdams, *supra* note 6, at 611 n.29.

72. For literature discussing the Supreme Court's indecision as to whether dismissal is the proper remedy for selective prosecution, see, for example, Poulin, *supra* note 6, at 1076 n.17; McAdams, *supra* note 6, at 611 n.29, 653 n.144, 665–66; Clymer, *supra* note 6, at 683 n.204, 736; Sapir, *supra* note 37, at 138 n.37; Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. AADC, 14 GEO. IMMIGR. L.J. 313, 345 (2000); Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1050 n.94 (2001); Ariel Zemach, *Reconciling Universal Jurisdiction with Equality Before the Law*, 47 TEX. INT'L L.J. 143, 186 & n.259 (2011); Carl J. Schifferle, *After* Whren v. United States*: Applying the Equal Protection Clause to Racially Discriminatory Enforcement of the Law*, 2 MICH. L. & POL'Y REV. 159, 185 (1997); Marc Michael, Note, United States v. Armstrong*: Selective Prosecution—A Futile Defense and Its Arduous Standard of Discovery*, 47 CATH. U. L. REV. 675, 676 n.8, 702 n.169 (1998).

For literature discussing the Supreme Court's indecision as to whether dismissal or suppression are the proper remedies for selective enforcement, see, for example, Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 741 (2002); 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); 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) [hereinafter Holland, *Safeguarding Equal Protection Rights*]; Brooks Holland, *Racial Profiling and a Punitive Exclusionary Rule*, 20 TEMP. POL. & C.R. L. REV. 29, 40 (2010) [hereinafter Holland, *Racial Profiling and a Punitive Exclusionary Rule*]; Brooks Holland, *Race and Ambivalent Criminal Procedure Remedies*, 47 GONZ. L. REV. 341, 349 (2011); Reenah L. Kim, Note, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461, 473 n.46 (2001).

For literature discussing the Supreme Court's indecision as to the proper remedies for both selective prosecution and selective enforcement, see, for example, PADULA, *supra* note 64, at 22 n.72, 187 n.47, 195; Ric Simmons, *Race and Reasonable Suspicion*, 73 FLA. L. REV. 413, 469 n.273 (2021); Brian J. O'Donnell, Note, Whren v. United States*: An Abrupt End to the Debate over Pretextual Stops*, 49 ME. L. REV. 207, 233 (1997); Phyllis

Other circuit courts that have tackled this issue have interpreted the relevant Supreme Court case law differently from Judge Lohier. Several circuit courts handling selective enforcement claims have simply acknowledged the lack of precedent concerning the available remedies for such violations, without interpreting *Armstrong* or *Whren* as ruling out dismissal or suppression as proper remedies. These circuit courts have mostly preferred not to rule on or opine about the appropriate remedy.[73] However, the Sixth Circuit, while acknowledging that the Supreme Court has not ruled on this issue, suggested—and later decided—that suppression is not an appropriate remedy.[74] My research has not found any circuit courts that have adopted suppression as the remedy for selective enforcement,[75] but a few circuit courts have suggested incidentally that dismissal may be proper.[76]

W. Beck & Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns*, 72 TEMP. L. REV. 597, 615 & n.145 (1999).

73. *See, e.g.*, *United States v. Chavez*, 281 F.3d 479, 486–87 (5th Cir. 2002) ("Neither the Supreme Court nor our Court has ruled that there is a suppression remedy for violations of the Fourteenth Amendment's Equal Protection Clause, and we do not find it necessary to reach that issue here."); *United States v. Lopez-Moreno*, 420 F.3d 420, 434 (5th Cir. 2005) (quoting *Chavez*, 281 F.3d at 486–87); *United States v. Torrellas*, 197 F. App'x 318, 319 (5th Cir. 2006) (per curiam) ("Although whether suppression is an appropriate remedy for an Equal Protection Clause violation is an open question, we need not answer that question here, because [the defendant] has failed to provide evidence of any discriminatory motives by the officers.") (citation omitted); *United States v. Williams*, 431 F.3d 296, 299–300 (8th Cir. 2005) (per curiam) ("[E]ven if there was a due process violation, it is uncertain that dismissal is an appropriate remedy [for selective enforcement]."); *United States v. Coleman*, 483 F. App'x 419, 421 (10th Cir. 2012) ("Because the district court was correct in holding that [the defendant] hasn't shown an Equal Protection violation, we have no need to consider the government's alternative argument that suppression of evidence is an inappropriate remedy [for selective enforcement] even when such a violation is proven."); *United States v. Alabi*, 597 F. App'x 991, 997 (10th Cir. 2015) ("[B]ecause [the defendant] has failed to demonstrate an equal protection violation, we also need not consider the parties' dispute as to whether suppression is the appropriate remedy for [selective enforcement].").

74. *See, e.g.*, *United States v. Nichols*, 512 F.3d 789, 794–95 (6th Cir. 2008) (stating that while the Supreme Court has not specified the remedy for selective enforcement, it is not "necessarily suppression of evidence otherwise lawfully obtained," but more likely "a 42 U.S.C. § 1983 action against the offending officers"); *United States v. Cousin*, 448 F. App'x 593, 594 (6th Cir. 2012) (per curiam) ("[O]ur recent decision in *United States v. Nichols* controls and precludes application of the exclusionary rule to [the defendant's] equal protection claim.").

75. Ric Simmons noted in his 2021 article that "no court" has adopted suppression as a remedy for selective enforcement. *See* Simmons, *supra* note 72, at 469 n.273. Since *Armstrong* and *Whren*, at least some state courts have done so. *See, e.g.*, *Commonwealth v. Lora*, 886 N.E.2d 688, 698–700 (Mass. 2008).

76. *See, e.g.*, *United States v. Washington*, 869 F.3d 193, 223 (3d Cir. 2017) (noting briefly that "[i]f 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. Alcaraz-Arellano*, 441 F.3d 1252, 1265 (10th Cir. 2006) (ruling that the defendant "cannot satisfy the

Similarly, circuit courts handling selective prosecution claims have also not interpreted *Armstrong* as suggesting that dismissal is an improper remedy. Some circuit courts that addressed the question of the appropriate remedy for selective prosecution commented that the Supreme Court has yet to rule on this issue.[77] Other circuit courts made some brief statements, in cases where the remedy issue was not material, suggesting that dismissal is the remedy for selective prosecution.[78]

C. In Quest of Proper Remedies: Dismissal of Criminal Charges and Suppression of Evidence as the Natural Candidates

Remedies for rights violations in the criminal process can be roughly divided into two kinds: those that are internal to the criminal process (such as dismissal of criminal charges or suppression of evidence) and those that are external to it (such as monetary damages, injunctive relief, or direct

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discriminatory-intent prong of the *Armstrong* standard for obtaining discovery or dismissal on the basis of selective enforcement"); *see also United States v. Mason*, 774 F.3d 824, 836 (4th Cir. 2014) (Gregory, J., concurring in part and dissenting in part). An older concurrence in the Sixth Circuit suggested that either dismissal or suppression may be proper. *See United States v. Navarro-Camacho*, 186 F.3d 701, 711 (6th Cir. 1999) (Moore, J., concurring) ("In a proper case, I believe that a defendant . . . could achieve suppression of the evidence or dismissal of the prosecution by demonstrating that the investigatory practice had a discriminatory purpose and a discriminatory effect."). However, the Sixth Circuit has meanwhile ruled that there is no remedy for selective enforcement within the criminal process. *See* sources cited *supra* note 74.

77. *See, e.g.*, *United States v. Hedaithy*, 392 F.3d 580, 606 n.23 (3d Cir. 2004) ("The precise nature and scope of [the remedy for selective prosecution] . . . has not yet been delineated."); *see also United States v. Thorpe*, 471 F.3d 652, 666 (6th Cir. 2006); *Williams*, 431 F.3d at 299–300 (explaining, in a case involving a selective enforcement claim, that the "[Supreme] Court has not decided whether dismissal of indictment or other sanction is proper remedy if defendant has been victim of prosecution based on race").

78. *See, e.g.*, *United States v. Jones*, 159 F.3d 969, 978 n.8 (6th Cir. 1998) (noting that the defendant, who claimed selective prosecution and was granted discovery, has "the opportunity to move to dismiss the indictment following discovery"); *United States v. Venable*, 666 F.3d 893, 900 (4th Cir. 2012) (noting that "[t]he burden on a party seeking to dismiss an indictment on the basis of selective prosecution is high"); *United States v. Lewis*, 517 F.3d 20, 23 n.2 (1st Cir. 2008) (noting that "the quantum of evidence that would be needed to authorize discovery is less than the quantum of evidence needed to dismiss the indictment on selective prosecution grounds"); *United States v. Taylor*, 686 F.3d 182, 197 (3d Cir. 2012) (ruling that the defendant "did not present sufficient evidence to satisfy the threshold for obtaining discovery on his selective prosecution claim, let alone dismissal of the indictment on those grounds"). Special attention should be given to a comment made by Justice Kavanaugh, as a judge for the D.C. Circuit, in a noncriminal case that did not involve any issues related to equal protection, selective prosecution, or selective enforcement: "If the Executive selectively prosecutes someone based on impermissible considerations, the equal protection remedy is to dismiss the prosecution, not to compel the Executive to bring another prosecution." *See In re Aiken Cnty*., 725 F.3d 255, 264 n.7 (D.C. Cir. 2013) (first citing *United States v. Armstrong*, 517 U.S. 456, 459, 463 (1996); and then citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886)).

sanctions against the official who violated rights).[79] The Supreme Court's remedial vagueness statement in *Armstrong* referred to the first type—remedies internal to the criminal process. It has not been questioned that victims of selective prosecution or selective enforcement can, at least in theory, seek remedies that are external to the criminal process. The Court's remedial vagueness policy should therefore be read as follows: "While there is an array of remedies available for victims of selective prosecution or selective enforcement outside the criminal process, the Supreme Court has yet to decide whether there are also remedies for these violations that are internal to the criminal process, and if so—which ones."

Remedies external to the criminal process are "far less appealing" for criminal defendants, whose "hope is to escape conviction and imprisonment, not to recover damages in a civil action for a violation of their constitutional rights."[80] But even these "far less appealing" remedies have proven extremely difficult to achieve. Thus, for example, victims of selective prosecution cannot recover monetary damages from the prosecutors who allegedly selectively prosecuted them due to the absolute prosecutorial immunity they enjoy.[81] It is also unlikely that victims of selective enforcement will recover damages from law enforcement officers, despite the fact that they are not immune from civil suits for selective enforcement.[82] The costs and difficulties associated with obtaining legal representation and the low probability that a jury will decide in favor of an individual they may perceive to be a criminal and against a police officer (or that the jury will award the victim compensation that is not negligible) make equal protection suits extremely unattractive for victims of selective enforcement.[83] In addition, the strict

79. *See generally* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 18, 25–28 (1964) (explaining that potential remedies for police violations can be either internal or external to the criminal process).

80. Kevin R. Johnson, *The Song Remains the Same: The Story of* Whren v. United States, *in* RACE LAW STORIES 419, 439 (Rachel F. Moran & Devon Wayne Carbado eds., 2008); *see also* Karlan, *supra* note 19, at 2011 ("'Guilty victims'—individuals who were stopped and ultimately convicted—have varying incentives to litigate depending on the particular remedy afforded them. Civil damages and injunctive relief offer guilty victims little incentive to litigate their claims of racial discrimination, while suppression offers a powerful incentive.").

81. *See, e.g.*, COLE, *supra* note 22, at 166 ("Some officials are absolutely immune: . . . [P]rosecutors [cannot] be sued for damages for discriminatory prosecutions, no matter how strong the evidence of wrongdoing."); *Conley v. United States*, 5 F.4th 781, 793–94 (7th Cir. 2021) (describing prosecutorial absolute immunity from suits for monetary damages for selective prosecution).

82. Law enforcement officers do not enjoy qualified immunity in cases of selective enforcement. *See, e.g.*, *Conley*, 5 F.4th at 794; *see also* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 277–78 (2000).

83. Steiker, *supra* note 19, at 664; Karlan, *supra* note 19, at 2011–12; Davis, *supra* note 30, at 436; Stephen Rushin & Griffin Edwards, *An Empirical Assessment of*

requirements for proving selective enforcement in the criminal process are essentially the same for proving selective enforcement in a civil suit.[84]

Amid the inadequacy of the various external remedies, scholars have looked to the criminal process for remedies for selective prosecution or selective enforcement. Attempting to dispel the remedial vagueness created by the Supreme Court, two remedies have been flagged as natural candidates: dismissal of criminal charges and suppression of evidence.[85] While dismissal may technically be a remedy for either selective prosecution or selective enforcement, suppression may only be a remedy for the latter (as selective prosecution, by its nature, does not lead to obtaining any evidence that can be excluded).

There are a few reasons why dismissal and suppression—and not other remedies—have been repeatedly invoked by scholars as the most acceptable remedies for selective prosecution or selective enforcement. First, dismissal (for selective prosecution) and suppression (for selective enforcement) were the remedies sought by the defendants in *Armstrong* and *Whren*, respectively.[86] In fact, criminal defendants claiming selective prosecution or selective enforcement almost always move to dismiss criminal charges or suppress incriminating evidence against them,[87] and very rarely seek different remedies (except for discovery).[88] Second, dismissal and suppression have been two of "[t]he four conventional remedies for violations of criminal procedure protections" together with reversal of convictions and monetary damages,[89] and the only ones among them that can be ordered by trial courts in criminal proceedings. Specifically, prior to *Armstrong*'s remedial vagueness statement, dismissal had been traditionally taken almost for granted by courts to be the remedy for selective prosecution (although they almost never ordered it).[90] Third, crafting remedies within the criminal process that are not

Pretextual Stops and Racial Profiling, 73 STAN. L. REV. 637, 701 (2021); Rudovsky, *supra* note 72, at 354–55; COLE, *supra* note 22, at 167.

84. *See infra* Part III.

85. *See* sources cited *infra* note 97.

86. *United States v. Armstrong*, 517 U.S. 456, 459 (1996); *Whren v. United States*, 517 U.S. 806, 809 (1996).

87. *See, e.g.*, Poulin, *supra* note 6, at 1089; Beck & Daly, *supra* note 72, at 616.

88. There are few cases where criminal defendants raise claims of selective prosecution or selective enforcement and seek remedies within the criminal process other than dismissal, suppression, or discovery. For such an example, see *United States v. Crinel*, No. 15-61, 2015 WL 4548601, at *5–6, *5 n.58 (E.D. La. July 28, 2015) (denying the defendant's motion to "return . . . all assets seized prior to indictment" to her possession on the grounds of selective enforcement, while commenting that "[t]he Court is not aware of a single case . . . in which a court has ordered similar relief").

89. Karlan, *supra* note 19, at 2004.

90. *See supra* notes 6, 38 and accompanying text.

dismissal or suppression may prove to be a difficult challenge.[91] As Sonja Starr observed, "[r]emedies for violations of criminal defendants' procedural rights are often all or nothing. Convictions are either reversed or affirmed; charges are either thrown out or let stand; evidence is either excluded or admitted."[92] Alternative remedies that are not "all or nothing" but more nuanced, such as sentence reduction for prosecutorial misconduct (as advocated for by Starr)[93] or for police misconduct (as recommended by Guido Calabresi[94] and by Harry Caldwell and Carol Chase),[95] are generally foreign to the criminal process in the United States.[96]

Proponents of dismissal or suppression as remedies for selective prosecution or selective enforcement have offered several justifications.[97] Two justifications stand out. First, as alluded to above, these strong remedies would best encourage defendants to raise claims of selective prosecution or selective enforcement, therefore ascertaining that the judiciary has a meaningful opportunity to address prosecutorial and police discrimination.[98] Second, dismissal and suppression are arguably the most

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91. *See, e.g.*, Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 827 (1999) (stating that "[a]s a practical matter, dismissal may be the only remedy [for selective prosecution]"); McAdams, *supra* note 6, at 653 n.144 ("[I]t is difficult to imagine the Supreme Court fashioning a remedy other than dismissal [for selective prosecution].").

92. Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1510–11 (2009).

93. *Id.* at 1519–20.

94. Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J. L. & PUB. POL'Y 111, 115–17 (2003).

95. 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).

96. *See, e.g.*, Starr, *supra* note 92, at 1511 (commenting that sentence reduction for procedural violations in the criminal process is "essentially unknown in U.S. courts").

97. For articles advocating for dismissal or suppression as remedies for selective prosecution or selective enforcement (sometimes under certain limiting conditions), see, for example, McAdams, *supra* note 6, at 654–67 (supporting dismissal as a remedy for selective prosecution); Alschuler, *supra* note 26, at 254–57 (supporting dismissal as a remedy for both selective prosecution and selective enforcement, and suppression as a remedy for selective enforcement); Holland, *Safeguarding Equal Protection Rights*, *supra* note 72 (supporting suppression as a remedy for selective enforcement); Holland, *Racial Profiling and a Punitive Exclusionary Rule*, *supra* note 72 (same); Karlan, *supra* note 19, at 2013–14 (same); Lisa Walter, Comment, *Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 257 (2000) (same).

98. Karlan, *supra* note 19, at 2013 ("Suppression creates a powerful reason for a criminal defendant to litigate an equal protection challenge vigorously: the very cases in which such a violation is most likely to have occurred are also those in which suppression is most likely to lead to dismissal or acquittal."); *id.* at 2028 ("[I]t is unclear what remedies

effective deterrents for discriminatory conduct by the prosecution or the police. Criminal justice officials who know that their misconduct may lead to the release of the individual with whom they engaged are expected to be less likely to violate the Constitution.[99]

Unsurprisingly, not all scholars have demonstrated similar enthusiasm about such strong remedies. Some have emphasized that dismissal or suppression may be a windfall for factually guilty defendants and have underlined the high social costs associated with refraining from punishing criminals.[100] Larry Alexander was even more concerned.[101] He warned that often the social costs stemming from dismissal (or reversal of convictions) as a remedy for selective prosecution will not stop at letting just one factually guilty defendant go.[102] Alexander gave the example of a prosecutor who selectively refrained from prosecuting a factually guilty murderer, basing his decision on a constitutionally impermissible factor.[103] Alexander raised the question: "Would we then conclude that, despite their guilt, the thirty murderers previously prosecuted [by the same prosecutor] should be released and compensated because they would not have been prosecuted had they been [a part of the group sharing the same impermissible factor that the prosecutor cherishes]?"[104]

The remedial vagueness surrounding selective prosecution or selective enforcement could theoretically be dispelled by the Supreme Court handing down one of the following decisions:

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other than dismissal will create an incentive for defendants to ferret out racial discrimination in the charging process.") (emphasis omitted).

99. *See, e.g.*, *id.* at 2013 ("[S]uppression . . . alters the incentives of the police to engage in the [discriminatory] behavior in the first place."); McAdams, *supra* note 6, at 659 ("[T]he only means of deterring selective prosecution [besides discovery] is to dismiss cases . . . ."); Holland, *Safeguarding Equal Protection Rights*, *supra* note 72, at 1123–24 (concluding that "[t]he deterrence rationale for the exclusionary rule . . . amply supports application of the exclusionary rule to equal protection violations to safeguard equal protection rights"); Holland, *Racial Profiling and a Punitive Exclusionary Rule*, *supra* note 72, at 59 ("[B]ecause an equal protection violation involves a specific decision to violate the Constitution's command not to discriminate on the basis of race, an equal protection violation presents a paradigmatic case for exclusionary rule deterrence efficacy . . . ."); Walter, *supra* note 97, at 291–92 ("In theory, the knowledge the police will not be able to keep the cash, or convict the defendant, will deter police from racial targeting in general.").

100. *See, e.g.*, Henning, *supra* note 91, at 827 ("As a practical matter, dismissal may be the only remedy [for selective prosecution], but as a matter of constitutional law, it is hard to justify permitting that result for a defendant who disputes the exercise of prosecutorial discretion, not his culpability."); Clymer, *supra* note 6, at 718, 736 (referring to dismissal as a remedy for selective prosecution as "draconian").

101. Larry Alexander, *Equal Protection and the Prosecution and Conviction of Crime*, 2002 U. CHI. LEGAL F. 155.

102. *Id.* at 159–62.

103. *Id.* at 159.

104. *Id.*

(1) There is a *strong, conventional remedy* for selective prosecution or selective enforcement available for defendants within the criminal process. This remedy can be either dismissal (for victims of selective prosecution or selective enforcement) or suppression (for victims of selective enforcement).
(2) There is a *weaker, non-conventional remedy* for selective prosecution or selective enforcement available for defendants within the criminal process, such as sentence reduction.
(3) There is *no remedy* for selective prosecution or selective enforcement available for defendants within the criminal process. The only remedies available for victims of such violations are outside the criminal process.

In the absence of Supreme Court action, lower courts may choose any of these three options. However, most lower courts adjudicating claims of selective prosecution or selective enforcement are unlikely to seriously consider option (2); option (1) or option (3) would seem much more plausible. As discussed above, claims of selective prosecution or selective enforcement in the criminal process are generally raised by defendants filing motions to dismiss criminal charges or to suppress incriminating evidence against them.[105] Alternative remedies that were proposed in the literature have rarely if ever been sought by criminal defendants or granted by courts.[106] Courts have incidentally commented briefly on the invalidity of other possible judicial responses, such as "compel[ling] the Executive to bring another prosecution" against those similarly situated individuals that the prosecution did not prosecute[107] or "compel[ling] the executive to file particular charges against a defendant."[108] But generally, lower courts around the country that have directly addressed remedial vagueness have considered only two options as viable: either that the remedy within the criminal process for selective prosecution or selective enforcement is one (or both) of the two conventional remedies of dismissal or suppression, or that there is no remedy available for victims of such violations within the criminal process.[109]

105. *See supra* note 87 and accompanying text.

106. Some scholars, as mentioned *supra* notes 93–95, proposed sentence reduction as a remedy for prosecutorial or police misconduct. Steven Clymer proposed that "[i]f a federally prosecuted defendant establishes an equal protection violation by identifying a pool of offenders who are prosecuted in state court, instead of dismissing the case, the court could attempt to afford the defendant the benefit of the state doctrines he would otherwise be denied." Clymer, *supra* note 6, at 737.

107. *In re Aiken Cnty.*, 725 F.3d 255, 264 n.7 (D.C. Cir. 2013).

108. *United States v. Snype*, 441 F.3d 119, 141 (2d Cir. 2006).

109. *See, e.g.*, *People v. Sims*, No. 2-20-0391, 2022 WL 970502, at *16 n.4 (Ill. App. Ct. Mar. 31, 2022); *T.J. ex rel. Johnson v. Rose*, C.A. No. 20-243 WES, 2022 WL 2752622, at *2–3, *2 n.3 (D.R.I. July 14, 2022); *United States v. Hare*, 308 F. Supp. 2d 955, 1002 n.43 (D. Neb. 2004); *United States v. Mumphrey*, 193 F. Supp. 3d 1040, 1054–59 (N.D. Cal. 2016). *But cf. United States v. Dixon*, 486 F. Supp. 2d 40, 44 n.6 (D.D.C.

II. THE POTENTIAL INFLUENCE OF REMEDIAL VAGUENESS ON THE INCENTIVES OF PLAYERS IN THE CRIMINAL JUSTICE SYSTEM

Legal scholars have mostly conducted a normative inquiry of the remedies that the Court should adopt for selective prosecution or selective enforcement. Scholars, however, have largely passed over the examination of a question of utmost importance: What are the potential implications of remedial vagueness for the daily operation of the criminal justice system? In other words, how could remedial vagueness potentially affect the behavior or the incentives of various players in the criminal justice system? Since *Armstrong* and *Whren*, for more than twenty-five years, criminal courts have been called by criminal defendants to adjudicate claims of selective prosecution or selective enforcement. Most of these courts have operated in the absence of any precedent concerning the remedial consequences of accepting these claims. Any potential influence of remedial vagueness on the adjudication of selective prosecution or selective enforcement claims may translate into influence on the incentives for prosecutors and police officers to engage in or to refrain from discriminatory conduct.

Therefore, there is a pressing need to uncover the potential influence of remedial vagueness. Below, Section II.A includes a theoretical analysis of the potential influence of remedial vagueness on the adjudication of selective prosecution or selective enforcement claims. Examination of literature on constitutional remedies suggests that, under the situation of remedial vagueness, criminal courts may have various incentives to refrain from ruling on the proper remedy question. As a result, courts may have an increased incentive to reject selective prosecution or selective enforcement claims on the merits, so that they do not have to reach the remedial stage, even if courts have reason to believe that a violation might have occurred. Section II.B includes a theoretical analysis of the potential influence of remedial vagueness on the incentives for police officers and prosecutors to comply with the Constitution. Even if dismissal or suppression were the Supreme Court-established remedy for selective prosecution or selective enforcement, the strict requirements for proving these claims on the merits, as well as other factors, would dilute these remedies' deterrent effect. The current uncertainty regarding the remedy for these violations and its potential immobilizing influence on courts may translate into an even lower incentive for racially biased police officers and prosecutors to treat "similarly situated individuals" of different races equally. This Section also includes a theoretical analysis of the influence of remedial vagueness on the incentives of criminal defendants. The lower

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2007) (noting that there is no practical need to decide in this case whether the remedy for selective enforcement is "suppression of the evidence recovered from the defendant's car, the dismissal of the indictment, or any other remedy in the criminal context").

incentive for courts to accept selective prosecution or selective enforcement claims may translate into a lower incentive to raise these claims in court, even if the claims are well supported. At the same time, remedial vagueness may increase the incentive for criminal defendants to accept a favorable plea offer from the prosecution.

Prior to the analysis, it is important to note that I am not aware of any studies empirically testing the level of familiarity of judges, prosecutors, police officers, or defense attorneys with the remedial vagueness policy. The fact that the question of the proper remedy for selective prosecution or selective enforcement has been left open or unclear surfaces in academic literature,[110] federal and state court opinions,[111] and several legal textbooks and treatises.[112] Occasionally, prosecutors, defense attorneys, and others cite this fact in their respective briefs.[113] But sometimes, the situation of remedial vagueness is not acknowledged in such sources, and the authors mention that dismissal is or may be the available remedy for selective prosecution or selective enforcement.[114] For the purposes of my analysis, it is not material that all players in the criminal justice system necessarily be aware of the remedial vagueness surrounding selective prosecution or selective enforcement. All that the analysis needs to assume

110. *See supra* notes 67, 72.

111. *See supra* notes 73–74, 77, 109; *see also, e.g.*, *Ali v. Gonzales*, 440 F.3d 678, 681 (5th Cir. 2006); *Jones v. Sterling*, 110 P.3d 1271, 1276 n.3 (Ariz. 2005) (en banc); *State v. Brown*, 930 N.W.2d 840, 918–19 (Iowa 2019) (Appel, J., dissenting); *Portillo Funes v. State*, 230 A.3d 121, 146 (Md. 2020).

112. *See, e.g.*, 2 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 6.03[A] (4th ed. 2006); RACHEL HARMON, THE LAW OF THE POLICE 307–08 (2021); 1 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 1.5(j) (4th ed. 2021); RONALD JAY ALLEN, JOSEPH L. HOFFMANN, DEBRA A. LIVINGSTON, ANDREW D. LEIPOLD & TRACEY L. MEARES, CRIMINAL PROCEDURE: ADJUDICATION AND RIGHT TO COUNSEL 1043 (3d ed. 2020); BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 4:9 (2d ed. 2021); 1 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 1:17a (3d ed. 2021).

113. *See, e.g.*, Brief of Appellee at 21, *United States v. Frazier*, 408 F.3d 1102 (8th Cir. 2005) (No. 04-1005); Brief for Respondent at 10–11, *People v. Soto*, 747 N.Y.S.2d 173 (2002) (No. 1594); Appellee's Answering Brief at 15 n.1, *State v. Tillmon*, 216 P.3d 1198 (Ariz. Ct. App. 2009) (No. 1 CA-CR 08-0139); Appellant's Reply Brief at 6 n.2, *United States v. Deberry*, 430 F.3d 1294 (10th Cir. 2005) (No. 04-1532); Petition for a Writ of Certiorari at 19–20, *Verniero v. Gibson*, 547 U.S. 1035 (2006) (No. 05-779); Principal Appellees' Brief on Behalf of the New Jersey State Police; State of New Jersey; C.L. Pagano; and Carson Dunbar at 46 n.13, *Dique v. New Jersey State Police*, 603 F.3d 181 (3d Cir. 2010) (Nos. 05-1159, 08-2525); Defendant-Appellant's Reply Brief at 8–9, *United States v. Coleman*, 483 F. App'x 419 (10th Cir. 2012) (No. 11-2173).

114. At times, authors cite *Yick Wo v. Hopkins* as a source for the assumption that dismissal is the remedy for selective prosecution or selective enforcement, *See, e.g.*, Siegler & Admussen, *supra* note 16, at 991 & n.17. More often, authors assume it without any apparent inquiry when the issue is not material to the discussion. *See supra* notes 76, 78. On other occasions, authors cite both *Armstrong*'s remedial vagueness statement and *Yick Wo* to point at the prima facie disharmony between them. *See, e.g.*, *Lovill v. State*, 319 S.W.3d 687, 693 n.23 (Tex. Crim. App. 2009); Alschuler, *supra* note 26, at 255.

is that courts that are seriously considering whether to accept a defendant's motion for dismissal or suppression, and that are therefore looking into relevant case law or scholarship to find out potential remedies, are likely to learn that the remedy question remains open. The analysis need not assume any awareness of police officers, prosecutors, defense attorneys, or criminal defendants of the remedial vagueness situation. Since my analysis is aimed at examining the potential influence of a situation where the remedy for selective prosecution or selective enforcement is undetermined, it will assume that there are no remedies within the criminal process for these violations prescribed by state laws in their respective jurisdictions.

A. The Potential Influence of Remedial Vagueness on the Adjudication of Selective Prosecution and Selective Enforcement Claims

Despite the remedial vagueness surrounding selective prosecution and selective enforcement, criminal courts, as mentioned, have continued to handle such claims raised by criminal defendants. This Section attempts to uncover the potential influence of remedial vagueness on the incentives for courts to accept or to reject such claims. Section II.A.1 briefly introduces some ways in which constitutional remedies have been described in the literature as central to constitutional adjudication, drawing from the example of the Fourth Amendment exclusionary rule. Relying on this rich scholarship, Section II.A.2 addresses the unique situation of remedial vagueness and includes a theoretical analysis of its potential influence on the adjudication of selective prosecution and selective enforcement claims.

1. THE CENTRALITY OF REMEDIES TO CONSTITUTIONAL ADJUDICATION

On paper, the remedy that a court would order upon finding that selective prosecution or selective enforcement has occurred—whether dismissal, suppression, or another—should have no influence on the adjudication of the merits of such claims. A court handling these claims should only ask itself whether the claimant in the case before it has met the requirements for proving selective prosecution or selective enforcement. That is, a court does not need to bother itself with the remedy prior to accepting these claims on the merits. A court should only cross the remedial bridge when it comes to it. Remedial vagueness should therefore have no effect whatsoever on the court's ruling on the merits in the case before it. According to this line of thought, the persistence of remedial vagueness is the result of the demanding requirements for proving

selective prosecution or selective enforcement, which are very difficult to meet.[115]

Granted, there can be no doubt that the nearly insurmountable requirements for proving selective prosecution or selective enforcement on the merits are the preeminent reason that such claims virtually always fail and that the remedy question remains open. If the standard were considerably more lenient, claimants of selective prosecution or selective enforcement would be expected to prevail in higher numbers, and the remedy question would likely be resolved quickly. But the current demanding requirements for proving selective prosecution or selective enforcement do not mean that the remedies for these violations, or lack thereof, are completely inconsequential. In fact, legal literature in the field of constitutional remedies provides insights on the manners in which remedial vagueness itself may potentially influence the adjudication of claims of selective prosecution or selective enforcement.

A rich body of scholarship illustrates a myriad of ways that remedial considerations can be central to constitutional adjudication. According to this literature, courts, the Supreme Court among them, constantly contemplate the remedies they may have to grant down the road upon finding that substantive constitutional rights have been violated. This contemplation may occur, for example, when courts are deciding the scope and contours of substantive constitutional rights[116] or when ruling on the applicability of justiciability doctrines.[117] Frequently, the prospect of the remedies that courts would have to order may even influence their willingness to enforce rights altogether.[118] The scholarship on these subjects, to be sure, is largely based on intuition and common sense about the motivations and incentives that drive judges (as human beings) and courts (as institutions) to act in certain ways.[119] For instance, scholars in the field assume that a central concern of courts is the "practical

115. *See* Gross & Barnes, *supra* note 72, at 741 ("In practice, the value of the Equal Protection Clause as a remedy for discrimination in criminal investigations is deeply compromised by the near impossibility of proof. As a result, few cases are litigated, and the legal doctrine remains undeveloped. Even the central issue of remedy is unsettled."); *cf.* PADULA, *supra* note 64, at 22 n.72 ("The Court's remarkable ability to go decade after decade without ever deciding the merits of a single selective enforcement claim in a criminal case explains why it has never had to declare what the remedy would be for such a violation.").

116. *See generally*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

117. *See generally*, Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006).

118. *See, e.g.*, Starr, *supra* note 92, at 1515–16; Nancy Leong, *Improving Rights*, 100 VA. L. REV. 377, 388–89 (2014); Michael Coenen, *Spillover Across Remedies*, 98 MINN. L. REV. 1211, 1214 (2014).

119. *See, e.g.*, Fallon, *supra* note 117, at 685.

consequences"[120]—or the "remedial consequences"[121]—of their decisions, and that therefore, it is sensible that this concern will frequently guide and shape their actions and decisions. But in addition to intuition and common sense, scholars also back their theses with real-world examples illustrating the centrality of remedies to constitutional adjudication.[122]

An oft-cited example of a remedy that is an engine of such an array of interrelations is the Fourth Amendment exclusionary rule. In the Supreme Court's seminal 1961 case, *Mapp v. Ohio*,[123] the Court held that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court."[124] By doing so, the Warren Court extended the exclusionary rule—which had been applicable in federal courts since 1914—to the states.[125] Almost immediately after being published, *Mapp* was already hailed as "one of the most significant opinions rendered by the Court in the area of criminal procedure since the turn of the century."[126] Few, if any, would disagree with that statement today. However, it is hard to deny that mandating the application of a powerful remedy like suppression in the states has in the long term been met with a judicial backlash, which exemplifies convincingly the enormous effect that the remedial stage may have on other stages of the criminal process. For instance, to evade the need to comply with *Mapp*'s demand to suppress evidence obtained in violation of the Fourth Amendment, courts, notably the Supreme Court, have narrowed down the scope of substantive Fourth Amendment rights. As summarized provocatively by Yale Kamisar:

> The Warren Court has been disbanded for more than thirty years. Since then, with only a few exceptions, the Burger and Rehnquist Courts have waged a kind of "guerilla warfare" against the law of search and seizure. As a result, Judge Cardozo's oft-quoted criticism of the exclusionary rule—"[t]he criminal is to go free because the constable has blundered"—is out of date. The Court has taken a grudging view of what amounts to a "search" or "seizure" within the meaning of the Fourth Amendment and has taken a relaxed view of what constitutes consent to an otherwise illegal search or seizure; it has so softened the "probable cause" requirement, so increased

120. *Id.*

121. Levinson, *supra* note 116, at 885.

122. See examples provided in two of the classic pieces on the centrality of remedies to constitutional adjudication. *Id.* at 889–893; Fallon, *supra* note 117, at 687–89.

123. 367 U.S. 643 (1961).

124. *Id.* at 655.

125. *See Weeks v. United States*, 232 U.S. 383 (1914).

126. Dale W. Broeder, *The Decline and Fall of* Wolf v. Colorado, 41 NEB. L. REV. 185, 186 (1961).

> the occasions on which the police may act on the basis of "reasonable suspicion" or in the absence of any reasonable suspicion, and so narrowed the thrust of the exclusionary rule that nowadays the criminal only "goes free" if and when the constable has blundered badly.[127]

Or as Calabresi succinctly put it: "[L]iberals ought to hate the exclusionary rule because the exclusionary rule, in my experience, is most responsible for the deep decline in privacy rights in the United States."[128]

It has long been argued that courts also avoid suppression of evidence by manipulating the fact-finding process, especially in cases that are not clear cut. As stated by Akhil Amar, "[j]udges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated.".[129] Numerous scholars have described, for example, a reciprocal process where judges, particularly in severe crime cases, accept testimonies of police officers suggesting that relevant evidence was not obtained unconstitutionally, even if the judges have reason to believe that these testimonies are perjurious. Police officers, recognizing the frequent judicial aversion to suppression of evidence, arguably feel encouraged to calibrate their testimonies accordingly.[130] (The latter phenomenon is often referred to as "testilying.")[131] This reciprocal process was described quite figuratively by Calabresi:

> [T]he question of fact as to whether the police are lying, or whether the evidence was properly obtained, is often close. If it is a close question and a judge finds that the police did not tell the truth, then—given the exclusionary rule—a murderer or rapist will be released. As a result, when in doubt a judge will say, "Maybe they are telling the truth."[132]

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127. Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 133 (2003) (emphasis omitted) (footnotes omitted) (quoting *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926)).

128. Calabresi, *supra* note 94, at 112.

129. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994).

130. *See, e.g.*, Calabresi, *supra* note 94, at 113; Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 83 (1992); Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1794–97 (2007); Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence,"* 37 FORDHAM URB. L.J. 743, 784 (2010).

131. *See, e.g.*, Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1040 (1996).

132. Calabresi, *supra* note 94, at 113.

Of course, the Fourth Amendment exclusionary rule is just one example. Courts have arguably evaded the need to order strong remedies for procedural violations via curtailment of substantive rights, alteration of justiciability doctrines, or manipulation of the fact-finding process in other contexts. Similar phenomena are documented, for instance, in the contexts of adjudication of claims of racially discriminatory peremptory challenges in jury selection[133] and *Miranda v. Arizona*[134] violations.[135]

2. ADJUDICATING SELECTIVE PROSECUTION AND SELECTIVE ENFORCEMENT CLAIMS WHEN THE REMEDY IS UNDECIDED

Having discussed the centrality of remedies to constitutional adjudication, the situation of remedial vagueness should give the reader pause. The above examples demonstrate that substantive constitutional rights and adjudication of their claimed violations can hardly be imagined independently from their associated remedies. Yet, courts routinely adjudicate claims of selective prosecution or selective enforcement, where the remedy for violations is still undetermined. This peculiar situation gives rise to two interesting questions. First, how has the Supreme Court been able to outline the requirements of the doctrines of selective prosecution and selective enforcement without deciding the remedy within the criminal process for the violation? Second, and of greater interest, what potential effect does remedial vagueness have on the adjudication of claims of selective prosecution and selective enforcement on the merits?

The answer to the first question may be relatively simple. The Supreme Court crafted, in *Wayte v. United States*,[136] the selective prosecution doctrine that we know today, demanding that claimants meet the strict "ordinary equal protection" requirements of discriminatory effect and discriminatory purpose,[137] instead of some more lenient requirements. Even if the Court in *Wayte* (perhaps like in *Armstrong*) did not consider *Yick Wo* to be dictating the proper remedy for selective prosecution (namely, dismissal of criminal charges), it was not operating in complete ignorance of the arsenal of potential remedies for such violations. Before *Armstrong*, many courts and scholars took almost for granted that dismissal of criminal charges was the remedy for selective prosecution.[138] Dismissal has also more generally been considered a conventional remedy

133. *See, e.g.*, Karlan, *supra* note 19, at 2014–23.

134. 384 U.S. 436 (1966).

135. *See, e.g.*, David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1247–49.

136. 470 U.S. 598 (1985).

137. *Id.* at 608.

138. *See supra* notes 6, 38 and accompanying text.

for rights violations in the criminal process.[139] And indeed, dismissal was the remedy sought by the defendants in *Wayte*.[140] Knowing that dismissal is at least a likely option for a remedy, the Court could shape the selective prosecution doctrine while having this powerful remedy in mind. By the same token, the Court in *Whren* directed claimants of discriminatory policing to the Equal Protection Clause and the strict requirements for proving its violation,[141] likely knowing that dismissal of charges and suppression of evidence are both potential remedies for such violations.

The answer to the second question—the potential influence of remedial vagueness on the adjudication of selective prosecution and selective enforcement—is more intriguing, and the core of this Section. One might expect that if dismissal or suppression were the Supreme Court-established remedies for selective prosecution or selective enforcement, they would possibly influence the adjudication on the merits in fashions similar to the ones regarding the Fourth Amendment exclusionary rule; namely, courts would have an incentive to avoid finding that a violation occurred to evade the need to order dismissal or suppression. But, as I will show, under the current situation of remedial vagueness, the incentive for courts to avoid finding that a violation occurred may be even stronger compared to a hypothetical world with a Court-established strong remedy. That is, the lack of Supreme Court precedent authorizing or mandating strong remedies for selective prosecution or selective enforcement may vigorously increase the incentive for courts to reject such claims on the merits, including in cases where they have reason to believe that a violation occurred.

To assess remedial vagueness's potential effect on the adjudication of selective prosecution or selective enforcement claims, it is first necessary to understand some of the various considerations that may serve as a disincentive for judges to order strong remedies for procedural violations in the criminal process. These considerations have been primarily reviewed in the rich literature and case law dedicated to the Fourth Amendment exclusionary rule.

Scholars and courts have listed several costs associated with suppression of unconstitutionally obtained evidence that may contribute to judges' urge to avoid ordering suppression.[142] These costs can be divided into two types: (1) "social costs," which are borne by society at large; and (2) "personal costs," which are borne by those who are perceived as accountable for creating the social costs (mostly the judges who order suppression).

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139. *See supra* note 89 and accompanying text.
140. *Wayte*, 470 U.S. at 604.
141. *Whren v. United States*, 517 U.S. 806, 813 (1996).
142. *See infra* notes 143–154 and accompanying text.

The primary and most immediate social cost of suppression of evidence is the possible failure to convict factually guilty defendants.[143] As mentioned above, this cost of the exclusionary rule was most famously referred to in 1926 by Judge Cardozo: "The criminal is to go free because the constable has blundered."[144] This social cost is higher when the crimes involved are severe. In such cases, judges may be especially reluctant to order suppression.[145]

The threat to public safety due to suppression of evidence can stem not just from the release of factually guilty defendants. For instance, some scholars, Richard Posner and Tonja Jacobi among them, have argued that suppression may lead to a situation of police overdeterrence. They envision scenarios in which police officers—due to their fear that the evidence they obtain will be suppressed—end up forgoing even constitutional searches and seizures.[146] Furthermore, in the long run, suppression may lead to deterioration in societal compliance with the law. As Richard Re noted, "[a] court's integrity—actual and perceived—must grievously suffer when known criminals stride proudly out of court, unpunished."[147] Theories of procedural justice suggest that a decline in the level of fairness, integrity, or legitimacy that the public attributes to the judiciary and its decisions can translate into lower levels of obedience to the law.[148] Therefore, as Christopher Slobogin warned, "[i]f, as legitimacy-compliance theory predicts, respect for authorities correlates with willingness to comply with the law," suppression of evidence may have long-term adverse implications for society.[149]

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143. *See, e.g.*, *Davis v. United States*, 564 U.S. 229, 237 (2011) ("[Suppression's] bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment.").

144. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

145. *See, e.g.*, Calabresi, *supra* note 94, at 112; Amar, *supra* note 129, at 799; Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 657 (2011).

146. Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 638 (1982); Jacobi, *supra* note 145, at 596–97. *But cf.* Orin S. Kerr, *An Economic Understanding of Search and Seizure Law*, 164 U. PA. L. REV. 591, 628 (2016) ("The empirical literature on how the exclusionary rule and civil damages actually deter officers is unsettled and remains in considerable dispute.").

147. Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1904 (2014); *see also* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 436–37.

148. *See generally* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

149. Slobogin, *supra* note 147, at 437 (footnote omitted). *But see* Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 363–64 (2011) (arguing that courts' avoidance of suppression of unconstitutionally obtained evidence—not decisions to suppress—"will generate disrespect for authority, chill voluntary compliance, and discourage law-abiding citizens

In addition to the social costs of suppression, which judges have publicly discussed in their opinions,[150] there are the judges' personal costs. These personal considerations, perhaps no less than presumed social costs, might move judges to decide against suppression. The most frequently mentioned personal cost that may concern judges is possible media and public criticism due to their decision to suppress.[151] Naturally, scholars frequently tie media and public criticism to another significant potential personal cost—harm to elected judges' reelection attempts.[152] But, of course, strong public criticism can also unsettle non-elected judges, even those with a lifetime tenure. Another potential personal cost of exclusion, which is often overlooked in scholarship but is no less important, is the harm associated with going against one's conscience.[153] If it is "the judge's sense that it is unjust to suppress the evidence under the circumstances of a particular case,"[154] then ordering suppression nevertheless would entail a self-inflicted personal cost for the judge, who may feel morally culpable for the social costs created by the decision to suppress evidence.

At this point, it is almost inevitable to wonder why it is that the judges who order suppression for Fourth Amendment violations are the ones primarily perceived as accountable for the associated social costs, thus bearing the bulk of the personal costs. Why does public criticism not focus on the police for violating the Constitution? After all, when evidence is suppressed, it is due to the police's wrongdoing, not the court's.

Randy Barnett provided a succinct and convincing answer to these questions: "Given judicial discretion in findings of fact and law, the judge who excludes evidence is perceived to be the person most directly responsible for sustaining a constitutional challenge."[155] Therefore, "the judge and not the police will most often be blamed by both the public and the prosecutor for scuttling the prosecution,"[156] while "the police usually are shielded from political responsibility for a failure to obtain a conviction."[157] In other words, in the public's perception, impunity of

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from offering the cooperation that makes it possible to apprehend and convict other offenders in future cases").

150. *See, e.g.*, *Davis v. United States*, 564 U.S. 229, 237 (2011); *Hudson v. Michigan*, 547 U.S. 586, 594–96 (2006).

151. *See, e.g.*, Orfield, *supra* note 130, at 83; Jacobi, *supra* note 145, at 657; Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 959 (1983).

152. *See, e.g.*, Orfield, *supra* note 130, at 83; Jacobi, *supra* note 145, at 657; Barnett, *supra* note 151, at 959.

153. Orfield, *supra* note 130, at 83.

154. *Id.*

155. Barnett, *supra* note 151, at 949.

156. *Id.* at 949–50; *see also* Slobogin, *supra* note 147, at 400; H. Mitchell Caldwell, *Fixing the Constable's Blunder: Can* One *Trial Judge in* One *County in* One *State Nudge a Nation Beyond the Exclusionary Rule?*, 2006 BYU L. REV. 1, 49.

157. Barnett, *supra* note 151, at 950.

factually guilty defendants is not an inevitable natural consequence of police misconduct, but rather an undesirable outcome that courts could prevent. When courts do suppress evidence, particularly in cases of severe charges, the public will therefore tend to attribute the major responsibility for the social costs to the judges ordering suppression, thereby imposing most of the personal costs on them.[158]

How can judges possibly abate personal negative consequences that might result from unpopular suppression decisions? One possible judicial technique could be to emphasize in suppression decisions that judges who suppress unconstitutionally obtained evidence do so because they *must* follow binding precedent, which under certain conditions mandates them to suppress evidence. And indeed, judges seem to employ this technique. Likely hoping to reduce the level of prospective public criticism against them and other personal costs, judges in lower courts who suppress evidence often mention in their decisions, in one form or another, that their hands were tied by Supreme Court or other appellate court precedents. The rhetoric employed is defensive, perhaps even apologetic.[159] And even

158. It is sometimes argued in the literature that prosecutors may take advantage of the common public tendency to attribute the major responsibility for nonconviction of criminal defendants to judges. Marc Galanter, for example, suggested that a prosecutor may decide to refrain from dismissing charges despite knowing that they will likely be dismissed by the court, because "[a] prosecutor may prefer that charges against the accused in an infamous crime be dismissed by the court rather than by his office." Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 29 (1983) (citing DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 72 (Frank J. Remington ed., 1966)).

159. *See, e.g.*, *United States v. Church*, 581 F. Supp. 260, 270 (W.D. Ark. 1984) ("Under the doctrine [established by the Supreme Court and by the Eighth Circuit], this Court has no choice but to suppress the evidence obtained in the search of the mobile home."); *United States v. Brinson*, No. CR 119-096, 2019 WL 7476672, at *5 (S.D. Ga. Dec. 4, 2019) ("[W]hile exclusion is a remedy to be applied sparingly, binding precedent leaves the Court no choice but to apply it here."), *report and recommendation adopted*, No. CR 119-096, 2020 WL 59728 (S.D. Ga. Jan. 3, 2020); *United States v. Keith*, No. CR 120-072, 2021 WL 6340985, at *6 (S.D. Ga. Dec. 2, 2021) ("[W]hile exclusion is a remedy to be applied sparingly, binding precedent leaves the Court no choice but to apply it here."), *report and recommendation adopted*, No. CR 120-072, 2022 WL 95287 (S.D. Ga. Jan. 10, 2022); *United States v. Staples*, 194 F. Supp. 2d 582, 590 (W.D. Tex. 2002) ("[Due to the Fifth Circuit's precedent,] the court is obligated to suppress all evidence seized as a result of the search of the vehicle, and suppress all statements made by defendant during and after the search."); *State v. Scalara*, 229 P.3d 889, 892 (Wash. Ct. App. 2010) ("[Supreme Court precedent] compels our suppression of the evidence collected during the vehicle search and reversal of the [defendant's] resulting convictions."); *United States v. Choi*, No. 97-00152, 1998 WL 542302, at *6 (D. Guam Feb. 9, 1998) ("As neither part of the first requirement was met, and as [two decisions of the Ninth Circuit] are binding precedents, the Motions to Suppress in the case at bar are [granted]."), *aff'd*, 185 F.3d 869 (9th Cir. 1999); *State v. Perez*, 193 P.3d 1131, 1132 (Wash. Ct. App. 2008) ("Because [of Supreme Court and other authoritative precedent], we have no choice but to conclude that the trial court erred in denying [the defendant's] motion to suppress.") (footnote omitted); *Perry v. State*, 814 So. 2d 844, 845 (Ala. Crim.

without being so straightforward, judges ordering suppression will almost always communicate their reliance on relevant precedent that compels suppression.

To be sure, this rhetoric is not exclusive to the context of the Fourth Amendment exclusionary rule. As Nina Varsava observed, "[s]tare decisis . . . seems to serve rhetorical functions in judicial opinions. For example, judges . . . might invoke precedent in an effort to buck responsibility for a decision (*Don't blame us—we're just following precedent*)."[160] However, as the above discussion on the exclusionary rule demonstrates, even if judges have the ability to cite precedent mandating suppression of evidence, it does not guarantee that they will necessarily follow it when the associated social or personal costs are high.

Appreciating that judges may often be dissuaded from suppressing evidence even when they can cite binding Supreme Court precedent, one can begin to appreciate the immobilizing effect that remedial vagueness may have on judges. A judge handling a claim of selective prosecution or selective enforcement raised in a motion to dismiss or to suppress knows that if they find that a violation has occurred, they will have to answer the question that the Supreme Court has left open: What is the proper remedy for selective prosecution or selective enforcement? As mentioned in Section I.C, there are two plausible answers to this question: a strong, conventional remedy (option (1) above) and no remedy within the criminal process (option (3) above).

Scholars have touched on the antagonism that courts may have towards dismissal or suppression as potential remedies for selective prosecution or selective enforcement, for the windfall they may generate for factually guilty defendants.[161] This kind of antagonism seems at first glance to resemble the traditional, long-documented antagonism of courts

App. 2001) (Wise, J., concurring) ("Based on the [Supreme Court of Alabama's precedent], this Court has no choice other than to find that the trial court erred when it denied [the defendant's] motion to suppress the cocaine seized as the result of the search of his residence."); *State v. Roeder*, No. 77,298, 1997 WL 35435574, at *3 (Kan. Ct. App. Dec. 24, 1997) ("[A]s we read [the Supreme Court of Kansas's precedent], we have no choice but to rule the motion to suppress should have been granted."); *United States v. Cruz-Roman*, 312 F. Supp. 2d 1355, 1366 (W.D. Wash. 2004) ("Based on the Court's findings, and on its holdings that [the defendant's] Fourth Amendment rights were violated, the Court has no choice but to suppress all of the evidence seized in the searches of [the defendant's] apartment made after the unconstitutional visual entry search and the unconstitutional arrest of [the defendant]."); *see also Mobley v. State*, 834 S.E.2d 785, 796 (Ga. 2019) ("The Georgia courts consistently rejected an exclusionary rule for violations of the Fourth Amendment until *Mapp* left our courts with no choice but to recognize such a rule.").

160. Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMAN. 62, 69 n.9 (2018).

161. *See, e.g.*, Clymer, *supra* note 6, at 718, 736; McAdams, *supra* note 6, at 653.

toward the Fourth Amendment exclusionary rule. But that is only one part of the story.

From the perspective of a court, ordering dismissal or suppression for a successful selective prosecution or selective enforcement claim under the remedial vagueness situation may entail personal costs that are likely even *higher* than the already high personal costs associated with Fourth Amendment suppression. Not only has the Supreme Court not *mandated* dismissal or suppression for selective prosecution or selective enforcement, but it has also not even *authorized* ordering these strong remedies. As opposed to a judge ordering suppression for Fourth Amendment violations, a judge ordering dismissal or suppression for selective prosecution or selective enforcement cannot convincingly signal that their hands were tied by binding precedent of the Supreme Court or other appellate courts. Likewise, a judge ordering dismissal or suppression for selective prosecution or selective enforcement cannot even state that their remedy is legally authorized based on precedent. Instead, the judge will have to explain in their decision why dismissal or suppression must be granted despite the lack of such precedent. By doing so, the judge will expose themselves to the risk of being held predominantly accountable by large sectors in the public for these remedies' social costs, thereby carrying the greatest share of personal costs.

A recent article authored by Richard Re may help illustrate the difficulties faced by judges operating in the atmosphere of remedial vagueness.[162] Precedents, Re explained, "have both permissive and prohibitory aspects."[163] Precedent is prohibitory, in the sense that it "cuts against all courses of action other than following the precedent," and permissive, as it "supports the lawfulness of a particular course of action—namely, adhering to past decisions."[164] As permissive, Re argued, precedents can serve as a "shield" protecting judges who do not wish to deviate from an existing precedent albeit various pressures to do so.[165] Invoking precedent, according to Re, "can help insulate from political, social, and even internal pressures those Justices who are already otherwise drawn toward preserving precedent."[166] Re's discussion on the "shielding" quality of precedent focused mainly on horizontal stare decisis, but it applies all the more so to vertical stare decisis. In the context of the Fourth Amendment exclusionary rule, for instance, Supreme Court precedent mandating suppression of unconstitutionally obtained evidence (under certain circumstances) both *permits* suppression and *prohibits* non-

162. Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907 (2021).
163. *Id.* at 912.
164. *Id.*
165. *Id.* at 925–26.
166. *Id.* at 926.

suppression.[167] By invoking relevant precedent, judges suppressing evidence can signal both that suppression is permissible, and that any other result in the case before them (namely, non-suppression) would be prohibited. Such signals can carry benefits for judges facing all sorts of pressures to rule otherwise and may therefore encourage them to adhere to precedent.[168]

Judges operating under remedial vagueness—that is, in the absence of any remedial precedent—can take advantage of neither the prohibitory nor the permissive aspects of precedent. Judges dismissing charges or suppressing evidence for selective prosecution or selective enforcement, as discussed above, cannot convincingly argue that they could not reach any other decision. No less importantly, they cannot fully assure (themselves and their audience) that dismissal or suppression are even lawful remedies. Therefore, judges ordering such remedies for selective prosecution or selective enforcement are particularly vulnerable to increased public backlash and other personal costs. These judges, in other words, simply have no shield.

To make things more challenging, the absence of precedent authorizing dismissal or suppression for selective prosecution or selective enforcement may concern judges who wish to avoid reversal.[169] That is especially the case where judges are aware of the continuous hostility of the Supreme Court towards strong remedies for procedural violations within the criminal process, which the remedial vagueness policy may reflect.[170]

Some courts have explicitly admitted that the lack of authoritative precedent for dismissal or suppression as remedies for selective prosecution or selective enforcement is in itself a reason for them to deny a remedy from even a successful claimant.[171] These courts have stated this despite having acknowledged that there is no precedent prohibiting them from doing so. One of the most explicit comments on this matter was made in the United States District Court for the District of Nebraska's decision in *United States v. Hare*,[172] where the court found that selective enforcement had not been proven on the merits:

> [E]ven if the trooper violated the defendants' rights as alleged, there is little or no federal authority for imposing the remedy of

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167. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

168. *See supra* text accompanying note 159.

169. *Cf.* Re, *supra* note 162, at 932 ("[A] federal judge will perceive both Court and circuit case law as having a presumptive safety about it: by following precedent, the judge takes a path that previously evaded reversal and so reduces the odds that her own decision might trigger unwanted Court review or an en banc proceeding.").

170. *See supra* Section I.B.

171. *See, e.g.*, Katz, *supra* note 67, at 1426–27.

172. 308 F. Supp. 2d 955 (D. Neb. 2004).

> dismissal or suppression. Without precedent from the Supreme Court or the Eighth Circuit supporting such a result, I probably would not dismiss this federal criminal case or suppress the evidence even if the state trooper violated the defendants' equal protection and travel rights . . . . I do not reach this question, although it is an issue which cries out for resolution by the appellate courts. As a practical matter, the federal trial courts need an answer in order to know whether the discovery and lengthy evidentiary hearings conducted in this case are ever necessary.[173]

And just recently, in *United States v. Crawford*,[174] the United States District Court for the Northern District of Indiana decided that a criminal defendant may not seek suppression of evidence obtained in a traffic stop under the Equal Protection Clause, since "neither the Supreme Court nor the Seventh Circuit Court of Appeals has authorized remedying an Equal Protection violation by application of the exclusionary rule."[175] The court therefore rejected the magistrate judge's recommendation to grant the defendant's suppression motion on equal protection grounds.[176]

Hare and *Crawford* are examples of decisions where courts admitted explicitly that the lack of authority to order dismissal or suppression may warrant denial of such remedies from successful claimants. But they are very rare. Likewise, it is very rare to come across decisions where courts rule that the remedies for selective prosecution or selective enforcement should only be external to the criminal process despite the fact that the Supreme Court has never ruled out remedies that are internal to it.[177] A possible reason that such decisions are infrequent is that courts—even those that are generally unsympathetic to remedies that are a windfall for defendants—may understand their true implication: a major curtailment of criminal courts' supervision of prosecutorial or police discrimination. Without a remedy for selective prosecution or selective enforcement, criminal defendants would not have an actual incentive to raise such claims in court, and even if and when they did—courts would avoid deciding these claims on the merits, deeming such decisions unnecessary in the absence of a remedy. Perhaps that explains the Supreme Court's choice in *Armstrong* to leave the remedy for selective prosecution vague, rather than stating that dismissal is not a proper remedy. As Richard McAdams mentioned, "[t]he Court might have reached the same outcome

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173. *Id.* at 962 n.2.

174. No. 2:20 CR 84, 2022 WL 2603558 (N.D. Ind. July 8, 2022).

175. *Id.* at *2.

176. *Id.* at *2–3.

177. *See, e.g.*, sources cited *supra* note 74; *United States v. Harmon*, 785 F. Supp. 2d 1146, 1170 (D.N.M. 2011).

[in *Armstrong*] by assuming the existence of an equal protection violation and then rejecting the district court's remedy—dismissal—as appropriate."[178] But such a move by the Court would have perhaps marked the end for raising selective prosecution claims in criminal courts and would have potentially been unpopular.

A theoretical analysis of the incentives involved suggests, therefore, that remedial vagueness may result in an increased incentive for courts handling claims of selective prosecution or selective enforcement to strive to evade the remedial stage. And the best way to achieve that, as judges might have learned from other contexts of constitutional criminal procedure, is by rejecting the selective prosecution or selective enforcement claim on the merits. Clearly, the nearly insurmountable requirements for proving selective prosecution and selective enforcement are the primary hurdles for successful claims. But in the infrequent cases where judges are not fully convinced whether these requirements have been met or not, there is a risk that remedial vagueness may in fact be the factor that would tilt the scale toward a judicial rejection of a claim, whereas an already-established remedy might tilt the scale toward accepting it.

Of course, courts would rarely if ever admit in their decisions that they are rejecting the merits of a constitutional violation claim to avoid ordering a strong remedy. Even the fact that a senior judge like Calabresi recognizes in an academic essay that this phenomenon may not be so rare in the context of the Fourth Amendment exclusionary rule is surprising.[179] But the theoretical analysis above suggests that courts' concern over the costs stemming from dismissal or suppression without relevant precedent, and the discomfort that judges may feel from ruling that there is no remedy for even a successful claimant, may increase their incentive to avoid the need to rule on the remedy question to begin with by rejecting claims on the merits.

Importantly, rejecting the merits of selective prosecution or selective enforcement claims, even where judges have reason to believe that an official has indeed violated the Constitution, is not a very difficult task. As described above, manipulations in the fact-finding process to avoid Fourth Amendment suppression of evidence may be common especially in close cases, where it is not clear whether the police have obtained the evidence unconstitutionally.[180] Close cases of prosecutorial or police discrimination

178. *See* McAdams, *supra* note 6, at 611 n.29.

179. *See* Calabresi, *supra* note 94, at 112–13. Judge Kozinski of the Ninth Circuit also commented on this issue. *See* I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 836–37 (2008) ("Judge Alex Kozinski of the Ninth Circuit has observed that it is 'an open secret long shared by prosecutors, defense lawyers and judges that perjury is widespread among law enforcement officers.'").

180. *See supra* Section II.A.1.

are likely much more prevalent in courts than cases with obvious discrimination. For several reasons, courts do not often encounter cases where there was a clear, easy-to-prove equal protection violation. First, defendants rarely come by evidence that would satisfy the demanding standard of the selective prosecution or selective enforcement doctrines, if such evidence even exists to begin with.[181] Furthermore, cases where prosecutors are genuinely concerned that a court would plausibly find that selective prosecution or selective enforcement were involved often do not reach courts. Whether because of their moral scruples, their concern over their personal or professional reputation, or their fear that the case may be dismissed or that crucial evidence may be suppressed—prosecutors in such cases may prefer not to go to trial. Instead, prosecutors may choose to dismiss these cases or offer a favorable plea bargain.[182] To that should

181. *See supra* Section I.A. To be sure, even prosecutors do not always gain access to evidence pointing at discrimination against an individual on behalf of the police. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 31 (1998) ("The consideration of race in the arrest process is usually not obvious, however, and unless a prosecutor were intentionally attempting to ferret out such decisions, she may not discover them.").

182. *See, e.g.*, Leipold, *supra* note 17, at 565–66 ("The reported cases [of racially discriminatory traffic stops] probably under-represent the extent of the problem . . . . Those who are improperly investigated, but who nevertheless are guilty of crimes, may be induced to plead guilty to a lesser charge if any resulting evidence from the stop is in danger of being suppressed; in clear cases of an illegal search or seizure, the charges might be dropped entirely."); *see also* Davis, *supra* note 181, at 31 ("If a prosecutor is aware of the inappropriate or illegal consideration of race at the arrest stage of the process, she may legitimately decide to exercise her discretion to decline prosecution."); Chin, *supra* note 46, at 1361 n.11 ("It is a near-certainty that criminal defendants . . . , after filing strong motions, got spectacular plea deals or . . . prosecutorial dismissals on pretextual grounds."); Henning, *supra* note 91, at 753 (speculating that "there may have been instances in which the government agreed to dismiss a case because of the appearance of an illegal bias in the decision to prosecute"). Similar phenomena are described in the literature in the context of Fourth Amendment violations. *See, e.g.*, Jacobi, *supra* note 145, at 597 ("[A] prosecutor facing a case that relies on a potentially illegal search may decide not to pursue the case. Or a prosecutor may offer a plea bargain or present a lower charge, due to the uncertainty about whether evidence will be excluded or not."); Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525, 1527 (2018) ("Although specific numbers are hard to come by, we know that prosecutors dismiss cases because of clear police error."); NEWMAN, *supra* note 158, at 72 ("In general, prosecutors hesitate to try cases where . . . the activities of the police in obtaining the evidence are likely to be viewed by the court or the jury as improper and perhaps more blameworthy than the conduct of the defendant."); Gary S. Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 HASTINGS L.J. 1065, 1086 (1982) ("The exclusionary rule . . . may play a far greater role in plea-bargaining than in trials. Although the guilty rarely go free because of the rule, they may receive reduced charges or sentences."); Esther Nir & Siyu Liu, *Defending Constitutional Rights in Imbalanced Courtrooms*, 111 J. CRIM. L. & CRIMINOLOGY 501, 523 (2021). *But cf.* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1710–11 (2010) (discussing the incentive for prosecutors to refrain from "dismiss[ing] (post-charge) the prosecution [they] neglected to decline (pre-charge)").

be added that prosecutors' willingness to end a case without a trial may have an inverse relationship with the severity of the crimes involved.[183] Therefore, courts may generally remain with cases where the prosecutorial or police discrimination is unclear and where the more apparent the discrimination is, the more severe the offenses the defendant is charged with. In such cases, even if a court has some concerns over selective prosecution or selective enforcement, deciding nevertheless that their demanding requirements have not been met should not pose too great of a challenge, and is also unlikely to face considerable public backlash.

Courts may also avoid the remedy question by dissuading defendants and their attorneys from even raising selective prosecution or selective enforcement claims. The literature suggests that this judicial technique is frequently applied. As Brooks Holland noted, "[l]acking any clear doctrinal basis for a remedy in criminal courts, claims of racial injustice naturally have fallen more and more on deaf ears, and have come to be treated at best as a diversion from 'colorblind' justice, and at worst as inflammatory advocacy . . . . Many defense lawyers unsurprisingly have embraced colorblindness in their own practice."[184]

Before moving forward to the next section, it should be noted that courts suspecting that selective prosecution or selective enforcement have taken place but balking at accepting these claims can still redress them covertly. For instance, a court can state in its decision that while the defendant has not established a selective enforcement claim, the defendant did raise a separate successful, "race neutral" Fourth Amendment claim, which warrants the suppression of incriminating evidence.[185] Alternatively, a judge may try to urge the prosecutor and the defendant to reach a favorable plea bargain, with or without explicitly stating the judge's motivation for this encouragement.[186]

183. *See, e.g.*, G. NICHOLAS HERMAN, PLEA BARGAINING § 2:02 (3d ed. 2012) ("Generally, the more heinous or aggravated the crime, the less likely the prosecutor will enter into a plea bargain that is favorable to the defendant.").

184. Holland, *Racial Profiling and a Punitive Exclusionary Rule*, *supra* note 72, at 40–41.

185. *Cf.* Chin, *supra* note 46, at 1361 n.11 ("It is a near-certainty that criminal defendants . . . , after filing strong motions, got . . . judicial . . . dismissals on pretextual grounds.").

186. *Cf.* Nir & Liu, *supra* note 182, at 523–24 (discussing a similar phenomenon in the context of Fourth Amendment violations).

B. The Potential Influence of Remedial Vagueness on the Incentives of Prosecutors, Police Officers, and Criminal Defendants

Scholars[187] and lower courts[188] that have supported dismissal or suppression as remedies for selective prosecution or selective enforcement have cited the remedies' deterrent value. Stated differently, prosecutors and law enforcement officers who believe that selective prosecution or selective enforcement would result in no conviction of the criminal defendant can be expected to have a significant disincentive to engage in such unconstitutional conduct.

Of course, even without a strong remedy for violation, prosecutors and police officers have various reasons not to operate discriminatorily. Even biased officials aware of their biases may choose to refrain from acting discriminatorily if, for example, they recognize that such behavior is immoral, or if they are concerned that being caught for discriminatory conduct may hurt their personal or professional reputation.[189] It is also possible that remedies for discrimination outside the criminal process, such as monetary damages or disciplinary sanctions, may discourage discriminatory behavior. At the same time, adopting dismissal or suppression as remedies for selective prosecution or selective enforcement would not always help deter police officers or prosecutors from committing these violations. For example, such remedies would not help deter a police officer from discriminatorily enforcing the law if by this behavior they are not hoping to secure convictions, but rather to harass members of a certain racial group.[190]

However, the risk that discriminatory conduct would result in dismissal or suppression may at least be considered by prosecutors and police officers for whom convictions are important as one reason not to engage in selective prosecution or selective enforcement. Under the same logic, if the Supreme Court decided that there were no remedies available within the criminal process for such violations, prosecutors and police

187. *See supra* note 99.

188. *See, e.g.*, *United States v. Benitez*, 613 F. Supp. 2d 1099, 1101 n.3 (S.D. Iowa 2009) (noting in dicta that "exclusion would seem to be the proper remedy [for selective enforcement] as it is highly doubtful that civil remedies would adequately deter police agencies from engaging in this unconstitutional and blatantly reprehensible behavior"); *United States v. Mumphrey*, 193 F. Supp. 3d 1040, 1059 (N.D. Cal. 2016) (noting in dicta that "dismissal of charges brought about as a result of a constitutional violation may serve in part as a deterrent to race-based law enforcement").

189. *Cf.* COLE, *supra* note 22, at 167 (mentioning the "strong social sanction against racial prejudice"); McAdams, *supra* note 6, at 605 ("Today, most discriminators strive to conceal their intent in order to avoid legal, social, and economic sanctions.").

190. For articles making similar observations with regard to Fourth Amendment violations, see, for example, Jacobi, *supra* note 145, at 602–06, 609–11; Amar, *supra* note 129, at 799; Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 54.

officers could be affirmatively encouraged to behave discriminatorily, knowing that this behavior does not threaten their ability to secure convictions.

But how does the current situation of remedial vagueness—where it is not clear whether there is a strong remedy for selective prosecution and selective enforcement within the criminal process—potentially affect the incentives of prosecutors and police officers to comply with the Constitution?

1. REMEDIAL VAGUENESS, SELECTIVE ENFORCEMENT, AND POLICE OFFICERS

Even if dismissal or suppression were adopted by the Supreme Court as a remedy for selective enforcement, police officers contemplating whether to engage in such unconstitutional behavior would likely know that the risk of a judicial finding of selective enforcement and a consequent dismissal or suppression would be very small. First and foremost, police officers would know that most individuals who are prosecuted eventually plead guilty,[191] thereby waiving potential selective enforcement claims.[192] They would also know that to the extent that defendants do not plead guilty, their defense attorneys would not necessarily raise an equal protection claim, either because they would not think that the police officer acted discriminatorily or because they would not anticipate that this claim would prevail. And, if defendants did raise a selective enforcement claim in court, the demanding requirements for proving it would probably be enough to block it in the absence of exceptionally strong evidence of police discrimination.[193] If courts, as in the Fourth Amendment exclusionary rule context, manipulated the law or the facts to avoid ordering these remedies, police officers' awareness of this phenomenon would further dilute the deterrent value of dismissal or suppression.[194]

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191. *See, e.g.*, John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/SSH2-FH9D].

192. *See* Steiker, *supra* note 19, at 659 ("A guilty plea waives all criminal procedure rights except the right to challenge the adequacy of the plea process itself (e.g., the voluntariness of the waiver) or an unlawful sentence."). For an example where defense counsels—thanks to great efforts and "intensive litigation" in which they argued that their clients were victims of selective enforcement—succeeded in "extract[ing] very favorable plea deals" on the condition that their clients "agree to abandon their claims of racial discrimination," see Siegler, Miller & Zunkel, *supra* note 16, at 113.

193. See *supra* Section I.A.

194. For literature describing the relatively weak deterrent effect of the Fourth Amendment exclusionary rule due to the many factors reducing the probability of suppression by the court, see, for example, Jacobi, *supra* note 145; Michael D. Cicchini,

Returning to the reality of remedial vagueness, police officers' disincentives to engage in equal protection violations may be even weaker. The potentially decreased incentive for courts to order dismissal or suppression for selective enforcement under the current policy of remedial vagueness may translate into an increased incentive for police officers to engage in selective enforcement. Furthermore, the fact that courts in a regime of remedial vagueness may be systemically discouraged to find that selective enforcement has occurred at all (either by rejecting the merits of the claim, by discouraging such claims from being raised in the first place, or in other ways) means that police officers may worry even less about their personal or professional reputations. The very low likelihood that a court will stigmatize a police officer as biased—and subject the same officer to the potential personal and professional harm that such a depiction may provoke—may naturally translate into a lower incentive for police officers to comply with the Constitution.

2. REMEDIAL VAGUENESS, SELECTIVE PROSECUTION, AND PROSECUTORS

While it is feasible that some police officers would engage in selective enforcement even if they thought that it would likely lead to dismissal or suppression,[195] few prosecutors would engage in selective prosecution if they thought it would not lead to a conviction (and, on the way, to public denunciation for having behaved discriminatorily).[196] However, even if the powerful remedy of dismissal were the Supreme Court-established remedy for selective prosecution, prosecutors would not necessarily avoid this behavior. As Starr explained succinctly:

> The effectiveness of a remedy in deterring prosecutorial misconduct turns on two factors: the probability that it will be invoked in the event of misconduct and the cost it imposes on prosecutors if it is invoked. The economic literature on deterrence in other contexts strongly suggests that the first factor is by far the most important.[197]

An Economics Perspective on the Exclusionary Rule and Deterrence, 75 MO. L. REV. 459, 470–73 (2010).

195. *See supra* note 190 and accompanying text.

196. *Cf.* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471–72 (2004) (describing the importance and value that most prosecutors assign to avoiding losing trials and to protecting their personal and professional reputations).

197. Starr, *supra* note 92, at 1522 (footnote omitted) (first citing Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 292 (1983); then citing Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL.

And indeed, even in a world with dismissal as the established remedy for selective prosecution, biased prosecutors aware of their biases would have little cause to worry that racially motivated charges against a defendant would be dismissed by the court. Like in the selective enforcement context, here too the strict requirements for a successful claim would fail most defendants. At the point of decision whether to bring charges against an individual, or which charges to bring, prosecutors can relatively accurately assess whether strong (direct or statistical) evidence of discrimination on their part exists, and if so, whether a defendant would potentially have access to this evidence. Prosecutors can therefore behave discriminatorily if they estimate that there is no reasonable chance that a selective prosecution claim against them would prevail.

In addition, assuming that dismissal was the proper remedy for selective prosecution, its potential deterrent effect would diminish given the aversion of courts to strong remedies for procedural violations in the criminal process. This judicial antipathy has been demonstrated regarding strong remedies for various types of claims for prosecutorial misconduct, such as speedy trial infringements or *Batson* violations.[198] Scholars have also suggested that in the era that preceded *Armstrong* and the Supreme Court's remedial vagueness statement, when courts largely assumed that dismissal was the proper remedy for selective prosecution, it was probably their distaste for this remedy that discouraged them from accepting defendants' selective prosecution claims.[199]

Readers who have followed my analysis thus far may have already realized that under the current policy of remedial vagueness, prosecutors may be even less concerned. Given that suspecting judges may have an increased incentive not to find that selective prosecution has occurred, prosecutors—including those highly attentive to their personal and professional reputations—may have a lower disincentive to engage in selective prosecution than if dismissal were mandated or authorized.

3. REMEDIAL VAGUENESS, SELECTIVE ENFORCEMENT, AND PROSECUTORS

The theoretical analysis thus far suggests that remedial vagueness may increase the incentive for prosecutors to prosecute a case despite having reason to believe that the case is tainted with selective enforcement by the police. That may be true even where the prosecutors themselves are not consciously biased against a certain racial group and where their decision to prosecute is not itself based on race. For instance, imagine an

ECON. 169, 176 n.12 (1968); and then citing Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 380 & n.112 (1997)).

198. *See, e.g.*, Starr, *supra* note 92, at 1513–18.

199. *See, e.g.*, Clymer, *supra* note 6, at 736.

unbiased prosecutor working for an office with a policy to aim to prosecute all cases of unlawful possession of controlled substances. This prosecutor is now contemplating whether to prosecute such a case, where the prosecutor has reason to believe that the primary incriminating evidence was obtained during a racially discriminatory stop-and-frisk conducted by the police. The lower incentive for courts to order dismissal or suppression for selective enforcement due to remedial vagueness may strengthen the incentive for this prosecutor to prosecute this case despite the selective enforcement likely involved.

4. REMEDIAL VAGUENESS AND CRIMINAL DEFENDANTS

Even if dismissal or suppression were the Supreme Court-established remedies for selective prosecution or selective enforcement, criminal defendants and their counsels would know that it is unlikely that such claims would prevail, given the demanding requirements for proving them.[200] That is likely true to a greater extent under the current policy of remedial vagueness, where courts, as elaborated above, may have an even stronger disincentive to find that the prosecutors or the police officers in the cases before them behaved discriminatorily. This, of course, may translate into a disincentive for defendants to raise selective prosecution or selective enforcement claims in court, and may therefore increase their incentive to focus instead on other claims (or just plead guilty to the charges against them).[201]

Furthermore, since remedial vagueness may increase courts' incentive to try to refrain from reaching the remedial stage, judges may have an increased incentive to actively try to dissuade defense counsels from raising selective prosecution or selective enforcement claims in court. And indeed, as I noted above, the literature suggests that remedial vagueness has increased criminal courts' hostility towards claims of equal

200. In *United States v. Mason*, 774 F.3d 824 (4th Cir. 2014), for instance, the Fourth Circuit denied an ineffective assistance of counsel claim according to which the defense counsel "declined to raise an Equal Protection claim of racially selective law enforcement" and instead focused only on a Fourth Amendment violation claim. *Id.* at 828–29. The court based its decision, among others, on the fact that "the *Armstrong* burden is a demanding one and [the claimant] has failed to identify any cases at the Supreme Court or in this circuit where an *Armstrong* violation for selective law enforcement has been found," while "Fourth Amendment claims . . . are often successful." *Id.* at 830.

201. Of course, in cases where criminal defendants or their attorneys are aware of the situation of remedial vagueness, they may strategically prefer to raise only those claims that have an already-settled remedy. *See, e.g.*, PADULA, *supra* note 64, at 195 (raising the option that the defense in *Whren v. United States*, 517 U.S. 806 (1996) may have chosen not to raise an equal protection claim, and instead focus on an argument that the police violated the defendant's Fourth Amendment rights, partly due to "the fact that [it] is not clear what the remedy is for an Equal Protection violation in the context of a criminal case because the Supreme Court has yet to have the 'opportunity' to decide such a case").

protection violations, and as a result, defense counsels have often refrained from raising them.[202]

Criminal defendants with strong selective prosecution or selective enforcement claims may have their cases dismissed by the prosecutors, who would prefer not to go to trial.[203] However, where such a dismissal does not happen, the increased incentive for courts to reject such claims may increase defense counsels' incentive to advise their clients to accept a favorable plea offer despite believing that their equal protection claims should (in an ideal world) be accepted by the court. In short, due to remedial vagueness, defendants and their counsels may have a lower incentive to reject plea offers.

The discussion thus far provides potential answers to the question of why a substantial number of criminal defendants continue to raise claims of selective prosecution or selective enforcement, despite courts' hostility toward such claims and the miniscule chance of success. Granted, from the perspective of criminal defendants, even claims that are doomed to fail are sometimes worth raising. For example, defendants may choose to raise them as a matter of principle to signal to the court, the prosecution, or the police that they will not remain silent on the injustice they suffered, even if the court is unlikely to recognize it. Other defendants might choose to raise even unsupported claims to strategically delay their case.[204] But as the discussion above shows, well supported claims of selective prosecution or selective enforcement may also have even more significant, tangible benefits for criminal defendants.[205] Thus, as mentioned, they may lead prosecutors to dismiss the case against the defendant or to extend a favorable plea offer to them (with or without the encouragement of the court), or lead courts to redress these claims covertly.[206] These results are no doubt desirable for criminal defendants, and they may also be perceived as fairer and more just than a lack of any form of redress for the defendants. However, it is questionable whether and to what extent these under-the-radar measures can contribute to deterrence of future discriminatory prosecution and policing in the absence of an official recognition of the selective prosecution or the selective enforcement that the criminal defendant has been victim to.

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202. Holland, *Racial Profiling and a Punitive Exclusionary Rule*, *supra* note 72, at 40–41.

203. *See supra* note 182 and accompanying text.

204. *See, e.g.*, Kayla Lasswell Otano, Note, *Victimizing the Victim Again: Weaponizing Continuances in Criminal Cases*, 18 AVE MARIA L. REV. 110, 119 (2020) (providing examples of reasons that criminal defendants would attempt to delay their case).

205. *See supra* Section II.A.2.

206. *Id.*

III. THE POTENTIAL INFLUENCE OF REMEDIAL VAGUENESS ON THE ABILITY OF DISCRIMINATION VICTIMS TO RECOVER DAMAGES IN A CIVIL ACTION

This Part shows that the Supreme Court's remedial vagueness policy, which applies only to the criminal context, may nevertheless influence the ability of victims of selective enforcement to recover damages in a civil action.

Raising a selective prosecution or selective enforcement claim in a criminal proceeding is not the only way that victims of these violations can seek redress for the harm they suffered. While the remedy for selective prosecution or selective enforcement within the criminal process is unsettled, there is no dispute that victims of these infringements can seek remedies outside the criminal process.[207] And indeed, individuals around the country have been filing civil suits against prosecutors and police officers, seeking monetary compensation for the harm they suffered (primarily under 42 U.S.C. § 1983).

While prosecutors enjoy absolute immunity from civil suits for monetary damages for selective prosecution, police officers are not immune from civil suits for selective enforcement.[208] However, there are various hurdles that individuals suing police officers for damages face, including the difficulties in obtaining legal representation and the low likelihood that a jury will decide in their favor and award them compensation that is worth their trouble.[209]

Yet, the biggest obstacle that victims of selective enforcement face in the civil context is the same one they face in the criminal process: proving discriminatory effect and discriminatory purpose.[210] Despite the different contexts in which they are raised, courts have essentially applied the same standard for proving selective enforcement claims in a criminal proceeding to civil actions brought by individuals suing police officers for selective enforcement.[211]

This parity in standards, however, makes little sense considering the differences in remedies. In criminal cases, the Supreme Court's strict standard was likely shaped by the prospect of strong remedies, like dismissal of criminal charges or suppression of evidence.[212] But in civil suits, where the remedy sought by claimants is money, not impunity,

207. *See supra* Section I.C.

208. *See supra* notes 81–82 and accompanying text.

209. *See supra* note 83 and accompanying text.

210. *See, e.g.*, ALEXANDER, *supra* note 29, at 130; COLE, *supra* note 22, at 167; Davis, *supra* note 30, at 436–37.

211. *See, e.g.*, *Bey v. Falk*, 946 F.3d 304, 319 (6th Cir. 2019), *cert. dismissed sub nom. McKinley v. Bey*, 141 S. Ct. 220 (2020); *Clark v. Clark*, 926 F.3d 972, 980 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 628 (2019).

212. *See supra* notes 136–141 and accompanying text.

prescribing the same strict requirements is far from intuitive. To the extent that monetary damages could at least modestly deter selective enforcement (either due to the money paid by the police[213] or due to the acknowledgement by the court that the police behaved discriminatorily),[214] it would be a small price to pay to help deter one of the most egregious aspects of policing.

If the strict standard which was crafted in the criminal context does not seem to be justified or appropriate in the civil context, why do courts handling civil actions consistently apply it? The answer may lie in a phenomenon which Michael Coenen named "spillover across remedies." This phenomenon was succinctly described by Coenen as follows:

> (2) [R]emedies can affect the definition of substantive rules in a variety of ways; and (2) substantive holdings shaped in one remedial context [e.g. criminal cases] can acquire precedential force within other remedial contexts as well [e.g. civil cases]. When these two things happen to the same substantive rule, spillover across remedies will occur.[215]

Spillover across remedies is all over the place. For instance, the Warren Court's extension of the Fourth Amendment exclusionary rule to the states in *Mapp v. Ohio* has resulted over the years in judicial curtailment of the scope of substantive Fourth Amendment rights.[216] While the motivation for this curtailment was primarily the wish to avoid suppressing incriminating evidence in criminal proceedings and releasing factually guilty defendants back to streets, it has also had ramifications in other contexts.[217] As Coenen stated, "there simply is one Fourth Amendment doctrine, and it applies equally across . . . different remedial contexts."[218] Every curtailment of substantive Fourth Amendment rights in the criminal process has therefore not just prevented a criminal defendant from being granted suppression (and impunity); rather, it has also prevented a civil plaintiff—who more frequently than criminal

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213. *See, e.g.*, Rudovsky, note 72, at 352 ("Large verdicts in cases involving unconstitutional practices or customs may deter future misconduct. Proof of racial bias has led to significant damages in the police misconduct context."). *But see* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000) (arguing that "[i]f the goal of making government pay compensation is to achieve optimal deterrence with respect to constitutionally problematic conduct, the results are likely to be disappointing and perhaps even perverse"); Kerr, *supra* note 146, at 628 ("The empirical literature on how . . . civil damages actually deter officers is unsettled and remains in considerable dispute.").

214. *See supra* text accompanying note 189.

215. Coenen, *supra* note 118, at 1224.

216. *See supra* Section II.A.1.

217. Coenen, *supra* note 118, at 1218.

218. *Id.*

defendants will be innocent[219]—from securing monetary relief from a police officer who they claim violated their rights.[220]

Spillover across remedies, as implied, is not foreign to selective enforcement.[221] The strict standard of selective enforcement was adopted in the criminal context, where courts may be disinclined to grant dismissal or suppression sought by criminal defendants, who are "generally either suspected or already convicted of socially undesirable behavior."[222] But it has spilled over into the civil context, where plaintiffs, who are "never charged with a crime in the immediate proceeding and are often entirely innocent of criminal wrongdoing," are seeking monetary damages.[223]

It should come as no surprise that the requirements for proving selective enforcement (and selective prosecution) are dominantly shaped by the criminal context and not by the civil context. It should also come as no surprise that the spillover across remedies happened in the direction of the criminal context to the civil context and not vice versa. As Nancy Leong demonstrated, context—"the remedies, facts, and procedures associated with a particular venue in which constitutional rights are litigated"—may have an enormous effect on the continuous shaping and reshaping of the scope of substantive constitutional rights.[224] Naturally, therefore, when claims for violations of a certain substantive right are raised and litigated most frequently in one context (e.g. criminal defendants moving to suppress incriminating evidence) and less frequently in another (e.g. civil plaintiffs seeking monetary damages), the scope and contours of the relevant substantive right will be more influenced by the first context rather than the latter.[225] Since the majority (or at least a

219. *See, e.g.*, Leong, *supra* note 118, at 390.

220. *See* Coenen, *supra* note 118, at 1218.

221. *See id.* at 1228–33 (describing the effects of spillover across remedies in the field of equal protection in general).

222. Leong, *supra* note 118, at 390 (describing criminal defendants claiming Fourth Amendment violations).

223. *Id.* (describing civil plaintiffs claiming Fourth Amendment violations). An empirical analysis of 135 "federal-level racial profiling civil suits" from 1991 to 2006 found that "in 56.3% . . . of the cases, the person making the claim that he or she was racially profiled was found engaging in criminal activity." *See* Shaun L. Gabbidon, Lakiesha N. Marzette & Steven A. Peterson, *Racial Profiling and the Courts: An Empirical Analysis of Federal Litigation, 1991 to 2006*, 23 J. CONTEMP. CRIM. JUST. 226, 230, 232 (2007). In other words, nearly half of the plaintiffs arguing that they were victims of racial profiling by law enforcement officers were not, in fact, involved in crime. *See id.* at 232. Perhaps unsurprisingly, the analysis also showed that more than sixty percent of the plaintiffs who won their lawsuit were not engaging in criminal activity. *See id.* at 233. However, not all of the plaintiffs claimed Fifth or Fourteenth Amendment Equal Protection violations; the study included plaintiffs who argued "racial profiling under the guise of Fourth, Fifth, Sixth, Eighth, or Fourteenth Amendment violations." *Id.* at 231.

224. Leong, *supra* note 118, at 378 (citing Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 407 (2012)).

225. *Id.* at 392–93.

considerable share) of selective prosecution and selective enforcement claims that federal and state courts adjudicate are made in criminal proceedings,[226] it is no wonder that the controlling requirements for proving selective enforcement are so demanding.

Remedial vagueness in the criminal context, while increasing the disincentive for courts to find that selective enforcement has occurred, does not legally bar defendants from bringing such allegations in court. Therefore, while virtually all criminal defendants have their selective enforcement claims rejected, there is still a significant number of criminal defendants claiming selective enforcement in the criminal context. Remedial vagueness, by keeping alive the very theoretical option of ordering dismissal or suppression for selective enforcement in the criminal context, has been perpetuating this situation, thereby likely ensuring that the requirements for proving selective enforcement in both the civil and the criminal contexts remain nearly insurmountable.

Had the Supreme Court dispelled remedial vagueness by ruling that there are *no* available remedies for successful selective enforcement claims within the criminal process, the effort to reduce discriminatory policing would conceivably get a boost over time from the civil direction. Selective enforcement claims would then be raised almost exclusively in the civil context, in suits for monetary damages (or injunctive relief). Since these claims would be initiated by individuals who are much more likely than criminal defendants to be factually innocent (and therefore more sympathetic in the eyes of judges and juries),[227] appellate courts could feasibly reshape the standard of selective enforcement to be more lenient and victim friendly over time. If that were to happen, courts and juries would more often find that the police had engaged in selective enforcement and order that the victims be compensated, and the police would be expected to gradually become more deterred from behaving discriminatorily.

Of course, civil actions' capacity to deter selective enforcement would remain limited even if the requirements for proving selective enforcement in the civil process became more lenient. There are several hurdles that may systematically discourage individuals from filing civil suits for selective enforcement,[228] and not all of them would be relieved even if the requirements for proving selective enforcement were to be eased. In addition, there is no guarantee that police officers who are held liable would suffer any personal financial loss, not to mention a significant

226. *See, e.g.*, Poulin, *supra* note 6, at 1089; Davis, *supra* note 181, at 41; Jonathan J. Marshall, Note, *Selective Civil Rights Enforcement and Religious Liberty*, 72 STAN. L. REV. 1421, 1446 (2020).

227. *See supra* note 223 and accompanying text.

228. *See supra* notes 80–83 and accompanying text.

one, if they are indemnified in part or in full.[229] But to the extent that police officers' fear of having a court or jury label them as biased plays a role in their decision whether to engage in selective enforcement, a higher likelihood of that happening may translate into improved police compliance with the Constitution.

IV. DISPELLING REMEDIAL VAGUENESS

Given the possible ramifications of remedial vagueness discussed above, can dispelling remedial vagueness by adopting dismissal of criminal charges or suppression of evidence as remedies be expected to help deter discriminatory prosecution and policing? The theoretical analysis in this Article suggests that the answer is yes. This Part shows that the remedies of dismissal or suppression can be expected to strengthen the incentive for criminal courts to accept such claims on the merits. Consequently, they can also be expected to increase the incentive for prosecutors and police officers to comply with the Constitution. Likewise, these remedies can be expected to increase the incentive for criminal defendants to raise selective prosecution or selective enforcement claims in court and not to agree to the prosecution's plea offers.

This Part also addresses two potential objections to the conclusion that dispelling remedial vagueness may bolster efforts against discriminatory prosecution and policing: first, that without making the requirements for proving selective prosecution or selective enforcement on the merits more lenient, adopting dismissal or suppression will make no significant contribution to their deterrence; second, that adoption of these strong remedies might lead the Supreme Court to qualify their application by exceptions or limitations that would be counterproductive to deterrence. While these objections merit careful consideration, they do not refute the potential benefits of adoption of such remedies for deterring prosecutorial and police discrimination.

A. The Potential Benefits for Deterring Selective Prosecution and Selective Enforcement

The Supreme Court-created remedial vagueness policy will not exist forever. At some point—whether next year, next decade, or beyond—the Supreme Court will dispel the remedial vagueness surrounding selective prosecution and selective enforcement. Considering crime control values,

229. Even when police officers are held personally liable for rights violations, they rarely suffer any personal financial loss. *See generally*, Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014). Instead, they are commonly indemnified, "even when indemnification was prohibited by law or policy, and even when officers were disciplined, terminated, or prosecuted for their conduct." *Id.* at 885.

on the one hand, and due process and equal protection values, on the other hand,[230] the Court will decide whether there are proper remedies for selective prosecution and selective enforcement within the criminal process, and if so, which ones.

Scholars have offered strong moral arguments in favor of dismissal of criminal charges or suppression of evidence as the proper remedies for these violations.[231] The theoretical analysis in this Article suggests that adoption of these remedies is supported also from the perspective of deterring discriminatory behavior by prosecutors and police officers.[232] Supreme Court precedent mandating or authorizing dismissal or suppression for selective prosecution or selective enforcement is expected to weaken the incentive for criminal courts to refrain from accepting such claims on the merits. To be sure, even if the Court does adopt such remedies, judges may still sometimes attempt to avoid ordering them, due to their associated social costs and the possible personal ramifications for the judges granting them.[233] But in a world with such remedial precedent, judges considering whether to accept selective prosecution or selective enforcement claims will not have to fear increased media and public criticism which is the result of ordering a remedy not authorized by Supreme Court precedent.[234] Judges can also be less concerned over reversal by an appellate court.[235]

The potential increased incentive for courts to find that selective prosecution or selective enforcement has occurred, in turn, should translate into increased incentive for prosecutors and police officers to comply with the Constitution, either for fear of not being able to uphold convictions or for concern over their professional and personal reputations.[236] At the same time, criminal defendants are expected to have greater incentive to raise selective prosecution or selective enforcement claims in court.[237] Criminal defendants with strong evidence of prosecutorial or police discrimination may also have increased incentive to bring their claims to court instead of agreeing to the prosecution's favorable plea offers.[238]

Conversely, dispelling remedial vagueness by deciding that there is no remedy available within the criminal process would be detrimental to the efforts to deter selective prosecution and selective enforcement. Under

230. *See* Packer, *supra* note 79.
231. *See* sources cited *supra* note 97.
232. Other scholars reached similar conclusions. *See* sources cited *supra* note 99.
233. *See supra* Section II.A.
234. *See supra* Section II.A.2.
235. *Id*.
236. *See supra* Sections II.B.1–II.B.3.
237. *See supra* Section II.B.4.
238. *Id*.

the current state of affairs, civil suits for monetary damages against prosecutors or police officers cannot alone serve as effective deterrents from discriminatory prosecution and policing (even if the requirements for proving selective enforcement in the civil process were to become gradually more lenient).[239] Other remedies external to the criminal process—including injunctive relief and direct sanctions against the relevant officials—are extremely difficult to obtain and therefore also cannot be relied upon to effectively deter selective prosecution and selective enforcement.[240] In addition, in the absence of any remedies within the criminal process for selective prosecution or selective enforcement, criminal courts would likely no longer handle such claims.[241] Any potential deterrence that may currently be achieved from the possibility that a court will grant a defendant's motion for discovery (even if the court will most likely not accept the claims on the merits) would be lost.[242] Likewise, to the extent that the adjudication process of these claims can in itself contribute to reduction of discriminatory behavior, even where claims are rarely accepted on the merits, these benefits would be gone as well.[243]

The Supreme Court, of course, can choose to dispel remedial vagueness by adopting a non-conventional remedy that is weaker than dismissal or suppression. Starr, for instance, advocated that the remedy for prosecutorial misconduct be sentence reduction.[244] Calabresi—and Caldwell and Chase before him—recommended that a similar remedy be adopted for constitutional police violations.[245] Steven Clymer proposed another alternative remedy, but one that could only apply to a relatively small subset of selective prosecution cases. According to Clymer's proposal, "[i]f a federally prosecuted defendant establishes an equal protection violation by identifying a pool of offenders who are prosecuted in state court, instead of dismissing the case, the court could attempt to afford the defendant the benefit of the state doctrines he would otherwise

239. *See supra* notes 80–84 and accompanying text and Part III.

240. *See, e.g.*, Karlan, *supra* note 19, at 2012–13 (describing the major difficulties in obtaining injunctive relief against the police); Starr, *supra* note 92, at 1517–18 (describing the major difficulties in obtaining direct sanctions against prosecutors).

241. *See supra* Section II.A.2.

242. *See* McAdams, *supra* note 6, at 657–59 (discussing discovery as a deterrent).

243. *See* Poulin, *supra* note 6, at 1088 ("[E]ven in an imperfect system of enforcement, we should strive to implement procedures that remedy the worst abuses, discourage less severe abuses, and remind prosecutors of the limits on their authority. Even when it will not provide a remedy, legal process can influence governmental behavior.").

244. Starr, *supra* note 92, at 1519–20.

245. Calabresi, *supra* note 94, at 115–17; Caldwell & Chase, *supra* note 95 at 70–75. These proposals were made in the context of Fourth Amendment violations, but with the necessary modifications they could also apply to equal protection violations. The three scholars also recommended that direct sanctions or penalties be imposed on the police officers that violated the Constitution. *Id.* at 75–76; Calabresi, *supra* note 94, at 116–17.

be denied."[246] The argument made by these scholars—which is supported by the literature on constitutional remedies[247]—is that courts' incentive to reject claims of misconduct is lower when the remedy ordered is less drastic than dismissal or suppression.[248] A theoretical analysis of the expected deterrent effect of these and other non-conventional remedies in the specific contexts of selective prosecution and selective enforcement is beyond the scope of this Article (but certainly deserves separate pieces dedicated to it). Nevertheless, it is important to mention that strong remedies like dismissal or suppression, as several scholars have commented, may be perceived by many as the only ones that can be commensurate with the particular severity of selective prosecution and selective enforcement.[249]

B. Response to Possible Objections

Naturally, critics who prioritize crime control values over due process and equal protection values may oppose adoption of strong remedies for selective prosecution or selective enforcement. Even those condemning selective prosecution and selective enforcement as immoral and unconstitutional may resist the social costs associated with ordering dismissal or suppression for these violations, foremost the impunity of potentially guilty defendants.[250] This line of critique, however, does not challenge the merits of the conclusion that adoption of dismissal or suppression for selective prosecution or selective enforcement can be expected to be beneficial for the deterrence of these violations.

The more interesting type of critique is the one that may be raised by those who are willing to pay considerable social costs to deter

246. Clymer, *supra* note 6, at 737. This proposal was tailored to address scenarios that resemble the facts of *United States v. Armstrong*, 517 U.S. 456 (1996).

247. *See supra* Section II.A.1.

248. Starr, *supra* note 92, at 1518–21; Clymer, *supra* note 6, at 736; Calabresi, *supra* note 94, at 116; *cf.* Caldwell & Chase, *supra* note 95, at 53 ("Particularly in cases involving serious crimes, courts tend to strain the Fourth Amendment to avoid the suppression of reliable evidence.").

249. *See, e.g.*, Henning, *supra* note 91, at 826 ("The problem in a selective prosecution case is finding a remedy, short of outright dismissal, that will address the underlying constitutional violation. Equal protection is one of the sacred principles of American society, and its violation calls for a strong response."); Poulin, *supra* note 6, at 1076 n.17 ("Any less drastic remedy [than dismissal] that permitted continuing prosecution of the discriminatorily selected defendant seems unresponsive to the constitutional violation."); Holland, *Safeguarding Equal Protection Rights*, *supra* note 72, at 1124–26 (explaining that "our courts cannot maintain their institutional integrity while accepting the proceeds of racially discriminatory investigations by law enforcement"); *cf.* Walter, *supra* note 97, at 292 ("[E]ven if the equal protection exclusionary rule were deemed to be a radical solution, the Supreme Court has required other far-reaching solutions in the past in the name of remedying racial discrimination.").

250. *See supra* Section I.C.

discrimination in the criminal justice system. Such critics may fear that dispelling remedial vagueness by adopting dismissal or suppression may prove unproductive given the strictness of the requirements for proving selective prosecution or selective enforcement on the merits, or even counterproductive given the possibility of consequent creation of exceptions or limitations to these remedies. This Section is dedicated to explicating and addressing these possible objections.

2. THE STRICTNESS OF THE REQUIREMENTS FOR PROVING SELECTIVE PROSECUTION AND SELECTIVE ENFORCEMENT

The requirements that claimants of selective prosecution or selective enforcement must meet to prevail—proving both discriminatory purpose and discriminatory effect—have long been considered nearly insurmountable.[251] Therefore, some may hold that adoption of dismissal or suppression will have miniscule to no benefit for deterring selective prosecution or selective enforcement, unless the requirements for proving them become more lenient. In fact, even some avid supporters of adopting such remedies suggest that it may be the case that dispelling remedial vagueness will only rarely give rise to dismissal or suppression.[252]

There can be no doubt that the nearly insurmountable requirements for proving selective prosecution or selective enforcement have been the primary hurdles for successful claims. The fact that most jurisdictions still operate without any precedent concerning the proper remedy for these violations is first and foremost an outcome of the "near impossibility" of satisfying these requirements.[253] However, dispelling remedial vagueness by adopting dismissal or suppression as remedies may beget an appreciable rise in the number of selective prosecution and selective enforcement claims that courts accept, especially compared to their negligible amount today, under the remedial vagueness policy.

First, courts' inability to rely on precedent mandating or authorizing strong remedies for selective prosecution or selective enforcement may increase courts' incentive to avoid ordering remedies even when claims *do* meet the strict standard.[254] Some courts suggested that they would not order dismissal or suppression for even meritorious claims in the absence of relevant precedent,[255] or ruled that these remedies are inappropriate

251. *See supra* Section I.A.

252. *See, e.g.*, Holland, *Racial Profiling and a Punitive Exclusionary Rule*, *supra* note 72, at 72 ("[An equal protection exclusionary rule] might prove fairly modest in its exclusion rate—perhaps only one in several hundred motions to suppress grounded in equal protection would result in actual exclusion.").

253. *See* Gross & Barnes, *supra* note 72, at 741.

254. *See supra* Section II.A.2.

255. *See supra* notes 171–176 and accompanying text.

altogether.[256] And as the theoretical analysis showed, courts may have an increased incentive to reject claims that they would possibly accept if not for remedial vagueness and its potential immobilizing effect on judges.[257] Therefore, more selective prosecution and selective enforcement claims may be accepted if dismissal or suppression are mandated or authorized as proper remedies.

But more importantly, there is reason to believe that some cases with potentially strong equal protection claims never even reach trial or are never acknowledged by courts as such. Such cases may either be dismissed by the prosecution, be resolved in a plea bargain that is favorable to the defendant, or be redressed by courts covertly.[258] That is, some of the potentially strong selective prosecution or selective enforcement claims are likely treated and resolved by the criminal justice system under the radar and are therefore invisible to the public. Remedial vagueness, as the analysis suggested, may increase the incentives for courts, prosecutors, and criminal defendants to choose or to agree to resolve these violations in this way.[259] Scholars, of course, have no plausible way to estimate the number of such strong claims that are resolved under the radar. But regardless of their exact number, adopting dismissal or suppression as remedies may result in more of these claims (though surely not all of them) being raised in court and treated by judges for what they really are: meritorious equal protection claims.

Furthermore, courts that as a result of relevant binding precedent feel more encouraged to order dismissal or suppression down the road, upon finding that selective prosecution or selective enforcement has occurred, may be more generous in the number of motions for discovery that they grant at the beginning of the road. While discovery may not always uncover evidence of unconstitutional discrimination, it can certainly improve claimants' chances of success.[260] It is also possible that courts' increased willingness to grant discovery may itself improve deterrence of discriminatory behavior.[261]

Accordingly, while most claimants of selective prosecution or selective enforcement will continue to fail due to these doctrines' strict standard, dispelling remedial vagueness by adopting strong remedies for these violations can be expected to lead to a larger number of successful claims. Therefore, strong remedies can be expected to improve deterrence of prosecutors and police officers from engaging in discriminatory behavior.

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256. *See supra* notes 74, 177 and accompanying text.
257. *See supra* Section II.A.2.
258. *See supra* notes 182, 185 and accompanying text.
259. *See supra* Sections II.A.2, II.B.
260. *See supra* Section I.A.
261. *See supra* note 242 and accompanying text.

2. THE RISK OF CREATION OF "INCLUSIONARY RULES"

Another possible objection to dispelling remedial vagueness by adopting dismissal or suppression as remedies for selective prosecution or selective enforcement is that, counterintuitively, such a step may be counterproductive to deterring these violations. After presenting the premises of such a possible claim, I will explain why, despite its attractiveness, it does not refute the conclusion that adopting strong remedies can be expected to be beneficial for deterrence purposes.

Thus far, my theoretical analysis assumed that if dismissal or suppression were to be mandated by the Supreme Court as a remedy for selective prosecution or selective enforcement, they would be "absolute," in the sense that their application would be unqualified by any exceptions or limitations. In other words, the assumption was that in a world with dismissal or suppression as mandatory remedies, if a criminal court were to formally find that a prosecutor or a police officer unconstitutionally engaged in selective prosecution or selective enforcement, the court would necessarily have to order dismissal or suppression.

Absolute remedies for constitutional violations, however, are a rare sight in the field of criminal procedure. As Carol Steiker demonstrated, "the Burger and Rehnquist Courts have accepted to a significant extent the Warren Court's definitions of constitutional 'rights' while waging counter-revolutionary war against the Warren Court's constitutional 'remedies' of evidentiary exclusion and its federal review and reversal of convictions."[262] Steiker argued that the Burger and Rehnquist Courts, which opposed the Warren Court's "criminal procedure 'revolution'" (most notably symbolized by its decisions in *Mapp* and *Miranda*),[263] curtailed its perceived ramifications for effective law enforcement by creating or bolstering several "inclusionary rules." Inclusionary rules, Steiker defined, are "rules that permit the use at trial of admittedly unconstitutionally obtained evidence or that let stand criminal convictions based on such evidence,"[264] such as "the doctrines regarding standing, the good-faith exception to the warrant requirement, the 'fruit of the poisonous tree,' impeachment, harmless error, and limitations on federal habeas review of criminal convictions."[265] The Roberts Court, like the Burger and Rehnquist Courts, has continued to create and strengthen inclusionary rules.[266]

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262. Steiker, *supra* note 56, at 2470.

263. *Id.* at 2466.

264. *Id*. at 2469.

265. *Id.* (footnote omitted).

266. *See, e.g.*, CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 233–34 (2016).

Inclusionary rules, as Steiker explained, are not just decision rules addressed to and instructing courts with regard to, for instance, the admissibility of unconstitutionally obtained evidence. Rather, these decision rules can and often do translate into the "'real' law" that law enforcement officials feel obligated to abide by, instead of the "official" conduct rules that exist on paper.[267] For example, the standing inclusionary rule provides that "a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights."[268] Accordingly, this decision rule translates into a conduct rule that officers may execute an unconstitutional search or seizure to obtain evidence against an individual whose "own constitutional rights" are not infringed due to the unconstitutional search or seizure.[269]

Somewhat ironically, remedial vagueness has shielded the doctrines of selective prosecution and selective enforcement from similar inclusionary rules. (Here, the term "inclusionary rules" includes any "rules that have the effect of mitigating the consequences to the government in criminal prosecutions of the unconstitutional behavior"[270] of either prosecutors or police officers.) Since the Supreme Court has never decided what the remedy for selective prosecution or selective enforcement is, it has also never had the opportunity, nor the need, to curtail the application of these remedies or to create exceptions to them.

It is conceivable that the Supreme Court might adopt inclusionary rules over time if it decided that dismissal or suppression were the proper remedies for selective prosecution or selective enforcement. If suppression were the remedy for selective enforcement, the Court could require, for example, that defendants prove standing; namely, that the defendants' "own right to equal protection" was violated. Such a requirement could bar suppression of evidence that was obtained during an unconstitutional racially discriminatory stop-and-frisk of an individual who is not the defendant themselves, and also serve as an incentive for biased police officers to conduct such unconstitutional stops-and-frisks (if they believe, for instance, that a member of a particular group may possess evidence that can incriminate other members of the same group).[271] Alternatively, if dismissal were adopted as the remedy for selective enforcement, the Court could, as Karlan suggested, decide to limit its application only to the charge of the offense that a police officer directly enforced selectively (for example, a traffic violation that the officer enforced because of the driver's

267. Steiker, *supra* note 56, at 2545.

268. *United States v. Payner*, 447 U.S. 727, 731 (1980).

269. Steiker, *supra* note 56, at 2536.

270. *Id.* at 2504.

271. For a related discussion about selective enforcement and standing, see Karlan, *supra* note 19, at 2009 n.43.

race), but not to "all charges that are based on evidence acquired [lawfully] during such [discriminatory police conduct]," such as illegal drugs.[272] Obviously, if such a limitation were to be developed, some police officers may view it as an incentive to conduct racially motivated pretextual traffic stops or other discriminatory police enforcement practices.

Likewise, if dismissal were the Court-established remedy for selective prosecution, the Court could also create inclusionary rules that would limit its scope. To take an extreme example, while selective prosecution (like selective enforcement, and as opposed to Fourth Amendment violations) requires, by definition, proof of discriminatory purpose, the Court could potentially create a category of "good-faith" inclusionary rules. For instance, the Court could decide that the charges against the defendant should not be dismissed even where it is proven that the prosecutor has engaged in selective prosecution, if their charging decision was reviewed and approved by a supervisor who had no proven discriminatory purpose and who had not been proven to be aware of their supervisee's discrimination.[273] Here, too, such a decision rule can quite intuitively be read by both prosecutors and their supervisors as conduct rules: intentionally-biased prosecutors may engage in selective prosecution if they hide this fact from their supervisors, and supervisors should generally refrain from questioning the motives of their supervisees.

Granted, under the situation of remedial vagueness, the lack of any inclusionary rules means that prosecutors and police officers cannot violate the Constitution while resting assured that certain categorical exceptions or limitations would necessarily bar ramifications for the criminal prosecution. At least in theory, prosecutors and police officers should know that any proven act of selective prosecution or selective enforcement can potentially result in the defendant not being convicted. Nevertheless, the concern over the creation of inclusionary rules should not lead to the conclusion that deterring discriminatory prosecution and policing is better served under the current situation of remedial vagueness. First, it is not known whether adopting mandatory dismissal or suppression for selective prosecution or selective enforcement would actually result in the development of inclusionary rules over time, or, if developed, what the number and nature of such inclusionary rules would be. It may be the case, for instance, that given the particularly high moral severity of selective prosecution and selective enforcement and the demanding standard that claimants must meet to prevail, the Supreme Court would choose not to create any inclusionary rules at all. Second, the

272. *Id.* at 2009–10.

273. For a description of several U.S. Attorney offices' internal review procedures, see Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, *passim* (1992).

level of deterrence of selective prosecution and selective enforcement under the current policy of remedial vagueness may be so low that it is difficult to see how creation of inclusionary rules could make it overall lower. Dispelling remedial vagueness by adopting strong remedies is expected to increase the overall incentives for prosecutors and police officers to comply with the Constitution, and even if the Court did end up developing several inclusionary rules, the overall level of deterrence would likely be higher than it is under the regime of remedial vagueness.

CONCLUSION

The remedial vagueness surrounding selective prosecution and selective enforcement in the criminal process may increase the incentive for courts to reject such claims on the merits. Courts that cannot rely on Supreme Court precedent (or another authoritative precedent) that mandates, or even authorizes, strong remedies for selective prosecution or selective enforcement may simply prefer not to find that such a violation has occurred in the case before them. Some courts have gone as far as to rule or state that in the absence of such authoritative precedent, dismissal of criminal charges or suppression of evidence should not be granted even for a meritorious claim. Other courts have ruled that dismissal or suppression are simply improper remedies for selective prosecution or selective enforcement. Consequently, prosecutors and police officers may be emboldened to engage in discriminatory prosecution and policing, while criminal defendants may have an increased incentive to refrain from bringing such allegations to court or to agree to a favorable plea offer extended to them by the prosecution. At the same time, remedial vagueness in the criminal context may indirectly constrain the ability of victims of selective enforcement to recover monetary damages from discriminating police officers in the civil process.

Dispelling the remedial vagueness policy that was established by the Supreme Court more than twenty-five years ago would not eradicate the phenomena of selective prosecution or selective enforcement. As the theoretical analysis in this Article shows, however, adopting dismissal or suppression as remedies for such violations may contribute to the efforts to deter them.

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