PUBLIC LAW AS A WHOLE AND NORMATIVE DUALITY: RECLAIMING ADMINSTRATIVE INSIGHTS IN ENFORCEMENT REVIEW

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INTRODUCTION

A recent ad campaign urged Americans to buckle their seatbelts by warning them to "Click It or Ticket."[1] But, theoretically, the penalty could be a lot more severe—consider a campaign entitled "Buckled or Booked." In the 2001 case *Atwater v. City of Lago Vista*, the petitioner, Atwater, was arrested and held in jail for a seatbelt violation.[2] The Supreme Court affirmed the constitutionality of the arrest, holding that the Fourth Amendment does not limit police officers' authority to arrest without warrant for minor criminal offenses.[3] So long as a police officer has probable cause to believe that an individual has committed even a very minor criminal offense in the officer's presence, she is authorized to make a custodial arrest without balancing the costs and benefits involved or determining whether the arrest is in some sense "necessary."[4]

Despite its holding, the Court seemed to acknowledge the absurdity of Atwater's arrest, with both the majority and dissenting opinions characterizing it as a "pointless indignity."[5] In fact, the absurd result of an arrest for a minor seatbelt violation, while extreme, indicates a broader problem in American jurisprudence—the exclusivity of constitutional law in enforcement review. Consider, for example, a world in which enforcement authorities were bound by administrative principles, such as the duty to act proportionally by giving due regard to

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1. The "Buckle Up America" campaign was run in May and June 2006 by the National Highway Traffic Safety Administration. *See* http://www.buckleupamerica.org (last accessed July 17, 2006).

2. Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

3. *Id.* at 340.

4. *Id.* at 354.

5. *Id.* at 347, 360, 372.

the balance between the ends pursued and the means used to achieve those ends. A police officer aware of the balance between deterring seatbelt violations to prevent automobile injuries and the appropriate means to achieve that goal is unlikely to infringe upon the freedom of violators by arresting them.

This Article contends that the American emphasis on constitutional demands at the relative expense of the principles and insights of administrative law can lead to paradoxical results. As an alternative to the current, dichotomous view, this Article proposes a more holistic approach towards public law.

Constitutional law and administrative law are both components of public law—the law of relationships between a government and those whom it governs. However, the American legal system often separates issues into those subject to constitutional review and those left to administrative review. Administrative law in the United States applies primarily to actions attributable to governmental entities serving regulatory functions. In reality, administrative law plays second fiddle; there is a tendency to evaluate every issue involving human liberties under solely constitutional principles (*over-constitutionalism*). As a result, potentially helpful insights from administrative law are often overlooked in "rule of law" cases.

In particular, administrative law in the United States excludes the actions of criminal enforcement authorities from its purview. Police and prosecutors are rarely seen as part of "administrative law" despite the fact that they are precisely the governmental actors who most directly intervene in people's lives. The use of constitutional review without any administrative perspective, combined with the traditional American reluctance to interfere with enforcement discretion, grants these authorities excessive power in administering criminal proceedings and may lead to insufficient controls over abuses of power.

In many other countries the situation is different. In some countries, such as England and Israel, the common law gradually established administrative grounds for judicial review and constitutional principles for the protection of human rights, even without the use of a unitary constitution. The principle of the rule of law, along with the doctrine of ultra vires—requiring government and its agents to act within their legitimate authority—formed the basis for judicial review of administrative power. Administrative law in these countries helps define and constrain the scope of government's executive, regulatory, and quasi-judicial activities. In Germany, even though the principle of the rule of law and the principle of legality are embodied in the constitution, administrative acts are reviewed under a larger set of review criteria than just those of the constitution.

This Article examines the American emphasis on constitutional standards at the expense of the principles and insights of administrative

law. I suggest that understanding how administrative and constitutional law can work together might be useful in the American legal context using England, Israel, and Germany as examples of nations whose legal systems successfully employ administrative insights. I argue that discretionary actions of administrative authorities—including criminal law enforcement agencies—should be governed by principles of *normative duality*: constitutional norms as well as administrative rules. In reviewing administrative authorities' exercises of discretion, courts should broadly combine constitutional analysis with consideration of administrative law principles. More specifically, I focus on two substantive principles of administrative law that U.S. courts should consider in judicial review: legality and proportionality.

Part I addresses the main feature of the administrative powers in modern countries—the extensive discretion granted by authorizing statutes. Recognizing the inevitability and necessity of discretion, this part deals with the rule of law in that context. I argue that the main purposes of public law—constitutional and administrative—are to keep the powers of government within their legal bounds and to limit abuses of power.

Part II describes the relationship between constitutional and administrative law in the United States. I argue that seeing these as separate types of review, rather than as part of a greater whole, leads to results at odds with the rule of law as described in Part I. I provide both practical and theoretical arguments in favor of judicial review of enforcement authorities. Part III introduces comparative approaches to administrative and constitutional judicial review to show how different cultural, historical, and political developments influenced the relationships between the two disciplines and perception of the rule of law. In particular, this Part discusses the doctrine of legality, which requires that government officials act within the powers vested in them, and the doctrine of proportionality, which requires that government actions inflict the least possible harm and that the benefit exceeds the harm caused.

Part IV introduces *normative duality*, a concept of combination of constitutional review with administrative grounds for judicial review. Here I show that proposed administrative insights have roots in American jurisprudence.

Parts V and VI demonstrate concrete potential contributions of the normative duality approach. These parts deal with the doctrines governing selective enforcement and racial profiling. Both involve unfairly harsh application of the law to a particular person or class, yet they are analyzed under different constitutional amendments. The doctrine of selective enforcement—uneven enforcement of neutral law—uses equal protection analysis under the Fourteenth and Fifth Amendments. Racial profiling—the use of race to decide the probability

of criminality—is analyzed under the Fourth Amendment. The exclusive use of constitutional review, without recourse to administrative insights, leads to troubling results. Furthermore, not only is constitutional review used exclusively, but different types of review (under different amendments) are used for similar legal situations. This creates a complicated interplay between two doctrines leading to paradoxical results and inconsistencies within constitutional review itself. The normative duality approach, and its use of administrative insights, helps solve these problems.

I. PUBLIC LAW AND THE RULE OF LAW

Since constitutional law and administrative law are both facets of public law, understanding their relationship requires an inquiry into the nature of public law. Public law is concerned with the activity of governing and the relations between the governors and the governed; namely the relationships between individuals and governmental authorities.[6] Following Martin Loughlin, it is the "assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition, sustain, and regulate the activity of governing."[7] While attempts to distinguish between public law and related fields[8] or to draw the exact limits of public law in regard to other areas of law[9] may be controversial, there is no doubt that constitutional law and administrative law are both viewed as branches of public law.[10]

Constitutional law involves the study of society's principal organs of government and their relationship to each other. In addition, it includes the study of basic democratic values, of which human rights are at the center. It exists both in legal systems with a formal constitution

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6. MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW 5, 153 (2003); ANDREW LE SUEUR, JAVAN HERBERG & ROSALIND ENGLISH, PRINCIPLES OF PUBLIC LAW 4-5 (2d ed. 1999).

7. LOUGHLIN, *supra* note 6, at 155.

8. On the affinity between public law and political science, see Gavin Drewry, *Bridging the Chasm: Public Law and Political Science*, *in* THE LAW, POLITICS AND THE CONSTITUTION: ESSAYS IN HONOUR OF GEOFFREY MARSHALL 203-21 (David Butler, Vernon Bogdanor & Robert Summers eds., 1999).

9. For the difficulty in distinguishing between public and private law, see LOUGHLIN, *supra* note 6, at 2 n.5. For discussion of the denial of any distinction between them, *see* John W.F. Allison, *Theoretical and Institutional Underpinnings of a Separate Administrative Law*, *in* THE PROVINCE OF ADMINISTRATIVE LAW 71-89 (Michael Taggart ed., 1997); and Michael Taggart, *'The Peculiarities of the English': Resisting the Public/Private Law Distinction*, *in* LAW AND ADMINISTRATION IN EUROPE: ESSAYS IN HONOUR OF CAROL HARLOW 107-121 (Paul Craig & Richard Rawlings eds., 2003). For the tendency to prefer more specific categories of law, see LE SUEUR, HERBERG & ENGLISH, *supra* note 6, at 5. For the "tripartite division of public law into the sub-disciplines of constitutional law, administrative law, and international law," and the growing realization that all of them "are in the same boat," see Michael Taggart, *The Tub of Public Law*, in THE UNITY OF PUBLIC LAW 455, 455 (David Dyzenhaus ed., 2004).

10. This convention is demonstrated by books addressing public law by combining the subjects of constitutional law, administrative law, and human rights. *See, e.g.*, IAN LOVELAND, CONSTITUTIONAL LAW, ADMINISTRATIVE LAW AND HUMAN RIGHTS (3d ed. 2003).

(such as the United States,[11] Canada,[12] and Germany[13]) and those with a "material" but unwritten constitution[14] (such as England[15] and Israel[16]). Administrative law focuses on one of the branches of government—the executive branch—and its role in supplying services to the public in the modern administrative state.[17]

The principle of the rule of law—that the government itself is bound by the law—is the unifying principle combining constitutional and administrative law into public law. Although this concept is shared in modern Western states, its exact meaning and its historical and conceptual foundations are contestable.[18] Early conceptions of the rule of law focused on the idea that individuals ought not to be subjected to officials wielding wide discretionary power.[19] Although indications against delegating discretion to the administration can be found in the American Constitution,[20] discretion has become a necessary tool for

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11. That American constitutional law includes governmental institutions issues and human rights can be demonstrated clearly by the content of the books dealing with the subject. *See, e.g.*, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed. 2000), at iii (explaining this inclusion in the preface of the third edition). *See also* NORMAN REDLICH, JOHN ATTANASIO & JOEL K. GOLDSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 4-6 (3d ed. 2005) (explaining the "structural constitution").

12. BERNARD W. FUNSTON & EUGENE MEEHAN, CANADA'S CONSTITUTIONAL LAW IN A NUTSHELL (2d ed. 1998); P. MACKLEM ET AL., CANADIAN CONSTITUTIONAL LAW (2d ed. 1997).

13. DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (2d ed. 1997).

14. For the distinction between written and unwritten constitutions, *see* STANLEY DE SMITH & RODNEY BRAZIER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 11-12 (6th ed. 1989). For criticism of the term "unwritten," see A.P. LE SUEUR & J.W. HERBERG, CONSTITUTIONAL & ADMINISTRATIVE LAW 9-11 (1995) (saying "there is no single constitutional document").

15. For the substance of the unwritten constitution of England, *see* H.W.R. WADE, CONSTITUTIONAL FUNDAMENTALS (1980); *and* Roger Cotterrell, *The Symbolism of Constitutions: Some Anglo-American Comparisons*, *in* A SPECIAL RELATIONSHIP?: AMERICAN INFLUENCES ON PUBLIC LAW IN THE UK 25-46 (Ian Loveland ed., 1995). For a wide discussion of human rights in the British legal system, see GLANVILLE WILLIAMS, LEARNING THE LAW 111 (11th ed. 1982). For the contemporary role of human rights in the English Constitution, see William Wade, *The United Kingdom's Bill of Rights*, *in* THE UNIVERSITY OF CAMBRIDGE CENTRE FOR PUBLIC LAW, CONSTITUTIONAL REFORM IN THE UNITED KINGDOM: PRACTICE AND PRINCIPLES 61-68 (1998).

16. Israeli law does contain components of a written constitution, which are known as "Basic Laws." Most of the basic laws deal with institutional aspects. In 1992 the Knesset passed two basic laws regarding human rights (Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation). *See* Michal Tamir, *Israel*, *in* 2 LEGAL SYSTEMS OF THE WORLD 755, 757 (Herbert M. Kritzer ed., 2002).

17. For the definition of "administrative law," see WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 4-5 (8th ed. 2000). For the modern administrative state, see LIEF CARTER & CHRISTINE HARRINGTON, ADMINISTRATIVE LAW AND POLITICS 4-13 (3d ed. 2000); LAWRENCE M. FRIEDMAN, LAW IN AMERICA 125 (2002); and William Bishop, *A Theory of Administrative Law*, *in* ADMINISTRATIVE LAW 335, 335 (Peter Cane ed., 2002).

18. For the context, see Richard H. Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COL. L. REV. 1, 1-10 (1997); and Jeremy Waldron, *The Rule of Law as a Theater of Debate*, *in* DWORKIN AND HIS CRITICS 319, 319 (Justine Burley ed., 2004).

19. A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 188 (9th ed. 1939) ("[i]n this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.").

20. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). This was the basis for the "non-delegation" doctrine, according to which Congress cannot delegate

administrative agencies to perform the welfare and regulatory functions of modern government.[21] The "traditional model of administrative law, [which] conceives of [an] agency as a mere transmission belt for implementing legislative directives," cannot hold in the modern administrative world; the legislature cannot foresee all the eventualities and flexibilities that may be required to implement legislation.[22] Inevitably, discretion is granted to the administrative agents;[23] namely, a restricted area is left open for an official's decision[24] among the various rules governing her actions.[25]

Thus, modern administrative powers contradict the rule of law in its historical sense. However, this anachronistic and formal perception has been replaced by new models for the rule of law. "The rule of law remains a valid norm, and an important one, but it has been transformed by administrative reality and modern social theory from the requirement of fixed and preestablished rules to one of socially embedded constraints on the actions of government officials."[26] Furthermore, it is now generally felt that laws should be followed for their substantive dimensions, which asserts that the law itself contains inherent moral values.[27]

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legislative power to the President. In its entire history, the Supreme Court has invalidated only two statutes on the ground of improper delegation of power. *See* J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L. J. 575, 582 (1971-72).

21. It seems that Dicey underestimated the scope of administrative power which actually existed even at the time he wrote. *See* P. P. CRAIG, ADMINISTRATIVE LAW 5 (4th ed. 1999). For a broad discussion on the administrative discretion in the modern state, see KENNETH C. DAVIS, DISCRETIONARY JUSTICE – A PRELIMINARY INQUIRY 3-26 (1971).

22. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1675 (1975). For the discretionary and continuous relationship between the citizens and the state in the modern welfare state, *see* Joel F. Handler, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law*, 92 YALE L. J. 1270, 1276 (1983).

23. There are several ways to define discretion. According to its positive definition, discretion is "a sphere of autonomy within which one's decisions are in some degree a matter of personal judgment and assessment." *See* DENIS J. GALLIGAN, DISCRETIONARY POWERS – A LEGAL STUDY OF OFFICIAL DISCRETION 8 (1990). This definition does not distinguish between situations in which the authorizing statute mentions standards for decision-making and situations in which there are none.

24. This is a negative-residual definition of discretion. *See* Robert E. Goodin, *Welfare, Rights and Discretion*, 6 OXFORD J. LEGAL STUD. 232, 233 (1986). Dworkin described discretion in the negative sense as the "hole in the doughnut." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1978).

25. Administrative powers have various extents of discretion according to the standards specified in the statute and their precision. *See* FREDERICK F. SCHAUER, PLAYING BY THE RULES – A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION MAKING IN LAW AND IN LIFE 222 (1991). For the relations between discretion and rules, *see* DIANE LONGLEY & RHODA JAMES, ADMINISTRATIVE JUSTICE: CENTRAL ISSUES IN UK AND EUROPEAN ADMINISTRATIVE LAW 166 (1999) (suggesting that discretion and rules should be regarded as "different points on a continuum").

26. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 351 (1998).

27. For the procedural versus the substantive meaning, see Jeffrey Jowell, *The Rule of Law Today*, *in* THE CHANGING CONSTITUTION 5-25 (Jeffrey Jowell & Dawn Oliver eds., 5th ed. 2004). For one of the substantive meanings given to the rule of law, see RONALD DWORKIN, A MATTER OF PRINCIPLE 12 (1985) ("[the rule of law] does not distinguish, as the rule-book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law,

What does "rule of law" mean today? Like other legal terms such as "democracy" and "rights," the rule of law has come to signify a cluster of ideals used as codes to describe modern political morality. Unfortunately, this often leads to use of these definitions without drawing sufficient distinction between them and with "a tendency to use any one of them as surrogate for all the others."[28] Here, I use the term "rule of law" to mean a principle that limits the abuse of power and is enforced by judicial review.[29] In line with this approach, the primary purpose of public law is to keep the powers of government within their legal bounds in order to protect citizens from abuse. "Abuse" in this sense is not necessarily a result of malice or bad faith; it can, and often does, result simply from misunderstanding the extent of one's legal powers, which can occur in the most well-intentioned governments.[30]

II. THE SEPARATION BETWEEN ADMINISTRATIVE AND CONSTITUTIONAL LAW IN THE UNITED STATES

Administrative law and constitutional law, as components of public law, must be used together to further rule of law concerns. However, in the United States, the two disciplines are treated as separate. The separation can be most clearly seen in the judicial review of enforcement authorities' actions. This Part describes the history and reasons for this separation.

In the American legal tradition, appeal to the rule of law is grounded in the doctrine of constitutionalism.[31] The Framers, relying on Montesquieu, placed great faith in the power of a written constitution to

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that the rules in the rule-book capture and enforce moral rights"). For a positivist perception of the rule of law, which claims that the ideal of government under a rule of law is not a moral virtue but an instrumental virtue that makes the law more effective, see JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210 (1979); and Joseph Raz, *Incorporation by Law*, 10 LEGAL THEORY 1 (2004).

28. Waldron, *supra* note 18, at 17.

29. Professor Richard Fallon has identified "four ideal-typical conceptions of the Rule of Law: a historicisicist, a formalist, a Legal Process, and a substantive ideal type." Fallon, *supra* note 18, at 10. Recognizing that all fall short of furnishing an adequate theory, he suggests that it is best to see the rule of law "as an ideal comprising multiple strands or elements, which the various ideal types help to illuminate." *Id.* at 56. Thus, "the legal process ideal type" focuses on the reasoned connection between the "sources of legal authority and the determination of rights and responsibilities in a particular case" and on judicial review "as a guarantor of procedural fairness and rational deliberation by the executive and administrative decisionmakers." *Id.* at 18.

30. WADE & FORSYTH, *supra* note 17, at 5; Jowell, *supra* note 27, at 25.

31. Feely and Rubin describe the extreme importance of the constitution in this sense:

> The Constitution not only serves as a transcendent constraint on ordinary politics, but provides definitive answer for the bewildering and threatening questions of political morality. It is seen as the source of such rules and thus becomes an ultimate authority that will protect us from ourselves and provide the stability we sacrificed when we cut ourselves off from our ancestral authority and our ancestral source of law.

FEELEY & RUBIN, *supra* note 26, at 348.

order society, guarantee liberty, and articulate the higher law,[32] which, by the consent of the governed, should rule the affairs of the nation. Even though the term "rule of law" is not mentioned in the United States Constitution, it is prominent in *Marbury v. Madison*,[33] which became "an enduring symbol of judicial power" [34] to review decisions of the legislature and the Executive. The power of judicial review in *Marbury* comes from the judicial power "to say what the law is,"[35] strengthened by the perception that, for every right, the law of the United States must furnish a remedy.[36] As Schwartz and Wade put it, "Americans have become a people of constitutionalists, who... see constitutional questions lurking in every case."[37] To demonstrate the way in which constitutional issues have permeated and continue to permeate American law, I refer to this practice as *over-constitutionalism.*

Administrative law in the United States plays "second fiddle" to constitutional law. [38] However, within its own sphere, American administrative law is well developed and far-reaching. In fact, American judges, on account of the diffusion of powers among federal and state governments, have intruded far more widely than English courts on questions the latter have regarded as matters of policy.[39] However, where constitutional issues arise, administrative law is pushed to the side. Thus it is the application, not the content, of administrative law that is problematic.

In the following sections I describe the limited realm of administrative law in the United States. I focus particularly on the exclusive constitutional review of enforcement agencies who are not perceived as administrative agencies and, thus, are granted wide discretion barely reviewed by courts. I then argue that the rule of law demands a different perception of the rules governing enforcement authorities' exercise of discretion and the willingness of courts to review their actions.

A. THE BOUNDS OF ADMINISTRATIVE LAW

32. *See* Anthony Bradley, *The Sovereignty of Parliament—Form or Substance?*, *in* THE CHANGING CONSTITUTION 26, 31-33 (Jeffrey Jowell & Dawn Oliver eds., 5th ed. 2004) (describing the Constitution of the United States as the "source of legislative sovereignty").

33. 5 U.S. (1 Cranch) 137 (1803).

34. RICHARD H. FALLON JR., THE DYNAMIC CONSTITUTION 12 (2004).

35. *See Marbury*, 5 U.S. (1 Cranch) at 177.

36 *Id.* at 163.

37. BERNARD SCHWARTZ & H.W.R. WADE, LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES 6 (1972)

38. Michael Taggart, *The Province of Administrative Law Determined?*, *in* THE PROVINCE OF ADMINISTRATIVE LAW 1, 17-18 (Michael Taggart ed., 1997).

39. SCHWARTZ & WADE, *supra* note 37, at 7, 209.

In spite of the common law roots of American administrative law,[40] its reach and substance are governed largely by legislative enactments. These include the federal Administrative Procedure Act (APA) and statutes that govern administrative decision-making by the agencies of state or local governments.[41] There exists disagreement over the role of common law judicial review after the enactment of the APA in 1946. While one view is that the APA governs the realm of administrative law "in a very positivist fashion,"[42] another concludes that its enactment "did little to displace the domination of common law in the field."[43] Nevertheless, there seems to be agreement that the administrative common law of judicial review is being replaced by a doctrine grounded in the judicial review provisions of the APA and other statutes.

The APA empowers the courts to set aside agency action found to be "contrary to constitutional right."[44] Thus, the Constitution has a role in administrative review.[45] However, since the APA itself is a "quasi-constitutional statute" whose foundations are in the Due Process Clause of the Constitution,[46] constitutional due process claims regarding its defined set of agencies are relatively rare—due process claims will generally be dealt with under the APA rather than the Constitution.[47]

While a huge public sector is subject to administrative law under the APA, there are two manners in which this body of law is restricted. First, the APA applies only to "agencies," a term which it defines.[48] Many structures of government that should be within the scope of the administrative law are excluded from it.[49] The Bureau of Prisons, for example, is not included in the definition. Since there is no set of federal common law principles[50] that would impose APA-like requirements on "non-agencies," the APA does not govern these entities.[51] Thus, the Ninth Circuit declined to apply the APA rules on the Bureau of Prisons,

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40. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 121 (1998).

41. To a significant extent, the body of law that governs the agencies of state and local governments is borrowed from and influenced by federal administrative law. This article will focus on the federal administrative law, which represents "American administrative law" in most respects relevant to this paper. Since I address the nature of the constitutional review, any suggestions are applicable in both federal and state courts.

42. Jack M. Beermann, *The Reach of Administrative Law in the United States*, *in* THE PROVINCE OF ADMINISTRATIVE LAW 171, 172 (Michael Taggart ed., 1997).

43. Duffy, *supra* note 40, at 115.

44. 5 U.S.C.A. § 706(2)(B) (1993).

45. LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 5 (6th ed. 2005).

46. PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 53 (1994); SCHWARTZ & WADE, *supra* note 37, at 8.

47. WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 117 (4th ed. 2000).

48. 5 U.S.C.A § 551(1) (1996).

49. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 1 (2d ed. 2001).

50. Federal common law rules are rules created by the court when the substance of those rules is not clearly suggested by federal enactments, constitutional or congressional. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 890 (1986).

51. Beermann, *supra* note 42, at 173-75.

since "the APA was not written with the problems of prison discipline in mind."[52] Secondly, the APA focuses on rulemaking and adjudication and leaves out all other executive actions that do not fall into these categories.[53] Thus, a major flaw of the APA is that enforcement authorities are outside its scope.[54]

Administrative law in the United States is informed by a great deal more suspicion of governmental power than of private power, even when a private entity performs a function with close parallels to traditional governmental roles. For example, public law rules are not applicable to government corporations.[55] While independent regulatory commissions perform powerful regulatory functions, they exist outside the executive department and thus beyond the jurisdiction of the president.[56]

Administrative law thus applies only to actions attributable to governmental entities serving regulatory functions under law. In this framework, the principle of the rule of law plays only part of its natural role and is accompanied or supplanted by other concerns. Among these considerations are cost-benefit analyses of regulation, control of the government over regulatory policies, political and expert judgments, and accountability.[57] Most cutting-edge administrative law scholarship is less concerned with legal issues than with the issue of how best to regulate.[58]

B. JUDICIAL REVIEW OF ENFORCEMENT AUTHORITIES

One of the clearest results of the American limitation on the applicability of administrative law is the exclusion of criminal enforcement authorities, including police and prosecutors, from administrative review. Their actions are instead reviewed under constitutional amendments regarding the criminal process.[59] Police and

52. Clardy v. Levi, 545 F.2d 1241, 1246 (9th Cir. 1976).

53. AMAN & MAYTON, *supra* note 49, at 5.

54. *See infra* notes 59-64 and accompanying text.

55. Beermann, *supra* note 42, at 191.

56. *See* FOX, *supra* note 47, at 56; KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE AMERICAN POLITICAL SYSTEM 28-29 (3d ed. 1996). These agencies are beyond the scope of this article.

57. For the Presidential Administration and the Cost-Benefit State, *see* STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & MATTHEW L. SPITZER, ADMINISTRATIVE LAW AND REGULATORY POLICY 30-35 (5th ed. 2002).

58. *See* Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 958 (1996-7). It has also been argued that the legal profession of administrative law, as a result of the exclusive attention given to due process, is "controlled by lawyers, who have emphasized courtroom procedural techniques as the virtual 'be all and end all' of good administration." SCHWARTZ & WADE, *supra* note 37, at 7.

59. For the problem of the government not facing the same structural and institutional checks in criminal proceedings as in civil regulatory actions, see Rachel Barkow, *Separation of Power and the Criminal Law*, 58 STAN. L. REV. 989 (2006).

prosecutors are hardly ever seen as part of "administrative law"[60] despite the fact that they are the governmental actors who most directly intervene in people's lives, and despite the enormous discretion they are granted within the American legal system.[61] This wide discretion, coupled with the strain of an overwhelming caseload in the United States and the fact that all claims must be litigated within an adversarial system, makes the use of selective enforcement (for example, not prosecuting in potentially troublesome cases) tempting.[62] Scholars have pointed to the importance of looking at the agencies responsible for criminal justice policies from an administrative point of view, in regard, for example, to regulation of sentencing[63] or police rulemaking processes.[64]

Over-constitutionalism in the criminal context (and the exclusion of administrative review) is compounded by the traditional American reluctance to interfere with enforcement discretion in general and particularly with the discretion not to enforce the law.[65] This reluctance is derived from the traditional perception of the governmental system as the interaction of opposing discrete forces—"the legislative, executive, and judicial power within the national government, the national government and the state governments in the general polity."[66] The doctrines of separation of powers and federalism reflect this conception of governance. Each branch of the national government constrains the power of the other two, while the national and state governments constrain each other.[67]

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60. To demonstrate, according to Judge Friendly's definition: "Administrative law includes the entire range of action by government with respect to the citizen or by the citizen with respect to the government, except for those matters dealt with by the criminal law and those left to private civil litigation...." 1 RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE 1 (4th ed. 2002) (citing Henry Friendly, New Trends in Administrative Law, 6 MD. BAR J. 9 (1974)).

61. For the wide discretion of the enforcement authorities, see DAVIS, *supra* note 21, at 162; JEROLD H. ISRAEL, YALE KAMISAR & WAYNE R. LAFAVE, CRIMINAL PROCEDURE AND THE CONSTITUTION 530 (2004 ed.); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 172 (7th ed. 2001); Jay A. Sigler, *The Prosecutor: A Comparative Functional Analysis*, *in* THE PROSECUTOR 53, 71 (William F. McDonald ed., 1979).

62. George F. Cole, *United States of America*, *in* MAJOR CRIMINAL JUSTICE SYSTEMS: A COMPARATIVE SURVEY 29, 45 (George F. Cole et al. eds., 2d ed. 1987).

63. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005).

64. Hudson Janisch & Ron Levi, *Criminal Justice from the Bottom-up: Some Thoughts on Police Rulemaking Processes*, *in* THE PROVINCE OF ADMINISTRATIVE LAW 243-78 (Michael Taggart ed., 1997) (referring to the situation in Canada).

65. KENNETH CULP DAVIS, ADMINISTRATIVE LAW 477-78 (5th ed. 1973).

66. FEELEY & RUBIN, *supra* note 26, at 342.

67. James Madison felt this way:

> From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying 'there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,' or, 'if the power of judging be not separated from the legislative and executive powers,' he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of

In terms of separation of powers concerns, the fact that the federal Attorney General is appointed by the president and many local prosecutors are political appointees[68] makes American courts fear that judicial inquiry into executive enforcement discretion is improper. The criminal justice system is in large part tied to the political system, and thus courts must tread lightly in issues of criminal prosecution to keep the powers "separate."[69] Instituting discretion review would require that judges enter deeply into the policies, practices, and procedures of the enforcement authorities[70] and "ask[] a court to exercise judicial power over a 'special province' of the Executive." [71] Courts cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbiter of the cases presented to them.[72] Thus, while discretion inherently contains the ability to discriminate, it is hardly ever reviewed by the

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> another department, the fundamental principles of a free constitution are subverted.

THE FEDERALIST NO. 47 (James Madison).

68. Sigler, *supra* note 61, at 55. For the vast amount of discretion of the prosecuting attorney in the United States and the political pressures, see Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057, 1080 (1955).

69. *See, e.g.*, United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) ("It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."). *See also* Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967). In that case, the court writes:

> It is assumed that the United States Attorney will perform his duties and exercise his powers consistent with his oaths; and while this discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors . . . it is not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers.

Id. at 482.

70. *See, e.g.*, Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999). In that case, the Court wrote:

> This broad discretion [afforded the Executive] rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.

Id. at 489-90 (*quoting* Wayte v. United States, 470 U.S. 598, 607-08 (1985)).
See also United States v. Redondo-Lemos, 955 F.2d 1296, 1300 (9th Cir. 1992) ("[s]uch judicial entanglement in the core decisions of another branch of government - especially as to those bearing directly and substantially on matters litigated in federal court - is inconsistent with the division of responsibilities assigned to each branch by the Constitution.").

71. United States v. Armstrong, 517 U.S. 456, 464 (1996).

72. For the "separation of power claim", see Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 719-20 (1997). *See also Redondo-Lemos*, 955 F.2d at 1300:

> The Office of the United States Attorney cannot function as prosecutor before the court while also serving under its general supervision. The court, in turn, cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbiter of the cases presented to it. In the end, the type of intense inquiry that would enable a court to evaluate whether or not a prosecutor's charging decision was made in an arbitrary fashion would destroy the very system of justice it was intended to protect.

courts: they traditionally recognize that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[73]

As a result, authorities have a great deal of power in administering criminal proceedings,[74] which may lead to insufficient control over abuses of power. For example, as I elaborate below,[75] while the equal protection doctrine protects again "constitutional discrimination,"[76] it does not impose on the enforcement authorities the duty to exercise their discretion with "administrative equality," and thus does not provide a sufficient safeguard against arbitrariness.

C. RULE OF LAW AND THE AMERICAN SEPARATION

The protection of the rule of law demands a different interpretation of the separation of powers doctrine in the realm of enforcement review.[77] This Section describes how judicial review of enforcement is necessary to uphold the rule of law in the United States. I begin this Section with theoretical arguments and then proceed to more practical reasons for judicial review of enforcement authorities.

Viewing separation of powers doctrine as a system of checks and balances,[78] as the Framers did,[79] requires involvement by all three powers in enforcement work with continuous synchronization and mutual feedback.[80] These checks and balances, already important in pre-

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73. Heckler v. Chaney, 470 U.S. 821, 831 (1985).

74. Mark Lemle Amsterdam, *The One-Sided Sword: Selective Prosecution in Federal Courts*, 6 RUTGERS-CAM. L.J. 1, 7 (1974).

75. *See infra* notes 262-263 and accompanying text.

76. Wade v. United States, 504 U.S. 181, 185-86 (1992), describes the prohibition on unconstitutional discriminative enforcement:

> Because we see no reason why courts should treat a prosecutor's refusal to file a substantial-assistance motion differently from a prosecutor's other decisions . . . we hold that federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive. Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant's race or religion.

77. For the modern functions underlining the separation of powers doctrine, namely "democracy, professionalism, and the protection of fundamental rights," see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 634 (2000).

78. For the "checks and balances" as a critical genius of the American Constitutional System, see JOHN NORTON MOORE, TREATY INTERPRETATION, THE CONSTITUTION AND THE RULE OF LAW 34-35 (2001).

79. *See* THE FEDERALIST NO. 47, *supra* note 67.

80. For the importance of all modes of governmental power—rulemaking, adjudication, and implementation—in pursuing the programs of the modern administrative state, see FEELEY & RUBIN, *supra* note 26, at 343. For the distinct but dependent tasks of each of the three powers in the criminal justice system—the police, the courts, and corrections—see KADISH & SCHULHOFER, *supra* note 61, at 1.

administrative time, are crucial in the modern state.[81] Courts, the final link in the chain, have a burden of responsibility in guaranteeing human rights, reducing arbitrariness, and preventing abuses of power. Courts have already realized, outside of the enforcement realm, that their task is to review the vast discretion of administrative authorities. As the Supreme Court has stated, "[c]ourts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes."[82] Hence, "[i]t will not do to say that it must all be left to the skill of experts. Expertise is a rational process and a rational process implies expressed reasons for judgment."[83]

Judicial scrutiny of enforcement discretion is supported by public choice theory. This theory based on the consensus principle,[84] which accepts the historical idea of the constitution as a social contract[85]—an idea which found its expression in the Declaration of Independence.[86] The theory distinguishes between the constitutional and the post-constitutional stages of the social contract and view the state as having two separate roles. At the constitutional stage, the state emerges as that institution of society which enforces the law (the protective state). At the post-constitutional stage, the state facilitates exchanges of public goods (the productive state).[87] The task of the protective state is to ensure that the terms of the conceptual contractual agreement are honored and that rights are protected. In this role the state is, ideally, external to the individuals or groups whose rights are involved.[88] The task of the productive state is to produce public goods,[89] facilitate complex

81. Edward L. Rubin argues that the concept of checks and balances, among others, is a product of social nostalgia. He suggests an alternative description of the modern government: instead of three or four branched tree, a multilevel network of interconnected units. *See* EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE (2005).

82. Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 15 (1942) (internal citation omitted).

83. Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 627 (1944).

84. This is the "leading normative principle of the economic approach," also known as "Pareto optimality," and a leading principle of social contract theories of the state. *See* Eli M. Salzberger, *The Independence of the Judiciary: An Economic Analysis of Law Perspective*, *in* JUDICIAL INTEGRITY 69, 73 (András Sajó ed., 2004).

85. The idea of a "transformation, by consensus, from a state of anarchy to a centrally governed society" was first proposed by Hobbes in LEVIATHAN (1651). Salzberger, *supra* note 84, at 75.

86. THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776) ("We hold these truths to be self-evident ... that all men are endowed by their Creator with certain unalienable rights . . . to secure these rights, governments are instituted among Men, deriving their just powers from the consent of the governed.").

87. JAMES M. BUCHANAN, THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN 68-70 (1975).

88. *Id.* at 95-97.

89. For definition of public goods and the reasons they are not likely to be produced by the market and government intervention is necessary to guarantee optimal supply, see NIVA ELKIN-KOREN & ELI M. SALZBERGER, LAW, ECONOMICS AND CYBERSPACE 49-55 (2004). *See also* BUCHANAN, *supra* note, at 36-38 (dealing with "market failure and the free-rider problem.").

exchanges among separate citizens, and increase the overall levels of economic well-being. In this role "government is *internal* to the community, and meaningful political decisions can only be derived from individual values as expressed at the time of decision or choice."[90] There is an inherent tension between the two roles, since the protective state should ensure that the productive state, which is engaged in reallocation of resources, does not overstep the constitutionally delegated bounds.

From this insight the theory draws several inferences regarding separation of powers. There must be separation between the productive and the protective functions of the state, as well as between the governmental agencies which perform these functions and the personnel in those organs.[91] Thus, the judiciary is part of the enforcement structure, and it must be independent of the legislative body, which performs the productive task. Nevertheless, the theory rejects the pure doctrine of separation of powers in favor of some degree of power sharing and functional dependency as a means of reducing a monopoly of power. Sharp separation strengthens the monopolistic powers of government and the exploitation of the public, decreases the public's welfare, and increases the potential for abuse of power.[92] The concept of checks and balances "leads to a view of the judiciary... as equal to the other two branches in the task of controlling [one another];" it should "take part in performing small portions of the legislative and administrative functions, just as it should not exclude the other branches from taking up some of the adjudication function as well."[93] Given all of the above, to a certain extent, "making law" by judges is justified as part of a review of the other organs involved.

In addition, judicial review is an obvious way of checking discretion to reduce arbitrariness and avoid abuse of power.[94] The cure for discretionary injustice, as Professor Kenneth Davis has argued, is not the elimination of such power but control of it through mechanisms to confine, structure, and check the discretion.[95] Perhaps even more important than judicial review of rule-making is judicial review of the

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90. BUCHANAN, *supra* note 87, at 97.

91. Salzberger, *supra* note 84, at 78-84; Eli M. Salzberger & Niva Elkin-Koren, *The Effects of Cyberspace on the Economic Theory of the State*, *in* LAW AND THE STATE: A POLITICAL ECONOMY APPROACH 58, 79-87 (Alain Marciano & Jean-Michel Josselin eds., 2005).

92. Salzberger, *supra* note 84, at 87; Salzberger & Elkin-Koren, *supra* note 91, at 87-90.

93. Salzberger, *supra* note 84, at 88.

94. *Cf.* LONGLEY & JAMES, *supra* note 25, at 169.

95. Kenneth Culp Davis, *The Inquiry—the Subject, Objectives, Background, and Method*, *in* DISCRETIONARY JUSTICE IN EUROPE AND AMERICA 1, 9-10 (Kenneth Culp Davis ed., 1976). Confining discretion involves setting its limits by the using rules which define the area in which the decision-maker's choice can operate. Structuring discretion involves controlling the way in which choices are made by the administrator between alternative courses of action which lie within the limits of the discretion. In that context Professor Davis suggests learning from the relative success of Western European countries in limiting such discretion. *See* DAVIS, *supra* note 21, at 217. *See also* PETER CANE, AN INTRODUCTION TO ADMINISTRATIVE LAW 134-135 (3d ed. 1996) (explaining the mechanisms of "confining" and "structuring" discretion) .

enforcement of the regulations enacted and the enforcement of the criminal law by the police and the prosecutors, who perform as administrative authorities.[96] Discretionary powers of enforcement authorities are exactly the kind which are particularly vulnerable to selective decisions.[97] In addition, the public interest lies not only in indicting the offender and exonerating the guiltless, but also in the moral integrity of the entire criminal justice process.[98]

There are good practical reasons for judicial review in the United States to scrutinize enforcement discretion claims. The professionalism claim against review cannot hold in every context. The extent of the willingness of the court to interfere should be along a continuum, dependent on factors such as the expertise of the administrative agent, the nature of the act involved, the relative importance of the non-legal expertise, and the need for uniformity in applying discretion. In choosing investigative methods, for example, enforcement authorities should receive a wide margin of discretion. However, the decision whether and when to enforce has a semi-judicial aspect and hence lies within the expertise of the judges and should therefore be subject to the norms laid out by the Supreme Court.[99] Courts do not necessarily have to interfere in allocating enforcement resources in order to protect against harm deriving from selective prosecution.[100] The role of the court is to guarantee that the selection made by the enforcement authorities is done in accordance with the purpose of the statute being enforced.[101] Not only does this role of the courts not trespass into the professional realm of the Executive, it lies entirely within the competence of the Judiciary to interpret and apply the law.[102]

It is important that enforcement authorities know that their discretion is reviewable. Legal process can influence governmental behavior;[103] the mere possibility of judicial review is likely to keep enforcement authorities in line. Even if the change in the doctrine would, in the short run, burden the courts with more litigation, such a burden is inevitable when current doctrine does not protect the rule of law. In the long run, the court system itself will benefit, because the need of the

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96. *Cf.* DAVIS, *supra* note 21, at 211-12 (arguing that the reasons for a judicial check of a prosecutor's discretion are stronger than for such a check of other reviewable administrative discretion).

97. *Cf.* Randall. L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1429 (1988) (discussing jury selection).

98. For the moral integrity of the criminal process, *see* ANDREW L.-T. CHOO, ABUSE OF PROCESS AND JUDICIAL STAYS OF CRIMINAL PROCEEDINGS 17-18, 74-76, 99-100 (1993).

99. *Cf.* ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 55-58 (1981).

100. Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Prosecution After* U.S. v. Armstrong, 34 AM. CRIM. L. REV. 1071, 1079-81 (1997).

101. *See infra* notes 278-279 and accompanying text.

102. *Cf.* Daniel J. Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. ILL. L.F. 88, 104.

103. For the importance of the legal process, see Poulin, *supra* note 100, at 1088.

enforcement authorities to justify their decisions will lead them to consider and explain their actions more carefully.

In sum, incorporating administrative insights into American judicial review would further the aims of the rule of law. In the next Part, I describe the ways in which administrative law insights are used in other judicial systems. In particular, I introduce the concept of "normative duality."

III. NORMATIVE DUALITY

Constitutional and administrative law need not be treated as unrelated disciplines. *Normative duality*[104] is a term I use to refer to the idea that when exercising discretion, administrative authorities (including criminal law enforcement authorities) must comply with both constitutional norms and administrative law. When reviewing the discretion of administrative authorities, courts should combine constitutional review with the rationales of administrative grounds for judicial review discussed above. The consequence in the United States will be the development of a layer of administrative insights within the constitutional review of administrative authorities meant to protect the rule of law.

This Part introduces normative duality. Section A describes how administrative and constitutional law developed together in other countries, while Section B introduces the concepts of legality and proportionality as elements of judicial review. These provide the foundation for Part IV, where I discuss why the inherent connection between constitutional law and administrative law, as demonstrated by these countries, should also influence the American legal system. Administrative insights, whose roots already exist in American jurisprudence, can contribute to the perception of public law as a whole and even help clarify constitutional review. Thus, my purpose in explaining the law in foreign jurisdictions is not to compare the United

104. This term is used by the Israeli Supreme Court when two systems of law—private law and public law—are applicable to a situation. As far as I know, the term has never been used to describe the applicability of administrative law and constitutional law simultaneously. For the "normative duality" regarding procurement contracts and tender law, see Gabriela Shalev, *Public Procurement Contracts in Israel*, 5 P.P.L.R. 185, 191 (1997). For the rule of "normative duality" regarding private corporations that are under the control of governmental authorities and regarding public authorities acting within the sphere of public law, see Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The Impact on Administrative Law*, 3 U. PA. J. CONST. L. 581, 590 (2001). For a totally different use of the term, see Christopher F. Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 570 (arguing that there is a trichotomy of paradigmatic decision-making methods—adjudicatory fairness, science, and politics—each of which is associated with a collection of positive and negative attributes, namely "normative duality.").

States to them, but to show how rule of law-based jurisprudential concerns might clear up confusion in American courts.

A. CONSTITUTIONAL AND ADMINISTRATIVE LAW: WORKING TOGETHER

The perceptions of administrative law, constitutional law, and the relationship between these disciplines vary throughout the world. Many Western legal systems do not have the same separation of administrative and constitutional law as does the United States. Understanding how these legal systems employ administrative review, particularly of enforcement authorities, may provide an insight into how public law can be viewed as a whole in the United States. Furthermore, it may help clarify internal dichotomies that result from the exclusive use of constitutional review without the insights of administrative law.

In England, the idea of a unified common law dating from feudal times prevented the development of a separate system for review of administrative authorities.[105] In Israel, administrative review has remained important even as the legal system has become strongly influenced by American jurisprudence.[106] These two countries, both without a constitution, developed analogues to constitutional law through administrative law.[107] Germany, a civil law nation with a constitution, has well-established judicial review of administrative actions.[108]

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105. The perception was that it contradicted the rule of law that demands subjection of all classes equally to one law administered by ordinary courts. *See* DICEY, *supra* note 19, at 189. *See also* DE SMITH & BRAZIER, *supra* note 14, at 534 (describing Dicey's approach toward the French separate administrative courts); Jowell, *supra* note 27, at 7 (describing the second meaning of Dicey's rule of law, which relates to the "equal subjection" of all classes "to one law administered by the ordinary courts").

106. *See* Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT'L REV. L. & ECON. 349, 357 (1993) ("the Israeli political and legal system is an intriguing combination of a Westminster and a Continental-European type of parliamentary democracy, with an increasingly effective American flavoring."). As Itzhak Zamir writes,

> In Israel, administrative law is, in a sense, more than just administrative law. It accounts for many of the norms and values which make Israel a free society governed by the rule of law. In many countries this may be attributed to constitutional law. In Israel, however, in the absence of a written constitution, basic principles such as the rule of law, individual freedoms, equality before the law, and fair government originated in administrative law, mainly through judicial review of administrative action.

Itzhak Zamir, *Administrative Law*, *in* THE LAW OF ISRAEL: GENERAL SURVEYS 51, 52 (Itzhak Zamir & Sylviane Colombo eds., 1995).

107. To demonstrate the connection between administrative and constitutional law, Professor S.A. de Smith, in one of his lectures at the London School of Economics and Political Science, said, "I regard constitutional law and administrative law as occupying distinct provinces, but also a substantial area of common ground." Taggart, *supra* note 38, at 1 (citing S.A. de Smith, *The Lawyers and the Constitution* 16 (1960)).

108. German judicial review on administrative actions differs from Israeli and English analysis in that it was not developed by the ultra vires doctrine, but stands instead on a formal written constitution. The Basic Law guarantees certain judicially enforceable rights. *See* Grundgesetz art. 19(4) ("[s]hould any person's right be violated by public authority, recourse to the

These countries' holistic notions of public law extend to the enforcement realm. In England, the criminal justice system is not exceptional: its actors are perceived as administrative authorities[109] and "are broadly subject to the same controls as are other officers performing duties of a public nature." [110] In Israel, enforcement authorities, including police and prosecutors, are perceived as holding administrative powers and hence subject to public law rules.[111] In fact, the whole body of criminal law, substantive and procedural, is perceived as a component of public law. In Germany, criminal enforcement authorities are perceived as administrative authorities and are subject to all grounds for judicial review,[112] even though the jurisdiction to examine their actions lies within ordinary courts.[113]

Historically, the Israeli and English judiciaries shared the American reluctance to interfere in enforcement authorities' decisions. However, their reluctance was based on different grounds. As we saw, in the United States the traditional aversion has been primarily based on the separation of powers doctrine.[114] In England non-intervention derived from the perception of the enforcement process as a prerogative of the Crown.[115] In Israel, the restraint stemmed from the tradition of the "independence of the attorney general."[116] Unlike in these countries, the basic perception in Germany has always been that of tight supervision by the judiciary over the executive, which ultimately found its expression in a need for judicial approval of prosecutorial decisions and in the wide

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court shall be open to him."). For analysis of judicial review according to this article, see DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 162-63 (1994).

109. This is demonstrated by English administrative law books, which include special chapters on police. *See, e.g.*, DE SMITH & BRAZIER, *supra* note 14, at 387-96; WADE & FORSYTH, *supra* note 17, at 149-60.

110. Peter Osborne, *Judicial Review and the Criminal Process*, *in* JUDICIAL REVIEW: A THEMATIC APPROACH 128, 128 (Brigid Hadfield ed., 1995).

111. For the power of the attorney general in Israel to stay proceedings as an administrative power, see Ruth Gavison, *Custom in the Enforcement of the Law: The Power of the Attorney General to Stay Criminal Proceedings*, 21 ISR. L. REV. 333, 345 (1986). For discussion of administrative and criminal enforcement agencies, see Shimon Shetreet, *Custom in Public Law*, 21 ISR. L. REV. 450, 485-89 (1986).

112. *See, e.g.*, Klaus Sessar, *Prosecutorial Discretion in Germany*, *in* THE PROSECUTOR 255, 266 (William F. McDonald ed., 1979); Joachim Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468 (1974).

113. StrafprozeBordnung [StPO] [Code of Criminal Procedure], 1987, Bundesgesetzblatt [BGBl] I, 1(1) ("Substantive jurisdiction of the courts shall be determined by the Courts Constitution Act."). For the pertinent provisions of the Courts Constitution Act, see The German Code of Criminal Procedure; The American Series of Foreign Penal Codes, Volume 10, at 209-216. (Horst Niebler trans., 1965).

114. *See, e.g.*, Inmates of Attica Correctional Facility v. Rockefeller 477 F.2d 375, 379 (2d Cir. 1973).

115. For a leading case, see Gouriet v. Union of Police Office Workers, (1977) 3 All. E.R. 70, 78.

116. For the independence of the Attorney General in Israel, see Allen Zysblat, *The System of Government*, *in* PUBLIC LAW IN ISRAEL 1, 16 (Itzhak Zamir & Allen Zysblat eds., 1996).

competence of the judiciary to review the decisions of enforcement authorities.[117]

However, even in the common law systems, the last decades have seen a considerable withdrawal from the traditional reluctance to intervene in decisions of enforcement authorities. The most significant progress has taken place in Israel, where the courts do not distinguish between judicial review over enforcement authorities and judicial review over other administrative authorities.[118] In England, courts have expressed a willingness to review certain prosecutorial decisions; recent years have seen striking developments.[119] The primary bases for judicial review are unreasonableness,[120] failure to follow a declared policy,[121] or failure to take relevant considerations into account.[122] In addition to those grounds, the abuse of process doctrine recognizes the inherent power of courts to stay prosecution,[123] and courts are willing to invoke it against prosecutors in the name of the rule of law.[124]

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117. JULIA FIONDA, PUBLIC PROSECUTORS AND DISCRETION: A COMPARATIVE STUDY 159-62 (1995). It is important to note that the prosecutor in Germany has also become a central player in the criminal justice system, as the rule of compulsory prosecution has been curtailed. *See id.* at 169-71.

118. *See* Itzhak Zamir, *Administrative Law*, *in* PUBLIC LAW IN ISRAEL 18, 36 (Itzhak Zamir & Allen Zysblat eds., 1996). In a leading case the Supreme Court of Israel held that the Attorney-General's decision that there was no "public interest" in instituting the prosecutions demanded by the petitioners was inherently unreasonable. This was the case even though the Attorney General weighed only relevant considerations and there was not sufficient evidence relating to similar situations to establish the claim of unjust discrimination. HCJ 935/89 Ganor v. Attorney-General 44(2) P.D. 485, *in* ASHER FELIX LANDAU, THE JERUSALEM POST LAW REPORTS 143-46 (1993).

119. ANDREW ASHWORTH, THE CRIMINAL PROCESS: AN EVALUATIVE STUDY 203 (2d ed. 1998). *See also* FIONDA, *supra* note 117, at 60-62 (describing the accountability of the Crown Prosecution Service).

120. For the willingness to review enforcement decisions on this basis, see R. v. General Council of the Bar, ex parte Percival, (1990) 3 All E.R. 136, 152; R. v. Metropolitan Police Commissioner, ex parte Blackburn (No. 3), (1973) 1 All E.R. 324, 236; R. v. Metropolitan Police Commissioner, ex parte Blackburn, (1968) 1 All E.R. 763, 776-77.

121. R v. Inland Revenue Commissioners, ex parte Mead and Another, (1993) 1 All E.R. 772, 782 (extending the applicability of the *Kent* case to criminal proceedings against adults); R. v. Chief Constable of Kent and Another, ex parte L., (1993) 1 All E.R. 756 (discussing criminal proceedings against juveniles).

122. *Mead*, 1 All. E. R. at 784. For discussion, see Christopher Hilson, *Discretion to Prosecute and Judicial Review*, 1993 CRIM. L. REV. 739, 741-42.

123. For the doctrine, *see* CHOO, *supra* note 98, at 1-15.

124. For example, Lord Griffith stated that:

> If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law . . . I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.

Bennett v. Horseferry Road Magistrates' Court, (1993) 3 All E.R. 138, 150.

B. BASIC ATTRIBUTES OF ADMINISTRATIVE REVIEW

In this Section, I introduce two aspects of administrative law—legality and proportionality—using their applicability in other nations' judicial review processes as examples. Both concepts aid judiciaries in protecting the rule of law and are of particular importance in the enforcement context. Later, I argue that the adoption of these two doctrines in the United States, where their roots have already taken hold, would help resolve both current jurisprudence antithetical to the rule of law and inconsistencies within constitutional review itself.

1. LEGALITY (RELEVANT CONSIDERATIONS AND PROPER PURPOSE)

Legality in the administrative law context refers to the idea that public authorities are restrained from exceeding their powers (acting ultra vires).[125] It is not enough that the source of the administrative agency's authority be in the statute; its exercise must fall within the limits defined by the legislature.[126] Pure legality in this sense does not exist in the modern state because of the broad discretion delegated by the legislature to the executive,[127] including even legislative[128] and judicial powers.[129] Nevertheless, agencies may not create new classifications based on what they think is desirable. Instead, they must act according to goals defined by the legislature.

Legislatures intend for competent authorities to exercise their own discretion, but only when it is in accordance with those rules (such as reasonableness and proper purpose) laid down by courts.[130] In Israel and England, for example, courts have extended the meaning of excess of power by reading authorizing statutes as containing implied limitations.[131] These include the ideas that administrative decisions must be reasonable and that they must conform to specific purposes.[132]

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125. For the ultra vires model and its implications, *see* CRAIG, *supra* note 21, at 7-12.

126. Zamir, *supra* note 106, at 52-53.

127. For the delegation issue, see ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 8-11 (4th ed. 1997).

128. For the principle of non-delegation as an element of the traditional model, see Stewart, *supra* note 22, at 1672-76. For the inability to revive the doctrine against delegation, see Stewart, *supra* note 22, at 1693-97; GELLHORN & LEVIN, *supra* note 127, at 18-28. *See also supra* note 20 (dealing with the basis of the "non-delegation" doctrine in the Constitution).

129. For delegation of judicial power, see GELLHORN & LEVIN, *supra* note 127, at 28-32.

130. Zamir, *supra* note 106, at 69. *See also* CRAIG, *supra* note 21, at 545 (explaining that "[t]he denomination of a consideration as relevant or irrelevant may involve the court in substituting its own views for those of the administration"); LONGLEY & JAMES, *supra* note 25, at 184 (explaining that in defining what is an improper purpose, the court "may be in danger of substituting its own policy view for that of an elected authority").

131. WADE & FORSYTH, *supra* note 17, at 37.

132. As Lord Green famously stated:

Proper purpose and relevance are sub-doctrines of legality. However, both are so deeply entrenched that they are perceived as the two main methods for controlling discretion.[133] "Proper purpose" refers to the notion that it is unlawful to use power to achieve a purpose other than that for which the power was conferred. Working out whether a decision-maker acted with improper purpose demands examination of the statutory context. Courts can refer to the empowering legislation to ascertain the purpose to be pursued through its exercise. "Complex problems can arise where one of the purposes is lawful and one is regarded as unlawful."[134] In such a situation, the main questions that courts in England and Israel ask are whether the lawful purpose is "the true and dominant one," and whether the unauthorized purpose "has materially influenced the actor's conduct."[135] An ancillary purpose may be achieved as long as the lawful purpose is paramount.[136]

"Relevance" deals with which factors may or may not be considered in making decisions. Legislative purpose determines, to a great extent, which considerations are relevant. Courts ensure that "the official decisions do not stray beyond the 'four corners' of a statute by failing to take into account 'relevant' considerations (that is, considerations which the law requires)" and, conversely, that "they do not take into account irrelevant considerations" (those considerations outside the object and purpose of the statute).[137] In Israel, the Supreme Court has gone further, holding that the authorities should take into account two main kinds of relevant considerations: specific considerations that are relevant to the case at hand and general considerations which apply to administrative powers generally and derive from the basic values and principles of the legal system. Prominent among these general freedoms are individual freedoms and equality.[138]

> [T]he court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it.

Associated Provincial Picture Houses v. Wednesbury Corporation, (1947) 2 All. E. R. 680, 685.

133. CRAIG, *supra* note 21, at 543.

134. *Id.* (elaborating six different tests that the courts used at one time or another).

135. LONGLEY & JAMES, *supra* note 25, at 187. *See also* Zamir, *supra* note 118, at 33 (explaining that "[i]f the improper purpose is just one of several purposes, it may invalidate the decision if it had a substantial effect on the authority or if it was the dominant purpose").

136. BRIAN THOMPSON, TEXTBOOK ON CONSTITUTIONAL & ADMINISTRATIVE LAW 352-53 (1993).

137. Jowell, *supra* note 27, at 20.

138. Zamir, *supra* note 106, at 70.

Since purpose is subjective, it is often not easy to determine whether or not a consideration has been taken into account.[139] In such cases, the objective "reasonable person" criteria may be useful; a decision is unreasonable when it is tainted by an improper purpose or by an irrelevant consideration. In Israel, "[t]he unreasonableness of the decision in such cases may serve as an indication of a defect in the exercise of discretion" and "may be sufficient to shift the burden of proof ... to the [administrative] authority."[140]

The experience of England shows how legality can contribute to judicial review. Early on, the legislative supremacy of Parliament placed the source of legal authority for the activities of public bodies in the hands of Parliament only.[141] As a result, every abuse of power had to be forced into the ultra vires ground for judicial review. Gradually, courts began to make some artificial, though logical and consistent, expansions of the grounds for judicial review. Assuming Parliament could not have intended otherwise, they read statutes as containing limitations that administrative decisions need be reasonable, or that administrative decisions should conform to certain implied purposes.[142] Administrative law was thus developed by courts through creation of different categories of ultra vires through statutory interpretation.[143]

Legality as an administrative concept can be important even where a written constitution prescribes power limits. Germany provides a clear example. In Germany, constitutionality is not exactly the same as legality; an action can be constitutional without being legal in the administrative sense when it could have been, but was not, prescribed by the Legislature. Full German legality analysis has three steps: 1) constitutionality; 2) negative legality; and 3) positive legality. First, for an action to be legal it must be constitutional. The Basic Law makes basic rights directly operative upon the Executive.[144] The second and third aspects are extraconstitutional: primacy of the law over all other manifestations of state authority (negative legality), and the requirement of a statute for the exercise of any administrative power (positive

139. LE SUEUR & HERBERG, *supra* note 14, at 209.

140. Zamir, *supra* note 106, at 71.

141. The issue of parliamentary sovereignty under the Human Rights Act is beyond the scope of this article, which addresses the issue of judicial review of administrative authorities and not of the legislature. For discussions of parliamentary sovereignty under the Act, *see* Bradley, *supra* note 33, at 53-59; Jeffrey Jowell, *Judicial Deference and Human Rights: A Question of Competence*, *in* LAW AND ADMINISTRATION IN EUROPE: ESSAYS IN HONOUR OF CAROL HARLOW 67, 69-70 (Paul Craig & Richard Rawlings eds., 2003); Lord Lester & Lydia Clapinska, *Human Rights and the British Constitution*, *in* THE CHANGING CONSTITUTION 62, 63-65 (Jeffrey Jowell & Dawn Oliver eds., 5th ed. 2004).

142. For the extensions of the doctrine, see CANE, *supra* note 95, at 349-50 (giving examples of the courts' willingness to "go a very long way to preserve their jurisdiction to supervise administrative action" by applying the ultra vires principle).

143. SCHWARTZ & WADE, *supra* note 37, at 210.

144. Grundgesetz [Basic Law] art. 1(3) ("The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.").

legality). Both aspects find a basis in the Basic Law and were developed by courts.[145] The Code of Administrative Courts Procedure specifically empowers the administrative courts to invalidate illegal actions of administrative authorities.[146] The Code specifies grounds for judicial review of discretion, such as excess of power or use of discretion not in accordance with the purpose of authorization.[147] Thus, the principle of constitutionality is only one of the aspects of legality and of the grounds for judicial review.

In sum, the administrative concept of legality—through its sub-doctrines—adds an important dimension to the review of authorities' actions. It is not enough that an officer does not infringe upon constitutional rights; she must act according to authorization of the enabling statute and to achieve the main objectives set by it. Constitutionality describes what *can* be prescribed by the legislature; legality describes what *has* been prescribed.

2. PROPORTIONALITY

The principle of proportionality is "at the heart of the European legal order and increasingly recognized as a key component in the rule of law "[148] in many countries around the world.[149] Proportionality's key insight is that "individuals affected by decisions should not be required to bear a burden that is unnecessary or disproportionate to the ends being pursued."[150] The principle, as generally understood, consists of three tests.[151] First, "suitability" requires that the means used must be appropriate to serve the legal aim. Second, "necessity" requires that the means adopted are the least restrictive way to achieve the aim. Third,

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145. Article 19(1) requires a law of general application for any restriction of any fundamental right and Article 20(3) binds the executive by law and justice. *See* MAHENDRA P. SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE 124-33 (2001).

146. Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Procedure] 1960, Bundesgesetzblatt Teil I [BGBl] I, 113

147. Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Procedure] 1960, Bundesgesetzblatt Teil I [BGBl] I, 114 states:

> To the extent that the administrative authority is authorized to act at its discretion, the court shall also examine whether the administrative act or its refusal or omission is unlawful for the reason that the statutory limits of its discretion have been exceeded or the discretion has not been used in accordance with the purpose of authorization.

148. Michael Fordham & Thomas de la Mare, *Identifying the Principles of Proportionality*, *in* UNDERSTANDING HUMAN RIGHTS PRINCIPLES 27 (Jeffrey Jowell & Jonathan Cooper eds., 2001).

149. DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 159-188 (2004).

150. Jeffrey Jowell & Anthony Lester, *Proportionality: Neither Novel nor Dangerous*, *in* NEW DIRECTIONS IN JUDICIAL REVIEW 51, 69 (J.L. Jowell & D. Oliver eds., 1988).

151. For the division to three subsidiary tests and for their content, *see* KOMMERS, *supra* note 13, at 46; SINGH, *supra* note 145, at 160; Lord Lester & Clapinska, *supra* note 141, at 77-78; and Bracha, *supra* note 104, at 638. Some scholars analyze proportionality as comprising more tests. *See, e.g.*, CRAIG, *supra* note 21, at 591; Fordham & de la Mare, *supra* note 148, at 28.

"proportionality in the strict sense" requires that, viewed overall, the burden on the right at issue must not be excessive relative to the benefits secured by the state objective.

So popular and useful has the doctrine of proportionality become in many legal systems over the world that David Beatty, in his recent book, *The Ultimate Rule of Law*, says:

> Making proportionality the critical test of whether a law or some other act of state is constitutional or not separates the powers of the judiciary and the elected branches of government in a way that provides a solution to the paradox that has confounded constitutional democracies for so long. Building a theory of judicial review around a principle of proportionality... satisfies all the major criteria that must be met for it to establish its integrity.[152]

Beatty examines the judicial practice in many democracies and draws the inference that "proportionality transforms ... questions of value into questions of fact."[153] Proportionality accords with separation of powers, and "has the capacity to ensure constitutions are the best they can possibly be."[154]

Proportionality serves in English common law as a judicially fashioned standard which requires that all discretionary powers be exercised with due regard to the balance between the ends pursued and the means to achieve those ends. Although it has been applied under other names, mainly reasonableness, it gradually emerged as a separate ground of review.[155] Proportionality also serves an important role in the jurisprudence of the European Convention on Human Rights.[156] In light

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152. BEATTY, *supra* note 149, at 160.

153. *Id. at* 170.

154. *Id.* at 176. There are some methodological problems in Beatty's argument, which derives normative justifications for judicial review from a descriptive analysis of the actual work of judges. As I will show, it is not accurate to say that proportionality is concerned only with judicial fact finding, since it requires estimation of the balance between the advantage of the means to fulfill governmental objectives and the extent to which those means infringe upon constitutional rights. *Cf.* CRAIG, *supra* note 21, at 601 (addressing the argument that the balancing exercise of the court allows an intrusion to the merits of a decision and clarifying that this ground does not support substitution of the authorities' discretion by that of the court).

155. For the relationship between reasonableness and proportionality and the recognition of proportionality as independent, *see* Paul Craig, *Unreasonableness and Proportionality in UK Law, in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 85-106 (Evelyn Ellis ed., 1999). *See also* CRAIG, *supra* note 21, at 598-600 (dealing with the relationship between the *Wednesbury* case and proportionality).

156. *See* David Feldman, *Proportionality and the Human Rights Act 1998, in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 117, 140 (Evelyn Ellis ed., 1999); Fordham & de la Mare, *supra* note 148, at 49-60. As a demonstration of the principle that infringement upon rights will be only to the necessary extent, see The European Convention on Human Rights, art. 9(2), http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf ("Freedom to manifest one's religion or beliefs shall be

of the Human Rights Act, which brings this Convention into domestic English law, courts need to apply the principle of proportionality and ask "whether (i) the legislative objective is sufficiently important to justify limiting a Convention right; (ii) the means used to impair the Convention right are rationally connected to it; and (iii) the means used to impair the Convention right are no more than is necessary to accomplish that objective." [157] The Human Rights Act conferred constitutional legitimacy on proportionality-based review and made it a general principle of English public law, [158] applying the same test both as a general standard of review and in relation to the Convention rights.[159] Thus, proportionality in England is not linked to a particular fundamental right, but is perceived as serving "the purpose of achieving a proper balance and consequently also the furtherance of the principle of justice." [160] Moreover, "[i]t seems ... to be likely that the growing frequency with which courts will have to grapple with issues of proportionality will lead them to be more open about using proportionality-based reasoning in other circumstances."[161]

In Israel, the harmonious way in which proportionality serves public law is not contestable.[162] As an effective means to reduce abuse of power, it is perceived today as one of the main instruments for judicial review of discretionary power.[163] Proportionality emerged about fifteen years ago as a new ground of administrative review, although it had been implicit long before.[164] The Supreme Court held that even where the balance of interests allows the authority to restrict a human right, the power should be exercised in proportion to need or danger. To this end, the authority must take into account the legislative purpose and the particular circumstances of the case. For example, "in the case of a pornographic film, subject to censorship, it may be disproportionate ... to

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subject only to such limitations as are prescribed by law and are *necessary* in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others") (emphasis added). There is a similar formula in the limitation clauses regarding other rights.

157. Lord Lester & Clapinska, *supra* note 141, at 77-78. For a longer discussion of proportionality under the Human Rights Act, 1998, see Fordham & de la Mare, *supra* note 148, at 77-89.

158. Lord Irvine of Lairg, *The Influence of Europe on Public Law in the United Kingdom*, *in* BASIL S. MARKESINIS, MILLENNIUM LECTURES 11, 23 (2000).

159. *See* CRAIG, *supra* note 21, at 600; Lord Lester & Clapinska, *supra* note 141, at 78. For a less holistic approach, see Jowell, *supra* note 141, at 78. (claiming that while proportionality in general "seeks to ensure substantive fairness in the exercise of any discretionary power," proportionality under the Human Rights Act "is an instrument tailored for ... [testing] the scope of Convention rights and [ensuring] that they are overridden only for compelling reasons").

160. NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY 1 (1996) (citing SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 679 (1992)).

161. Feldman, *supra* note 156, at 142.

162. For a discussion of proportionality as an administrative as well as constitutional ground for the review of administrative discretion, see Bracha, *supra* note 104, at 637-39.

163. Itzhak Zamir, *Unreasonableness, Balance of Interests and Proportionality*, *in* PUBLIC LAW IN ISRAEL 327, 333 (Itzhak Zamir & Allen Zysblat eds., 1996).

164. Zamir, *supra* note 106, at 72.

ban the film if the legislative purpose may be adequately served by less drastic measures, such as cutting out certain scenes or excluding minors from the cinema."[165] The requirement of proportionality was upgraded to the constitutional level by making it part of the limitation clause in the two Basic Laws regarding human rights. Those clauses demand, inter alia, that any violation of a protected right would be "to an extent no greater than required."[166] Since administrative authorities are subject to the provisions of the Basic Laws,[167] they also have to meet the test of proportionality.[168] Inspired by comparative law,[169] the courts in Israel developed this ground of review through the three subsidiary tests focusing on the relationship between the means and the purpose, and apply it in both administrative and constitutional review.[170]

Proportionality does not need to be explicitly written in law to be useful. For example, even though the European Economic Community Treaty does not mention the concept of proportionality, the European Court of Justice has developed a "common law principle" which requires that "the individual should not have his freedom of action limited beyond the degree necessary for the public interest."[171] This is, in other words, proportionality.

In Germany, the principle of proportionality is not based "on any implied legislative prohibition against unreasonable exercise of powers."[172] Instead, proportionality is based on the principle of means appropriate to the end or in the cause and effect relationship, which were

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165. Zamir, *supra* note 120, at 36.

166. Basic Law: Human Dignity and Liberty, art. 8, http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm ("There shall be no violation of rights under this Basic Law except by a law fitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required, or by regulation enacted by virtue of express authorization in such law."). Basic Law: Freedom of Occupation, art. 4, contains the same formula regarding freedom of occupation, http://www.knesset.gov.il/laws/special/eng/basic4_eng.htm.

167. Basic Law: Human Dignity and Liberty, art. 11, http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm, ("All governmental authorities are bound to respect the rights under this Basic Law."), Basic Law: Freedom of Occupation, art. 5 ("All governmental authorities are bound to respect the freedom of occupation of all Israel nationals and residents."), http://www.knesset.gov.il/laws/special/eng/basic4_eng.htm. For the applicability of these provisions to criminal enforcement authorities, see Eliahu Harnon, *The Impact of the Basic Law: Human Dignity and Liberty on the Law of Criminal Procedure and Evidence*, 33 ISR. L. REV. 678, 683-84 (1999).

168. Bracha, *supra* note 104, at 639.

169. For the reference to Canadian case law, see David Kretzmer, *The New Basic Laws on Human Rights: A Mini-revolution in Israeli Constitutional Law?, in* PUBLIC LAW IN ISRAEL 141, 151 (Itzhak Zamir & Allen Zysblat eds., 1996). For other examples, see Bracha, *supra* note 104, at 638 and the references cited therein.

170. Bracha, *supra* note 104, at 638.

171. Jowell & Lester, *supra* note 150, at 56. *See also* Francis G. Jacobs, *Recent Developments in the Principle of Proportionality in European Community Law, in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 1, 2 (Evelyn Ellis ed., 1999) (explaining that since the provisions of the treaty "could scarcely be sufficient to support a principle of general application," the European Court "preferred to treat proportionality as a 'general principle of law'").

172. SINGH, *supra* note 145, at 160.

early recognized as requirements of the rule of law.[173] Though the Basic Laws contain no explicit reference to proportionality, the principle has acquired constitutional status according to a 1965 decision of the Federal Constitutional Court. [174] The Court has derived the principle of proportionality from the rule of law, that is, from the character of basic rights, "as an expression of the general right of the citizen towards the State that his freedom should be limited by the public authorities only to the extent indispensable for the protection of the public interest."[175] Thus, proportionality is perceived as an overriding rule for the guidance of all state activities and applies to legislative measures just as it applies to administrative measures.[176]

In sum, proportionality can be used to supplement constitutional insights. It is not enough that an act was constitutionally authorized; the act also needs balance between the aim and the harm caused. Thus, for example, an authority's act can be disproportional if there are less harmful means to achieve the aim or if the harm the act causes exceeds the benefit it creates.

IV. INTRODUCING NORMATIVE DUALITY TO AMERICAN JURISPRUDENCE

As shown in the previous Part, many modern judicial systems use insights from both constitutional and administrative law in judicial review. The United States, we learned earlier, does not. Introducing normative duality in the United States, however, would not require revolutionary changes in American jurisprudence. In this Part, I demonstrate that the roots of the normative duality approach run deep in American law. I suggest that the inherent connection between constitutional law and administrative law (as parts of public law) be recognized in an American system where it can harmoniously fit.

The approach of normative duality can be considered as part of the movement towards "internationalization"[177] of public law. There have long been indications that India, Canada, Australia, and England make

173. The German Constitutional Court held in 1959 that "[t]he rule of law requires that the administration can interfere with the rights of an individual only with the authority of law and that the authorization is clearly limited in its contents, subject, purpose and extent so that the interference is measurable to a certain extent, foreseeable and calculable by the citizen." EMILIOU, *supra* note 160, at 63 (citing E 9 S 137 (147)).

174. BVerfGE 19, 342 (348-49).

175. EMILIOU, *supra* note 160, at 66 (citing BVerfGE 19 S 342 and E 35 S 401).

176. *Id.* at 161. *See also* KOMMERS, *supra* note 13, at 46 (explaining that the German Constitutional Court "consistently invokes the principle of proportionality in determining whether legislation and other governmental acts conform to the values and principals of the Basic Law").

177. "Internationalization" in this sense is a term invoked as a "label to explain developments in domestic legal theory which have no readily discernible root." Ian Loveland, *Introduction: Should We Take Lessons from America?*, *in* A SPECIAL RELATIONSHIP?: AMERICAN INFLUENCES ON PUBLIC LAW IN THE UK 1, 5 (Ian Loveland ed., 1995).

extensive use of United States Supreme Court case law as a guide to the exercise of judicial discretion in public law matters.[178] American judges, however, have been reluctant to do similarly.

Indeed, one might argue on originalist grounds against the normative duality approach outlined above.[179] However, this Part will demonstrate that the normative duality approach can be perceived as a step in the development of constitutional review. Constitutional review is not, and has never been, a static discipline. Indeed, "we must acknowledge that the legal protections provided for individuals by the Constitution have changed throughout American history."[180] Thus, even if the APA may be said to constitute a "comprehensive statement of the right, mechanics and scope of judicial review,"[181] the same cannot be said of the Constitution.[182]

A. LEGALITY

Are the principles of proper purpose and relevant considerations, so well developed in other countries, foreign to the American legal system? Not at all. Similar principles can be found both in administrative and constitutional law.

The APA authorizes judicial review of whether an agency action is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[183] This is a direct ultra vires test. Usually, enabling acts are clear as to the substantive boundaries of an agency's jurisdiction. Some cases, however, demand statutory interpretation and require a closer look at the legislative history and at the language of the statute, particularly the provisions that tell the agency what to regulate.[184] In *Chevron*,[185] the Supreme Court set forth a revised, two-step approach to the review. The first step asks whether the statute is clear, or if Congress

178. For a survey of the developments, see *id.* at 1-23. There are additional legal and constitutional implications of accommodating principles of European public law within the legal framework of the United Kingdom. *See* LORD IRVINE, *supra* note 158, at 11.

179. The perception of "originalism" refers to theories maintaining that constitutional meaning should be fixed either by the "original understanding" of the constitutional language or by the "intent" of the Framers and ratifiers. For an extended discussion about the dangers of "originalism" (fundamentalism), see CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005) (definition of "fundamentalism" is *at* xiii; the dangers of the theory are discussed throughout the book).

180. CHRISTOPHER E. SMITH, MADHAVI MCCALL & CYNTHIA PEREZ MCCLUSKEY, LAW & CRIMINAL JUSTICE: EMERGING ISSUES IN THE TWENTY-FIRST CENTURY 126 (2005).

181. Duffy, *supra* note 40, at 212.

182. For the legitimacy of "constitutional common law," see Henry P. Monaghan, *The Supreme Court 1974 Term – Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). For a later suggestion of "taxonomic understanding of constitutional doctrine," see Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

183. 5 U.S.C.A. § 706(2)(C) (1996).

184. FOX, *supra* note 47, at 76-77.

185. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

has directly decided the precise question at issue.[186] If the answer is no, the second step is to ask whether, if the statute is ambiguous, the agency's interpretation is based on a permissible construction of the statute.[187] Such an arrangement asserts the primacy of congressional intent where it can be identified.[188] Thus, the principle of limiting the authority to proper purposes and relevant considerations is indeed recognized in American administrative law.

The reference to the purpose of the statute is even more transparent in judicial review on constitutional grounds. Courts examine the connection between the ends and the means of the relevant statute in three ways depending on the circumstances.[189] Under the rational basis test, laws are sustained if they bear a reasonable relationship to a legitimate state end.[190] Strict scrutiny applies to "fundamental interests"[191] or "suspect classes."[192] Laws under strict scrutiny are upheld only if they are narrowly tailored and serve a compelling state interest.[193] A middle tier, for "quasi-suspect classes," looks for an important governmental objective to which the classification is substantially related.[194]

While "purpose" can take on many meanings, some courts have employed methodology similar to that of statutory interpretation in checking the constitutionality of a statute[195]. Namely, "[w]hen the

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186. *Id.* at 842.

187. *Id.* at 843.

188. There are many instances in which courts have deemed Congress to have spoken to the issue and applied the interpretation of the statutory words. *See* Paul Craig, *Jurisdiction, Judicial Control, and Agency Autonomy, in* A SPECIAL RELATIONSHIP?: AMERICAN INFLUENCES ON PUBLIC LAW IN THE UK 173, 187-88 (Ian Loveland ed., 1995)

189. *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Education, 347 U.S. 483 (1954). For cases describing the Justice Warren test as a "two tiered approach", see, e.g., Harris v. McRae, 448 U.S. 297 (1980); Craig v. Boren, 429 U.S. 190 (1976).

190. [T]he idea of equality that is embodied in the Equal Protection Clause imposes a limitation on government's ability to classify. All laws classify, and equal protection requires that such classifications have a certain relation to the purpose of a law. The rule is usually stated as requiring that a classification be rationally related to legitimate government purposes.

Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 358 (1999).

191. For the origin of the higher-tier analysis that Court applies to fundamental rights, see Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

192. For a rationale for close scrutiny when classification involves a particular religious, national, or racial minority in a famous footnote, see United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

193. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 147 (1997); REDLICH, ATTANASIO & GOLDSTEIN, *supra* note 11, at 378-79.

194. *See* THE EDITORS OF THE HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW 55 (1990); ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS 61-64 (1995). For "the close judicial scrutiny" of classification based upon gender, see Frontiero v. Richardson, 411 U.S. 677, 682, 688 (1973).

195. In [statutory interpretation], purpose is sought as a guide to proper application of a statute. In equal protection cases, by contrast, a court is not faced with a problem of applying a statute consistently with the overall policy established by the legislature; instead, the concern is to assess the constitutional validity of a statute whose coverage is usually not at issue.

purpose of a challenged classification is in doubt, they have attributed to the classification the purpose thought to be most probable."[196]

In sum, examination of purposes and objectives of statutes is not foreign to American constitutional review. However, as I demonstrate in Parts V and VI, there are areas of constitutional review in which courts do not refer to the properness of purpose and the relevance of considerations, but where such insights would contribute to the coherence of judicial review.

B. PROPORTIONALITY

The United States Constitution does not mention the principle of proportionality, except in regard to bail, fines, and punishments.[197] Nevertheless, proportionality, which embodies the basic principle of fairness, can serve as an important tool in the constitutional review of administrative authorities, including enforcement authorities.[198] Two of the three subtests of proportionality are already well established in American jurisprudence. Thus, American courts possess the tools for using proportionality, and the principle should not be used exclusively under the Eighth Amendment.

The first proportionality test is the suitability test, a positive component, which checks whether the means taken by the authority are appropriate to achieve the stated goal. Suitability is very similar to American rational basis review, which checks whether the means bear a reasonable relationship to a legitimate state end.[199] In both cases, the judiciary usually finds enough of a relationship for the test to be

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Comment, *Developments in the Law – Equal Protection,* 82 HARV. L. REV. 1076, 1077-1078 (1969). When the constitutionality of a statute is challenged, the court is expected to safeguard constitutional values, while at the same time maintaining proper respect for the legislature as a coordinate branch of government.

196. *Id.* at 1078.

197. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). This prohibition is directed against "all punishments which, by their excessive length or severity, are greatly disproportioned to the offenses charged." By virtue of the Fourteenth Amendment it is applied to any actions taken in state courts. Richard H. Andrus, *Which Crime Is It? The Role of Proportionality in Recidivist Sentencing after Ewing v. California*, 19 BYU J. PUB. L. 279, 280-81 (2004). For proportionality regarding the Eighth Amendment, *see* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: 'Proportionality' Relative to What?*, 89 MINN. L. REV. 571 (2005). For proportionality of punishments as deriving from substantive due process, see James Headley, *Proportionality Between Crimes, Offenses, and Punishments*, 17 ST. THOMAS L. REV. 247 (2004).

198. *Cf.* Jowell & Lester, *supra* note 150, at 51 (arguing that "[f]ar from being dangerous, [proportionality] embodies a basic principle of fairness, the explicit recognition of which would, we believe, greatly strengthen the coherence of [the English] system of administrative law").

199. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) ("A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes.").

satisfied.[200] One can argue that the sparse language of the American Constitution limits the applicability of this test; while rights in the German Basic Law, for example, give guidance for application of the subtest, the American Constitution does not.[201] However, this argument holds only for judicial review of the legislature. In regard to administrative power, courts should check the objectives of the authorizing statute and see if the means taken by the authorities are suitable to the aim of achieving the enabling law's objectives.

The second step is the necessity test, a negative component, which demands proof that appropriate, less restrictive means are not available. The United States Supreme Court applies a similar principle in regards to remedial legislation enacted under Section 5 of the Fourteenth Amendment.[202] Beatty has compared proportionality's necessity test to the American strict scrutiny test.[203] Indeed, in some cases the Supreme Court has demanded that the government use "the least restrictive means of achieving some compelling state interest."[204] I believe that the necessity sub-test is not equivalent to strict scrutiny, but is instead similar to middle-tiered scrutiny.[205] In applying the necessity test, most jurisdictions grant authorities "a margin of appreciation"[206] to choose between several means that cause minimal injury.[207] Thus, applying the necessity test does not mean a demand of means narrowly tailored to the ends. Regardless, it is clear that the reasoning behind the necessity test exists in the American constitutional review, and there is no reason why

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200. For the rational basis review as a paradigm of judicial restraint, *see* F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993). Cases in which the Supreme Court has applied rational basis review and found a statute unconstitutional are few. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 439 (1982) (Blackmun, J., concurring) ("[T]he rational-basis standard is 'not a toothless one.'").

201. *Cf.* KOMMERS, *supra* note 13, at 46.

202. Discussing the various limits that Congress imposed in its voting rights measures, the Court has noted that where "a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5." Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647 (1999); City of Boerne v. Flores, 521 U.S. 507, 533 (1997).

203. BEATTY, *supra* note 149, at 182.

204. *See, e.g.*, Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 899 (1990). For another case in which this condition was interpreted as demanding case-by-case determination of a question, as against a flat ban, see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 126 S. Ct. 1211, 1221 (2006).

205. *Cf.* KOMMERS, *supra* note 13, at 46 (arguing that the necessity test is more than rational basis and less than strict scrutiny).

206. For discussion of the "margin of appreciation" *see* Nicholas Green, *Proportionality and the Supremacy of Parliament in the UK, in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 145, 154-55 (Evelyn Ellis ed., 1999) and Walter van Gerven, *The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe, in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 37, 47 (Evelyn Ellis ed., 1999).

207. For the concept of "margin" or "latitude" that presents the public authority with the freedom of choice, see Fordham & de la Mare, *supra* note 148, at 28-29.

a similar test could not be applied to administrative and enforcement authorities.

The one aspect of proportionality not yet included in American law is the third step, proportionality in the strict sense. The third sub-test demands that the means used be proportionate to the end sought and that the burden on rights at issue must not be excessive relative to the benefits secured by the state objective. It thus embodies an element of reasonableness in administrative decisions. While the test itself is not present in American law, its notion of reasonableness already exists in American judicial review on enforcement authorities.[208]

However, there are arguments against the adoption of proportionality in the strict sense in the United States[209]. The United States Constitution defines protected rights in an absolute manner, ignoring the issue of balancing principles.[210] When the Supreme Court has needed to deviate from this absolutism, it has created exceptions rather than using balancing tests. For example, while the Constitution says that "Congress shall make no law ... abridging the freedom of speech,"[211] the Court famously wrote that "[i]t is well understood that the right of free speech is not absolute at all times and under all

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208. One example is the doctrine of "prosecutorial vindictiveness," which deals with claims of intentionally charging more serious crimes or seeking more severe penalties in retaliation for a defendant's lawful exercise of a constitutional right. Courts presume an improper vindictive motive when a "realistic likelihood" of vindictiveness existed. *See* United States v. Goodwin, 457 U.S. 368, 373 (1982); Blackledge v. Perry, 417 U.S. 21, 27 (1974). Although the doctrine has served elsewhere as a demonstration of courts' reluctance to review prosecutorial discretion, *cf.* C. Peter Erlinder & David C. Thomas, *Prohibiting Prosecutorial Vindictiveness While Protecting Prosecutorial Discretion: Toward a Principled Resolution of a Due Process Dilemma*, 76 J. CRIM. L. & CRIMINOLOGY 341, 430 (1985), which shows that the use of the principle of reasonableness in the context of reviewing enforcement action has roots in the American judicial system.

209. Beatty describes this criticism:

> The idea that judicial review can be reduced to the enforcement of a principle of proportionality will strike a lot of people as counterintuitive, if not foolish and even regressive. It smacks of being a throwback to a 'mechanical jurisprudence' that has been discredited for almost a hundred years. A theory based on the principle of proportionality bears little resemblance to the common understanding that judicial review is a process in which judges protect people's basic constitutional rights by elaborating and elucidating a sacred text. It entails very little interpretation and makes the concept of rights almost irrelevant. It has the effect of turning a lot of conventional wisdom on its head.

Beatty, *supra* note 149, at 160.

210. The European Convention on Human Rights lays down specific balancing tests for different rights. *See* Jeremy McBride, *Proportionality and the European Convention on Human Rights, in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 23, 24 (Evelyn Ellis ed., 1999). The Israeli and the Canadian models lay down one general balancing test that must be employed in all cases in which restrictions have been placed on one of the protected rights. For the Israeli limitation clause, see *supra* note 166. For the Canadian model, see Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) ("The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."). For a discussion of the United States model compared to other countries, see Kretzmer, *supra* note 169, at 150-51.

211. U.S. CONST. amend. I.

circumstances. There are certain *well-defined and narrowly limited classes* of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[212]

If at all, this argument holds in regard to review on the legislature and has nothing to do with review of administrative powers, which are never absolute. Administrators have only powers granted by the law, and these powers must be employed for the public interest. Thus, balancing effectiveness and fairness is an inherent task of the authorities and of the courts reviewing the authorities' discretion.[213] Furthermore, the experience of proportionality shows that "the concept can be applied with varying degrees of intensity so as to accommodate the range of types of decision which are subject to judicial review."[214] Indeed, the third sub-test, adding the demand of reasonableness, can pragmatically[215] help in the balancing between the competing interests.[216]

In the next two Parts, I show how these elements of normative duality, already present in American law, might be helpful in analyzing two difficult legal issues in the United States: selective enforcement and racial profiling. These two phenomena are governed by different constitutional amendments. The exclusiveness of constitutional review, without administrative insights, creates problematic results in the jurisprudence of each of the doctrines. Moreover, since both doctrines might be relevant in cases of selective enforcement based on race, the interplay between the doctrines creates some paradoxical results.

V. SELECTIVE ENFORCEMENT

"Selective enforcement" occurs when a law that seems fair and impartial is applied, administered, or enforced by public authorities in a

212. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (footnote omitted) (emphasis added).

213. For the need to balance between effective administration and the safeguard of individual interests, *see, e.g.*, SINGH, *supra* note 145, at 122.

214. CRAIG, *supra* note 21, at 601. *See also* LORD IRVINE, *supra* note 158, at 20-24.

215. I agree with Beatty that proportionality "transforms judicial review from an interpretative exercise" of the text into a pragmatic conception of law. Beatty, *supra* note 149, at 182-83. Indeed, even Professor Richard Posner, who criticized Beatty's book in many ways, ended by saying that "[a]bove all, Beatty's book is both a timely reminder of the importance of pragmatic engagement with reality in constitutional adjudication and a fascinating *tour d'horizon* of an emerging global community of aggressively interventionist constitutional judges." *See* Richard A. Posner, *Constitutional Law from a Pragmatic Perspective*, 55 U. TORONTO L.J. 299, 309 (2005).

216. In this context, American constitutional review can be inspired by the pragmatic approach in other countries. For example, in much of its work, the Constitutional Court in Germany is "less concerned with *interpreting* the Constitution ... than in applying an end-means test for determining whether a particular right has been [violated] in the light of a given set of facts." KOMMERS, *supra* note 13, at 46.

discriminatory manner.[217] The law may be enforced only against certain individuals or groups, or there may different enforcement policies depending upon identity.[218] Selective enforcement is not the opposite of complete enforcement; complete enforcement is neither feasible[219] nor desirable[220] given the scarcity of resources.[221] Selective enforcement is a specific kind of partial enforcement. Its selectivity makes it illegitimate. The question of what exactly constitutes illegitimate selective enforcement is a normative question that has different answers in various legal systems.

In order to establish the claim of selective enforcement, one must meet a triple demand of proof: 1) other violators similarly situated are generally not prosecuted; 2) the selection of the claimant was "intentional or purposeful"; and 3) the selection was pursuant to an unjustifiable standard, such as race, religion, or another arbitrary classification.[222] This complex demand was developed in American case law.

The first major Supreme Court involvement with selective enforcement was the 1886 *Yick Wo* decision.[223] In *Yick Wo*, the Supreme Court recognized that although the law could be facially neutral, it could be applied differently by an administrative agency to people in similar circumstances. Such a practice, the Court argued, injures the right to equal protection anchored in the Fourteenth Amendment. As Justice Matthews wrote:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to

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217. This can be a criminal enforcement authority or regulatory enforcement authority. For nonenforcement and other defects in regulatory enforcement authorities, *see* Note, *Judicial Control of Systematic Inadequacies in Federal Administrative Enforcement*, 88 YALE L.J. 407, 408 (1978).

218. *Cf.* Gavison, *supra* note 111, at 333.

219. FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 151 (1970) ("[f]ull enforcement of the criminal law in the sense that every violator of every statue should be apprehended, charged, convicted, and sentenced to the maximum extent permitted by law has probably never been seriously considered a tenable ideal.").

220. According to the economic analysis of criminal law, the optimal rate of enforcement lies at the point where the social cost from extra enforcement equals the social utility from diminishing criminal activity. *See* I. Ehrlich, *The Economic Approach to Crime—A Preliminary Assessment*, *in* READINGS IN THE ECONOMICS OF LAW AND REGULATION 297-303 (A.I. Ogus & C.G. Veljanovski eds., 1984); A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45 (2000) .

221. This is the main feature of every enforcement system. *See* Cole, *supra* note 62, at 43.

222. WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE § 13.4 (2d ed. 1999).

223. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

> their rights, the denial of equal justice is still within the prohibition of the Constitution.[224]

In the long period since *Yick Wo*, the law dealing with selective enforcement has become more crystallized. The basic requirement established by the case, that there must be proof of an "evil eye and unequal hand," has not changed.[225] In order to be successful on such a claim, a plaintiff must prove not only that the law is enforced unequally but also that there was discriminatory intent in the enforcement. The plaintiff must be a victim of intentional discrimination based on race, gender, national origin, or another improper classification.[226] The Supreme Court is not satisfied with proof of the government's awareness of the consequences of the policy regarding a particular group, but requires proof of discriminatory intent. This requires proving that the choice of a particular course of action was made at least partly "because of," not merely "in spite of," its adverse effect upon an identifiable group.[227] This is a heavy burden. As a result, the number of decisions which have accepted the claim is very small.[228]

Part of the difficulty in proving selective enforcement comes from the fact that public authorities enjoy the presumption of legality, which assumes that the agency is acting legally and in good faith and requires

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224. *Id.* at 373-74.

225. For the fact that this standard remained the crux of the claim, see Karen L. Folster, *Just Cheap Butts, or an Equal Protection Violation? New York's Failure to Tax Reservation Sales to Non-Indians*, 62 ALB. L. REV. 697, 717 (1998).

226. For the main decision establishing the requirement, see Oyler v. Boles, 368 U.S. 448, 453 (1962). *See also* Edelman v. California, 344 U.S. 357, 359 (1953) (explaining that the evidence adduced on trial showed, at most, that the statute is not used by the Los Angeles authorities in all of the cases in which it might be applicable and emphasizing the necessity of showing systematic or intentional discrimination); Snowden v. Hughes, 321 U.S. 1, 10 (1944) (noting the lack of any allegations in the complaint tending to show a purposeful discrimination between persons or classes of persons or to characterize the failure to nominate the petitioner as an unequal, unjust, and oppressive administration of the laws of Illinois); United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974) (asserting that "[t]o support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights").

227. Wayte v. United States, 470 U.S. 598, 610 (1985).

228. LAFAVE, ISRAEL, & KING, *supra* note 222. Criticism was passed on the small number of instances in which a selective enforcement claim was recognized. Consider, for example, Justice Sprecher's opinion in *United States v. Falk*:

> In conclusion, we wish to note our disapproval of the apparently frequent, and often too easy, practice of simply dismissing all allegations of illegal discrimination in the enforcement of criminal laws with a reference to *Oyler v. Boles* and its statement that the conscious exercise of some selectivity in the enforcement of laws does not violate the Constitution.

479 F.2d 616, 624 (7th Cir. 1973).

whoever claims differently to bear the burden of proof.[229] This includes the assumption that the enforcement authority acts with relevant and proper motives.[230] In line with the motive requirement, the claimant must present clear evidence of an intention to discriminate, refuting the presumption that the motives are proper.[231] This, too, is a difficult task.[232] In order to be entitled to discovery or an evidentiary hearing in a selective enforcement case, the defendant asserting infringement of her equal protection right must make a prima facie case for the existence of the essential components of the claim.[233]

In spite of the great potential of statistical evidence and its ability to aid the defendant in meeting this burden of proof, the current rule is that evidence pointing to failure to prosecute other violators merely establishes selectivity and cannot by itself establish a prima facie showing of intentional discrimination.[234] Such statistical evidence can support selective enforcement claims only when offered with other evidence.[235] In *United States v. Armstrong*,[236] the Supreme Court

229. Stefan H. Krieger, *Defense Access to Evidence of Discriminatory Prosecution*, 1974 U. ILL. L. F. 648, 653 (1974). *Accord* Givelber, *supra* note 102, at 91-92.

230. *See, e.g.*, United States v. Hastings, 126 F.3d 310, 313 (4th Cir. 1997) ("[A]bsent a substantial showing to the contrary, governmental actions such as the decision to prosecute are presumed to be motivated solely by proper considerations.").

231. For a rare case in which the defendant succeeded to meet this initial burden of proof, *see Falk*, 479 F.2d at 623. *See also.Berrios* 501 F.2d at 1212-13 (2d Cir. 1974) (deciding that the claimant would at most be entitled to introduce at a hearing material that is demonstrably relevant, i.e., which would tend to establish the elements of his defense of selective and discriminatory prosecution. The court also noted that the government is entitled to have withheld from the defendants all material in the memorandum which does not relate to the defense of selective prosecution, but is not entitled, on a mere claim of generalized confidentiality, to withhold material that is relevant to the defense). It is important to note that these decisions were given before the *Armstrong* case. *See infra* notes 236-239 and accompanying text.

232. *See* GOLDSTEIN, *supra* note 99, at 10; ISRAEL, KAMISAR & LAFAVE, *supra* note 61, at 530; LAFAVE, ISRAEL, & KING, *supra* note 222, at 46-50.

233. *See, e.g.*, Wade v. United States, 504 U.S. 181, 186 (1992); United States v. Blackley, 986 F. Supp. 616, 618 (D.D.C. 1997). Sometimes a distinction is made between the burden of proof required to get an evidentiary hearing (colorable basis of discrimination) and the burden of proof required to get discovery (sufficient evidence to raise reasonable doubt that the government acted properly in seeking the indictment). *See* United States v. Cyprian, 23 F.3d 1189, 1195 (7th Cir. 1994).

234. There are rare cases in which statistical evidence helped to prove selective enforcement. *See, e.g.*, United States v. Ojala, 544 F.2d 940 (8th Cir. 1976). In this case, the appellant – a former Minnesota representative – contended that he was targeted for prosecution because he had exercised his First Amendment rights to protest the Vietnam War. Statistical evidence showed that in the years 1969-71 there were around 51,000 tax delinquency investigations in Minnesota, but only nine cases were recommended for criminal prosecution in the state. The court was convinced that a prima facie showing of selective enforcement was satisfied, but justified the selectivity on the grounds of the public position of the appellant. In *United States v. Robinson*, 311 F. Supp 1063 (W.D. Mo. 1969), the government prosecuted a private investigator for illegal wiretapping. Statistical evidence showed that the government had never prosecuted government officials who committed the same offense. The court sustained the claim of discriminatory enforcement, since the statistical evidence was supported by other evidence. The government justified the distinction by arguing that government wiretaps were in the public interest.

235. Krieger, *supra* note 229, at 654-56.

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

determined the necessary standard to obtain discovery in a selective enforcement claim:

> The claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.[237]

In addition, the Court essentially cut off recourse to statistical evidence[238] and, moreover, demonstrated its potential detriment to the defendant. The Court emphasized federal data showing that the majority of those sentenced for crack cocaine trafficking were black.[239] Furthermore, the Supreme Court criticized the Court of Appeals for assuming, as a basis for granting a discovery order, "that people of *all* races commit *all* kinds of crimes."[240]

A. THE PROBLEMS

The current jurisprudence on selective enforcement is problematic for three reasons. First, individuals are injured by selective enforcement even when there is no discriminatory motive. Second, the doctrine protects only against group discrimination, not against individual discrimination. Third, proving a selective enforcement claim (and thus protecting against selective enforcement) is nearly impossible under the rules set by the Supreme Court.

Unequal treatment injures even when there is no discriminatory motive. As Professor Paul Butler writes, "victims are injured by the effect of law, not the purpose of law. Therefore, victims ought to care more about eradicating the effect than about comprehending the purpose."[241] However, the exclusivity of constitutional judicial review, under the equal protection clause, only gives weight to the authority's

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237. *Id.* at 465 (citations omitted).

238. The defendant offered an affidavit with an accompanying "study," to the effect that, in every one of the 24 cases involving similar drug charges and closed by a federal public defender's office during the prior year, the defendant had been black. However, the Court concluded that "[t]he study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted." *Id.* at 470.

239. *Id.* at 469.

240. *Id.* (citing United States v. Armstrong, 48 F.3d 1508, 1516-17 (1995)).

241. Paul Butler, *Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1277-1278 (1998) (footnotes omitted). *See also* Kennedy, *supra* note 97, at 1424 ("[r]acial subordination, however, can be maintained without discrete, episodic, affirmative acts of purposeful discrimination. Indeed it can be more securely entrenched by habitual patterns of action and inaction that inflict harms upon blacks without any intentional design whatsoever.").

motive in enforcing the law.[242] Equal protection analysis proceeds from the premise that legislators must necessarily classify citizens in order to achieve various goals and to advance general welfare.[243] For example, the state is free to select a particular class as a subject of taxation;[244] a heavier tax placed on chain stores than on individual retailers can be consistent with the Equal Protection Clause.[245] However, any classification must pass a reasonableness test under which the rational connection between the classification and the aim is examined.[246] When there is a "suspect" grouping, a higher standard is required.[247] Thus, equal protection does protect against de jure discrimination, and it may seem a valid way, under rule of law principles, to view selective enforcement.

But discrimination can be de facto, not just de jure.[248] It is in such situations—in which disparate impact is claimed—that American precedent raises the requirement of motive.[249] A statute having a disparate impact on a distinct class does not trigger heightened scrutiny absent a showing of a purposeful discrimination.[250] This requirement of motive in legislation is itself problematic and has spawned a considerable body of literature.[251] Regardless of this criticism, the motive requirement was used elsewhere, in particular in the enforcement context. Systematic classifications made by authorities in the framework of enforcing laws are valid insofar as they are "reasonable."[252] This is the source of the

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242. U.S. CONST. amen. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."). The Fifth Amendment does not contain an Equal Protection clause similar to that of the Fourteenth Amendment, which applies only to the states. The Supreme Court has held that the concepts of equal protection and due process are not mutually exclusive and that discrimination by the federal government may be so unjustifiable as to be a violation of due process. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

243. Comment, *Developments in the Law – Equal Protection,* 82 HARV. L. REV. 1076 (1969). *See also* Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947) ("A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment.").

244. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 512 (1937).

245. Louis K. Liggett Co. v. Lee, 288 U.S. 517, 537 (1933).

246. *Supra* note 190 and accompanying text.

247. *Supra* notes 191-193 and accompanying text.

248. For the different discrimination claims, see TRIBE, *supra* note 11, at 1438.

249. The doctrine was established in *Washington v. Davis*, 426 U.S. 229 (1976).

250. William G. Bernhardt, *Constitutional Law: The Conflict of First Amendment Rights and the Motive Requirement in Selective Enforcement Cases*, 39 OKLA. L. REV. 498, 508 (1986). *See also* REDLICH, ATTANASIO & GOLDSTEIN, *supra* note 11, at 376 (explaining that even in cases which lightened the burden of proving discriminatory intent, simply proving discriminatory effect or impact was not sufficient).

251. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (suggesting recognition of unconscious racism of governmental actors in situations of neutral policies with disparate racial impact); R.H. Lenhardt, *Understanding the Mark: Race, Stigma and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004) (arguing that racial stigma, not intentional discrimination, constitutes the main source of racial harm and that courts must take this social science insight into account in constitutional analysis).

252. *See* Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1117 (1961). *See also* Karl S. Coplan, Note, *Rethinking Selective*

requirement to prove an intentional discrimination according to an unjustifiable standard, which was developed in the framework of the doctrine of selective enforcement.

Furthermore, the motive requirement is inconsistent with other constitutional doctrines. First, the necessity of motive to prove selective enforcement does not square with the Supreme Court's view of motive in the legislative context.[253] Though legislative motive is not the precise equivalent of prosecutorial motive,[254] it seems that any implicit discretionary grant to the Executive by Congress must be subject to the same constitutional limitations as those that apply to Congress.[255] Hence, if a positive motive is not relevant when Congress infringes upon a constitutional right, there is no reason for it to be relevant when speaking of an enforcement authority. Second, regular analysis under the First Amendment does not require proof of the government's intent to violate the freedom of speech: The claim is satisfied merely by proving the violation of the right. The Court's refusal to trace the intention stems from reluctance to deal with "psychoanalysis," as well as from the basic perception that good motives are irrelevant when freedom of speech is affected.[256] Hence, those claiming selective enforcement of First Amendment rights are in a significantly worse legal position than those with a standard First Amendment case. This is especially problematic if we take into account that discretionary decisions, such as enforcement decisions, "are particularly vulnerable to ... selective responses."[257]

The second major problem with current selective enforcement jurisprudence is that the doctrine limits judicial review to discrimination against classes of people. This conflicts with the Constitution, which condemns discrimination against "any person," not just against classes.[258] There is, therefore, an internal inconsistency which essentially allows intentional singling out of a particular person.[259] Furthermore, the grounds underlying singling out might be improper purpose, irrelevant considerations or arbitrariness—all of which constitute abuse of power.

This focus on group discrimination, to the exclusion of worry over individual discrimination, allows arbitrary action by enforcement authorities. Agencies, under the APA, are not allowed to act arbitrarily.

Enforcement in the First Amendment Context, 84 COLUM. L. REV. 144, 155-156 (1984) (explaining that an advocate of the motive requirement in First Amendment-selective prosecution cases might argue that just as disparate impact on suspect classes requires heightened scrutiny only if wrongfully motivated, so too disparate impact on speakers – the result of passive enforcement of an otherwise neutral statute – demands such scrutiny only if wrongfully motivated).

253. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383-84 (1968).

254. Bernhardt, *supra* note 250, at 505.

255. Coplan, *supra* note 252, at 160.

256. *Id.* at 149.

257. Kennedy, *supra* note 97, at 1429.

258. *See* U.S. CONST. amen. XIV, § 1.

259. *Cf.* Robert G. McCloskey, *The Supreme Court 1961 Term*, 76 HARV. L. REV. 54, 121 (1962).

[260] However, this prohibition is not placed on enforcement authorities; they appear entitled to make arbitrary selections as long as the selections are not based on unconstitutional classification. [261] Thus, while enforcement authorities are obliged to "constitutional equality"—the prohibition of discriminating against certain classes, they are not obliged to "administrative equality"—the duty to treat similar cases in a similar way. [262] The result is that "[c]riminals have neither a moral nor a constitutional claim to equal or entirely proportional treatment." [263] Arguments in favor of this status quo focus on manipulating the perceived probability of detention to enhance deterrence. [264] Several scholars, however, have concluded that even this aim does not justify arbitrariness. [265] Furthermore, a due balance should be made between "administrative equality" and the individualization of justice through

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260 The APA authorizes courts to hold unlawful and set aside agency actions, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.A. § 706(2)(A) (1996).

261 The Court has written that:

> [T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

Oyler v. Boles, 368 U.S. 448, 456 (1962). For an indication of a different approach, see Falls v. Town of Dyer, Indiana, 875 F.2d 146, 149 (7th Cir. 1989).

> Dyer does not say that Falls' shop is distinctive or that his portable signs are more of a problem than anyone else's . . . It rests on the proposition that so long as Falls actually broke the law, no pattern of selectivity other than on account of race or a proscribed characteristic can be unconstitutional. Not so. If Falls can prove that the law of Dyer is that "Phillip H. Falls may not use portable signs, and everyone else may", then he has stated a claim of irrational state action, of a bill of attainder by another name.

262. This was demonstrated by the Court of Appeals for the District of Columbia Circuit, where an appellant claimed that the district attorney refused to consent to a guilty plea, while consenting to a plea tendered by his co-defendant. *See* Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967) ("Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges.").

263. United States v. Marshall, 908 F.2d 1312, 1326 (7th Cir. 1990).

264. *See, e.g.*, Tom Baker, Alon Harel & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 Iowa L. Rev. 443 (2003-2004) (using insights from behavioral economics and concluding that predictability in punishment may be inefficient). *See also* Alon Harel & Usi Segal, *Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime*, 1 AM. L. & ECON. REV 276 (1999) (invoking psychological insights to illustrate that the choice to increase certainty with respect to the size of the sentence and decrease certainty with respect to the probability of detection and conviction can be justified on the grounds that such a scheme is disfavored by criminals and consequently has better deterrent effects).

265. *See* Baker, Harel & Kugler, *supra* note 264, at 448-49 (emphasizing that while the authors are aiming to expand the traditional paradigm beyond the focus on the size of the sanction and the probability of detection as means by which law can deter wrongful behavior; they are not saying that increasing uncertainty is necessarily desirable). For a more extreme opinion, according to which there is no place for equality claims within criminal law, see Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 302 (1983).

discretion.[266] As Professor Davis noted, decisions can be based on broad discretion and still be reasonable and just; there is no reason to exercise power capriciously, inconsistently, or despotically.[267]

The third problem with current selective enforcement jurisprudence involves the heavy burden of proof on plaintiffs claiming selective enforcement. The *Armstrong* rule, later extended beyond race,[268] has elicited wide-spread criticism. First, it is very difficult to prove the existence of an unprosecuted group of similarly situated individuals of a different race. There is "a 'Catch 22': the defendant needs discovery to obtain the information necessary to entitle [him] to discovery."[269] Second, even if the defendant succeeds in proving the existence of a control group, it is difficult to succeed in proving that the prosecution was aware of its existence.[270] Third, even if the defendant succeeds in proving awareness of the existence of the control group, there is still the additional barrier of proving the intention to discriminate. In this case, mere doubt cast on the rationality of the decision to indict, for example by pointing to a disparate impact of the prosecution policy on a suspect class, is not sufficient to shift the burden of proof.[271]

Paradoxically, the rigidity of the motive requirement removes any of the help to disadvantaged groups that the "suspect class" concept was designed to provide.[272] Since almost no claim can meet this burden of proof, the prohibition on selective enforcement became "a hornbook law,"[273] hardly ever producing a practical remedy[274] and failing to supply an adequate tool to fight racial oppression in its modern guises.[275]

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266. *Cf.* SINGH, *supra* note 145, at 172 (noting that in German law, unlike in common law systems, "equality of treatment in the exercise of discretionary powers is as important, if not more, as the individualisation of justice through discretion").

267. DAVIS, *supra* note 21, at 29.

268. United States v. Hastings, 126 F.3d 310,311 (4th Cir. 1997) (deciding that a member of the Republican Party indicted of failing to pay federal income tax was not entitled to pursue a claim of selective prosecution or to receive discovery on that claim).

269. Poulin, *supra* note 100, at 1098.

270. *Cf.* Givelber, *supra* note 102, at 108.

271. *See* Wayte v. United States, 470 U.S. 598, 610 (1985) (showing that the Court was not satisfied with proof of the government's awareness of the consequences of the policy regarding a particular group, but required proof of discriminatory intent, which meant proving that the choice of a particular course of action was made, at least in part, "because of," not merely "in spite of," its adverse effect upon an identifiable group). *Cf.* Clymer, *supra* note 72, at 733 (suggesting an alternative test, which recognizes the judicially enforceable right to rationality review. This would enable the defendant to contest the rationality of the charging decision by showing disparate impact).

272. For the concept of the suspect class, see Frances Raday, *Socio-Dynamic Equality: The Contribution of the Adversarial Process*, *in* THE CONSTITUTIONAL BASES OF POLITICAL AND SOCIAL CHANGE IN THE UNITED STATES 141, 151 (Shlomo Slonim ed., 1990) ("[i]t is an acknowledgment of the need to discard habits of thought and stereotypes that have obstructed the recognition of the basic premise that members of stigmatized subgroups are 'like' other members of society.").

273. N Douglas Wells, *Prosecution as an Administrative System: Some Fairness Concerns*, 27 CAP. U. L. REV. 841, 843 (1999).

274. For the inability to meet the proof demands, see also Krieger, *supra* note 229, at 661 (saying that as a result of the impossible burden of proof that courts placed on defendants, very few claims of discriminatory enforcement are sustained); and Richard H. McAdams, *Race and Selective Prosecution - Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 606 (1998)

B. THE NORMATIVE DUALITY SOLUTION

Normative duality analysis of "selective enforcement" places emphasis on the result, the unequal treatment, rather than the intention to discriminate. In England and Israel the emphasis in questions of equality is on the result; the motives of the authority are perceived as irrelevant.[276] Even in Germany, where early jurisprudence required proof of "intention," more recent judgments have recognized that discrimination is not necessarily a result of intention.[277]

A holistic view, based on the normative duality of constitutional and administrative rules, draws the inference that, when exercising discretion to enforce the law, authorities are not only restricted from making discriminatory classifications, but they are also prohibited from acting arbitrarily, unreasonably, upon irrelevant considerations, and disproportionally.

1. LEGALITY

Current doctrine of selective enforcement and the motive requirement allow enforcement authorities to act outside of their given powers. It should not be allowed under legality analysis.

Some classification is allowed in law enforcement.[278] Legislatures classify by determining which actions are legal and which are illegal. According to the basic principle of legality of administration, the agent is constrained to adhere to the terms of delegation made by the principal. Once the legislature passes a law, the executive agency must act to fulfill the law's purpose in this sense. The Executive is not authorized to create a classification which differs from the goal set by the legislature.[279]

(claiming that the *Armstrong* rule "will prevent many defendants who were selectively prosecuted from gaining discovery, and thereby ensure that many meritorious claims will never be proven").

275. *See* Kennedy, *supra* note 97, at 1419.

276. For England, see James v. Eastleigh Borough Council [1990] 2 A.C. 751, 765-66 ("the purity of the discriminator's subjective motive, intention or reason for discriminating cannot save the criterion applied from the objective taint of discrimination"). For Israel, see HCJ 104/87 Nevo v. National Labor Court 44(4) P.D. 749, *in* LANDAU, *supra* note 118, at 164, 166.

277. Gubelt, in: von Münch/Kunig, Bd.1, 5. Aufl. 2000, Art. 3 Rn. 104 [German].

278. *Cf.* Comment, *supra* note 252, at 1117-18.

279. Indications of this approach can be found in some decisions at the state level, from which one can understand that enforcement according to a classification not set by the legislature constitutes prohibited selectivity. *See* Bargain City U.S.A., Inc. v. Dilworth, 179 A.2d 439, 443 (Pa. 1962) ("the constitutionality of the statute cannot be governed by its enforcement unless the discrimination in enforcement flows directly from a discrimination intended by the statute, a conclusion we cannot here draw."). *See also* People v. Kail, 501 N.E.2d 979, 981 (Ill. App. 1986) ("the State 'may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational'") (*quoting* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985)). However, it is important to note that the requirement of motive is imposed today at both federal and state levels.

In line with this, enforcement authorities are only allowed to weigh considerations compatible with the purpose of the authorizing law. It is possible that a classification would be proper if it were made by the legislature, but not by the enforcement agency. Yet the agency cannot make this classification itself since the agency is not authorized to act according to goals which are not set by the legislature. There is no doubt that enforcement authorities are authorized and even required always to weigh general considerations such as respect for individual rights, but there is nothing in these general considerations to permit the creation of classes which do not match the statutory purpose.

The motive requirement does not square with the doctrines of proper purpose and relevant considerations, which prohibit considerations not faithful to the enabling law even when these considerations are constitutional. Arguing that enforcement agencies are authorized to draw classifications provided that there is no basis in gender, race, religion, or similar criteria amounts to legitimating acts taken for political, personal, or other purposes foreign to the statute. Certainly, enforcement authorities weigh a variety of considerations and sometimes the goals of their actions are mixed. In England and Israel, courts use the tests of the "material effect" and "dominant purpose," which ask whether the lawful purpose is "the true and *dominant* one," and whether the unauthorized purpose "has *materially* influenced the actor's conduct." [280]

Authorities are thus not supposed to act arbitrarily. [281] A full discussion of what constitutes arbitrariness exceeds the scope of this article. [282] However, following Professor Galligan, it is important to note that arbitrariness is antithetical to rationality. An act is rational if the person performing it believes that it serves a particular goal; the act is arbitrary if she does not have this belief. [283] In the exercise of public power, there is an additional limitation; belief that the action serves the purpose under discussion is not enough, but there must be objective or empirical reasons that the means will lead to the required ends. [284] Hence, classification which is not related rationally to the purpose of the law is, at least, an arbitrary classification.

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280. LONGLEY & JAMES, *supra* note 25, at 187 (emphasis added).

281. On arbitrariness, *see* CHOO, *supra* note 98, at 123-26.

282. There are many ancillary questions regarding arbitrariness in enforcement. For example, it remains an open question whether and when "sample enforcement" and "random enforcement" constitute arbitrariness. For sample enforcement, see Falls v. Town of Dyer, 875 F.2d 146, 148 (7th Cir. 1989). For random enforcement, see Clymer, *supra* note 72, at 712-714; Note, *Constitutional Law–Equal Protection of the Laws–Defendant Permitted to Prove Discriminatory Enforcement of Statute that is Generally Enforced*, 78 HARV. L. REV. 884, 885-86 (1965).

283. *See* GALLIGAN, *supra* note 23, at 143.

284. For the duty to rely on scientific methodology, see Ecology Center, Inc. v. Austin, 430 F.3d 1057, 1064 (9th Cir. 2005) ("there are circumstances under which an agency's choice of methodology, and any decision predicated on that methodology, are arbitrary and capricious. For example, we have held that in order to comply with NFMA, the Forest Service must demonstrate the reliability of its scientific methodology.").

Requiring adherence to legality's insights would solve the problematic motive requirement as well as the lack of protection against individual discrimination. An individual who does not belong to a suspect class can claim that enforcement of the law against her constitutes prohibited discrimination through unauthorized classification, regardless of motive. The harsh burden of proof would be ameliorated since the presumption of legality of administration, which the claimant is supposed to refute, does not include the need to deny the assumed bone-fide motive of the authority.

Finally, this broader review of selective enforcement grounds, which checks not only the constitutionality of the authority's action but also its legality, is supported by democratic arguments. If a given law is rarely enforced such that it affects only a few people or a politically powerless group, it is not being applied as the legislature intended. "Moreover, its wisdom will not be tested through the democratic political process because most people simply will not be inconvenienced by the law."[285]

2. PROPORTIONALITY

Proportionality in enforcement jurisprudence plays two major roles. First, the underlying law must be proportional. The criminal law "is intended to protect the most vital social interests against particularly severe infringements, when there is no less intrusive means for defending them."[286] However, the *implementation* must also be proportional; an enforcement agent applying the law must give due regard to balancing the law's enforcement with the harm it may cause. It is this second dimension that is ignored by current constitutionally-based jurisprudence.

Selective enforcement has tremendous costs. It violates the legitimate expectations of the public, who generally understand the law, its content, and application by viewing administrative behavior and not by reading statutes themselves.[287] Moreover, selectivity in law enforcement severely contradicts the fundamental principle of equality before the law: similar cases are not dealt with comparably. It is not just to treat different law-breaking citizens differently—at least when the

285. Givelber, *supra* note 102, at 96-97.

286. M. Kremnitzer, *Constitutionalization of Substantive Criminal Law: A Realistic View*, 33 ISR. L. REV. 720, 726 (1999).

287. MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 129-30 (1973). *See also* Poe v. Ullman, 367 U.S. 497, 502 (1961) ("'[d]eeply embedded traditional ways of carrying out state policy ...' – or not carrying it out – 'are often tougher and truer law than the dead words of the written text.'") (*quoting* Nashville, C. & St. L. R. Co. v. Browning, 310 U.S. 362, 369 (1940)).

breaches of the law have no materially different attributes.[288] Beyond deep resentment and danger to the legal system, which are the potential results of any severe infringement upon equality, there can be economic implications of selective enforcement, such as damaging or inhibiting free competition and causing damage to the reputation and income of those against whom the law is enforced.[289] Furthermore, the results of selective enforcement are destructive not only to individuals but to society as a whole, since it jeopardizes the rule of law, obedience to the law, and public faith in the legal system.[290]

Introducing proportionality helps ameliorate these problems. There are circumstances in which the injury to the person against whom the law is enforced exceeds the public benefit of an investigation or an indictment. In such a case, the enforcement action is disproportional. In light of this, the emphasis should be on the wrong result of selective enforcement rather than on the authority's motive. Where the result is disproportional, enforcement should be overruled, even in the absence of discriminatory motive.

VI. RACIAL PROFILING

Racial profiling is "any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity."[291] However, as a symbol of one of the most complex and emotional issues facing law enforcement today,[292] the term "racial profiling" has taken on many definitions and has become a somewhat amorphous concept.[293] Some definitions employ moral terminology[294]

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288. CHOO, *supra* note 98, at 125; DAVIS, *supra* note 21, at 167-69; KADISH & KADISH, *supra* note 287, at 130.

289. *See, e.g.*, Fed. Trade Comm'n. v. Universal-Rundle Corp., 387 U.S. 244, 251 (1967) ("the Federal Trade Commission does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry"). *See also* Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1137 (1961) (providing examples).

290. Poulin, *supra* note 100, at 1087. For the connection between effectiveness and the public faith, see Tomer Einat, *How Effective is Criminal Fine Enforcement in the Israeli Criminal Justice System?*, 33 ISR. L. REV. 322, 326-27 (1999).

291. DEBORAH RAMIREZ, JACK MCDEVITT & AMY FARRELL, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED 3 (U.S. Department of Justice 2000).

292. For the concern of law enforcement agencies, see Richard G. Schott, *The Role of Race in Law Enforcement: Racial Profiling or Legitimate Use?*, 70 LAW ENFORCEMENT BULL. 24 (FBI Publications, Nov. 2001) and Grady Carrick, *Professional Police Traffic Stops*, 69 LAW ENFORCEMENT BULL. 8 (FBI Publications, Nov. 2000).

293. MILTON HEUMANN & LANCE CASSAK, GOOD COP, BAD COP – RACIAL PROFILING AND COMPETING VIEWS OF JUSTICE 3 (2003).

294. *See, e.g.*, Paul H. Zoubek & Ronald Susswein, *On the Toll Road to Reform: One State's Efforts to Put the Brakes on Racial Profiling*, 3 RUTGERS RACE & L. REV. 223, 224 (2001)

while others use legal and constitutional terms. [295] The term "profiling" has moved in public perception from a description of a professional law-enforcement practice[296] to a characterization of one of the worst forms of police abuse.[297] This is in large part due to the use of the term as a synonym[298] for the police practice of "stopping a disproportionate number of male African-American drivers on the assumption that they have a heightened likelihood of being involved in criminal activity."[299] In June 1999 President Bill Clinton stated in a conference that "racial profiling is in fact the opposite of good police work, where actions are based on hard facts, not stereotypes. It is wrong, it is destructive, and it must stop." [300]

Racial profiling involves the use of pretext stops, searches, and seizures carried out by enforcement officers at least partially for reasons other than the justification submitted afterwards. [301] For example, a pretext investigatory stop occurs when a police officer uses a traffic violation to stop a vehicle to search for drugs without the objective cause necessary for a drug investigation stop.[302] In fact, the term "driving while black" [303] has been applied to the high number of stops of African-

("[r]acial profiling is a form of prejudice in the literal sense that it entails pre-judging the likelihood that a person is a criminal on the basis of skin color.").

295. *See, e.g.*, DARIN D. FREDRICKSON & RAYMOND P. SILJANDER, RACIAL PROFILING at ix (2002) ("[R]acial profiling occurs when law enforcement officials rely on race, skin color and/or ethnicity as an indication of criminality, reasonable suspicion, or probable cause, except when part of the description of a particular suspect.").

296. For rationales of legitimate criminal profiling, see DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 16 (2002).

297. FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 159 (2003).

298. The question whether racial profiling must be synonymous with abuse of power is a complicated and fascinating one. For an argument that "barring knife-edge cases, racial profiling is always efficient, helping the police to mitigate the screening problem when criminal activity varies across racial groups," see Yoram Margalioth & Tomer Blumkin, *Targeting the Majority: Redesigning Racial Profiling*, 24 YALE L. & POL'Y REV. 317 (2006).

299. *See* BLACK'S LAW DICTIONARY 1286 (8th ed. 2004). For the origin of racial profiling, see *also* HEUMANN & CASSAK, *supra* note 293, at 2 (explaining that the term "racial profiling" arose in the mid-1990s to describe specific types of police practices – stopping minority motorists on the highway to search for drugs – although those practices actually began more than a decade before that); *and* FREDRICKSON & SILJANDER, *supra* note 295, at 21-22 (describing the origin of the drug courier profile).

300. *See* RAMIREZ, MCDEVITT & FARRELL, *supra* note 296, at 1 (citing ATTORNEY GENERAL'S CONFERENCE ON STRENGTHENING POLICE-COMMUNITY RELATIONSHIPS, REPORT ON THE PROCEEDINGS 22-23 (Washington, DC: US Department of Justice, June 9-10, 1999)). By 2000, racial profiling was an issue in the presidential election. *See* HEUMANN & CASSAK, *supra* note 293, at 3-4.

301. Craig M. Glantz, *Supreme Court Review: 'Could' This Be the End of Fourth Amendment Protections for Motorists?*, 87 J. CRIM. L. & CRIMINOLOGY 864, 865 (1997).

302. Andrew J. Pulliam, Note, *Developing a Meaningful Fourth Amendment Approach to Automobile Investigatory Stops*, 47 VAND. L. REV. 477, 479 (1994).

303. For the term, see Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439, 440 (2004).

American male drivers because of the presumption that they engage in drugs and weapons activities.[304]

Racial profiling law has been established primarily through Fourth Amendment jurisprudence. The Fourth Amendment protects the right of people to be secured against unreasonable searches and seizures:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[305]

It is applicable to the states through the Fourteenth Amendment. Thus, the constitutional test for search and seizure is "probable cause."

But not all stops require "probable cause." The test for the more limited police actions, known as "stop and frisk" is "reasonable suspicion."[306] The Supreme Court held in *Terry v. Ohio*[307] that when a reasonably prudent police officer justifiably believes that his safety or that of others is endangered, he may conduct a reasonable search on a person who is behaving suspiciously, even though there is no probable cause to make an arrest.[308] According to *Terry*, a court must ask whether the officer had reasonable suspicion based on an objective assessment of the facts at the time of the stop (an objective standard for testing the legality of the stop) and whether the scope of the search was reasonably related to the facts and circumstances which initially justified the stop.[309]

In 1996, the Supreme Court held that the legality of stopping a vehicle is not related to the police officer's subjective motive; so long as an objective cause exists, the action is legal.[310] The Court agreed that the Constitution forbade selective enforcement on racial grounds, but held that when considering whether a stop was warranted, the prosecution only needed to show objective evidence that the officer had witnessed a traffic violation. Thus, "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[311] In deciding "whether a police officer has met the requisite minimum standard (i.e. reasonable

304. FREDRICKSON & SILJANDER, *supra* note 295, at 21-22; HEUMANN & CASSAK, *supra* note 293, at 16.

305. U.S. CONST. amend. IV. This amendment applies only to action of the federal government, but it is enforceable against states through the due process clause of the Fourteenth Amendment with the same sanctions that are used against the federal government. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

306. For the legal situation before and after the *Terry* case, see HEUMANN & CASSAK, *supra* note 293, at 17-22.

307. Terry v. Ohio, 392 U.S. 1 (1968).

308. *Id.* at 20-27.

309. Pulliam, *supra* note 302, at 494-96.

310. Whren v. United States, 517 U.S. 806, 819 (1996).

311. *Id.* at 813.

suspicion in the case of a stop or a frisk or probable cause in the case of an arrest or a search)," the courts rely on an objective rather than subjective test, with no regard for the officer's underlying motive or intent.[312]

In practice, while most courts confronting the issue "have authorized police to use race in making decisions to question, stop, or detain persons so long as doing so is reasonably related to efficient law enforcement,"[313] more and more anecdotal evidence of stops for "driving while black" has accumulated.[314] The debate over racial profiling has led to governmental condemnation of the practice and to the explicit prohibition of the racial profiling practice in some states.[315] Nevertheless, racial profiling continues. Condemnation of the practice, or even making specific types of stops illegal, may help in the short run, but does not solve the complex underlying issues that continue to affect American liberty. In the wake of the war on terror, Heumann & Cassak have noted that "'Flying While Arab' threaten[s] to replace 'Driving While Black.'"[316]

A. THE PROBLEMS

Current racial profiling jurisprudence presents three major problems. First, by removing the subjective motivation of the officer from the Fourth Amendment calculus, the Court essentially validated the use of pretext stops and left selective enforcement on the basis of race without a remedy. Second, the doctrine grants police excessive discretion in a way that facilitates arbitrariness. Third, claimants face an absurd situation regarding the burden of proof: if there was even a minor objective reason for the stop, they cannot claim it was illegal.

Why is jurisprudence that allows racial profiling problematic? The reasons are too numerous to list here but, inter alia, the use of racial

312. Zoubek & Susswein, *supra* note 294, at 251

313. KENNEDY, *supra* note 193, at 141. *see also* Butler, *supra* note 241, at 1286.

314. *See* HARRIS, *supra* note 296, at 1-15; HEUMANN & CASSAK, *supra* note 293, at 3; RAMIREZ, MCDEVITT & FARRELL, *supra* note 296, at 5-6. For those anecdotes trying to show that the practice of pretext stops is a kind of on-the-job informal training of policemen, see: *Racial Profiling: Prejudice or Protocol?*, http://www.horizonmag.com/6/racial-profiling.asp.

315. HEUMANN & CASSAK, *supra* note 293, at 4. In addition, police departments around the country began to collect data on all traffic stops. New Jersey was the first to initiate examination of the practice. In the interim report issued after the examination, the Attorney General of New Jersey "adopted a bright-line rule that State Police members are not permitted to consider a person's race, ethnicity, or national origin to any extent in making law enforcement decisions. Under this approach, racial profiling occurs if a motorist's race or ethnicity was taken into account and in any way contributed to the officer's decision to act or refrain from acting." Zoubek & Susswein, *supra* note 294, at 229.

316. HEUMANN & CASSAK, *supra* note 293, at 4. *See also* David Harris, *Flying While Arab: Lessons From the Racial Profiling Controversy*, CIVIL RIGHTS JOURNAL 8-13 (Winter 2002), http://www.usccr.gov/pubs/crj/wint2002/wint02.pdf (claiming that racial profiling has undergone rehabilitation).

profiling as a pretext for a search "not only harms the individual, it also undermines the integrity of the state by making it a tool for [discrimination] against a group,"[317] "fuel[s] existing skepticism about the fairness of law enforcement, and . . . undermine[s] the rule of law."[318] However, even given these enormous problems, current doctrine significantly reduces the ability of defendants to contest enforcement stops and to prove that "race played a part in the decision to stop and arrest."[319] The objective test of requiring evidence of a violation, which aims to avoid discrimination,[320] paradoxically leaves abuse of power without remedy. Courts have emphasized that "[t]he fact that there was no Fourth Amendment violation does not mean that one was not discriminatorily selected for enforcement of a law."[321] However, in reality, it is almost impossible to meet the requisite threshold showing to get discovery to support the selective enforcement claim.[322] Thus, there is no good way of prosecuting racial profiling.[323] This is the first problem with racial profiling jurisprudence.

Second, as a result of the *Whren* decision, police are granted unlimited discretion in a way that facilitates arbitrary intrusions. Since any objective reason for a stop can justify further intrusions, it is hard to protect against arbitrariness. Thus, racial profiling jurisprudence conflicts with the Fourth Amendment's objective of preventing arbitrary search and seizure.[324] The Supreme Court made this objective evident in *Brown v. Texas*,[325] stating that a central concern in balancing the competing considerations embodied in the Fourth Amendment ensures

317. Phyllis W. Beck & Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns*, 72 TEMPLE L. REV. 597, 618 (1999).

318. Sean Hecker, *Race and Pretexual Traffic Stops: An Expanded Role for Civilian Review Board*, 28 COLUM. HUM. RTS L. REV. 551, 604 (1997). The author suggests addressing the problem by the use of police civilian review boards. *See id.* at 592-604.

319. Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling after Whren v. United States: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725, 732-33 (2000) .

320. Compare Justice Doherty's words, regarding the concept of reasonable cause in Canada: "The requirement that the facts must meet an objectively discernible standard is recognized in connection with the arrest power, and serves to avoid indiscriminate and discriminatory exercises of the police power." Hudson & Levi, *supra* note 64, at 276 (citing *R v. Simpson*, (1993) 12 OR (3d) 182, 202 (Ont. C.A.)).

321. *See, e.g.*, Gibson v. Superintendent of New Jersey Department of Law, 411 F.3d 427, 440 (3d Cir. 2005); Carrasca v. Pomeroy, 313 F.3d 828, 836 (3d Cir. 2002); Bradeley v. United States, 299 F.3d 197, 205 (3d Cir. 2002).

322. Marc Michael, *United States v. Armstrong: Selective Prosecution – A Futile Defense and Its Arduous Standard of Discovery*, 47 CATHOLIC U. L. REV. 675, 681 (1998).

323. *Cf.* Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHICAGO-KENT L. REV. 559 (1998) (noting that most of the judicial efforts to eliminate racism have focused on intentional discrimination by state actors, while disparate racial effects of police or prosecutorial conduct have traditionally not been enough to induce a constitutional or statutory remedy).

324. Glantz, *supra* note 301, at 864; Hecker, *supra* note 318, at 579; Pulliam, *supra* note 302, at 517. For arbitrary search and seizure, see Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 411 (1974).

325. 443 U.S. 47 (1979).

"that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field."[326] Justice O'Connor noted this clearly in her dissenting opinion in the *Atwater* case, in which the Supreme Court held that the Fourth Amendment does not forbid arrest for a minor criminal offense. [327] Relying on *Whren*, the Court observed that although the Fourth Amendment generally requires a balancing of individual and governmental interests, the result is rarely in doubt where an arrest is based on probable cause.[328] Governmental interest will often come out on top of the individual right. Justice O'Connor was concerned with the majority decision. In her words:

> My concern lies not with the decision to enact or enforce these [fine-only misdemeanors] laws, but rather with the manner in which they may be enforced. Under today's holding, when a police officer has probable cause to believe that a fine-only misdemeanor offense has occurred, that officer may stop the suspect, issue a citation, and let the person continue on her way . . . Or, if a traffic violation, the officer may stop the car, arrest the driver . . . search the driver . . . search the entire passenger compartment of the car including any purse or package inside, and impound the car and inventory all of its contents . . . Although the Fourth Amendment expressly requires that the latter course be a reasonable and proportional response to the circumstances of the offense, the majority gives officers unfettered discretion to choose that course without articulating a single reason why such action is appropriate. Such unbounded discretion carries with it grave potential for abuse.[329]

Third, victims of racial profiling are robbed of both Fourth Amendment claims and equal protection claims. They are left without any recourse to justice. While the Supreme Court has recognized that denial of a Fourth Amendment claim does not exclude an equal protection claim, this does not hold in practice. This results from the subjective-objective dichotomy: under Fourth Amendment analysis, courts focus on the conduct of the particular law enforcement officer who was directly involved in the specific seizure or search at issue, while under equal protection analysis persons claiming to be victims of unconstitutional behavior are allowed to show evidence of patterns of the enforcement authority's conduct.[330] However, statistical evidence is

326. *Id.* at 51.
327. Atwater v. City of Lago Vista, 532 U.S. 318, 355 (2001).
328. *Id.* at 325.
329. *Id.* at 371-72 (emphasis added) (footnotes omitted).
330. Schott, *supra* note 292, at 31; Zoubek & Susswein, *supra* note 294, at 257-58.

not sufficient to meet the motive requirement. Thus, in practice, officers that can prove a minor objective reason to stop and detain the individual are not guilty of a Fourth Amendment violation. If the plaintiff cannot provide a control group or cannot prove that they were intentionally discriminated against on the basis of race, the equal protection claim is denied.[331] The unfortunate result is that even if there was abuse of power by taking into account an irrelevant consideration of race, the defendant is not protected by judicial review.

B. THE NORMATIVE DUALITY SOLUTION

Administrative insights can help solve these problems. Police engaging in racial profiling are not acting with a proper purpose (do not pass the legality test) and are putting an unjustifiable, excessive burden on people of one race (violating proportionality). In this section I show that if judges used normative duality insights to look at racial profiling, legality and proportionality concerns would require drawing the inference that the practice of racial profiling in the form of pretext stops is illegal.

1. LEGALITY

Police are given the task of maintaining law and order and investigating crimes. In order to perform this task, the police must be able to profile criminals.[332] The use of class probability, by which an individual is assumed to possess features of the group she belongs to, is a different story. While this practice can be used by insurance companies

331. For an example of the connection between racial profiling and selective enforcement, and the denial of both of the claims, see Flowers v. Fiore, 239 F. Supp. 2d 173 (1st Cir. 2004). In *Flowers*, the court held that the defendant officer had ample reason to detain Flowers and therefore denied the Fourth Amendment claim. *See id.* at 177. The court also stated that "selective enforcement of motor vehicle laws on the basis of race, also known as 'racial profiling', is a violation of equal protection." *See id.* at 178. However, the selective enforcement claim was denied because Flowers did not present evidence that he was treated differently from similarly situated white motorists, nor did he present evidence that would support a claim that he had been detained because of his race. *See id.* at 178.

332. Criminal profiling is possible because criminals tend to establish *modus operandi*, namely distinctive features of criminal behavior. *See* FREDRICKSON & SILJANDER, *supra* note 295, at 17-19. Even the biggest opponents of racial profiling agree that other forms of "profiling" must remain legitimate and important parts of modern police work. *See, e.g.*, Zoubek & Susswein, *supra* note 294, at 237 ("[i]n short, legitimate 'profiles' focus on the conduct and methods of operation of criminals, rather than on personal characteristics that individuals cannot change, such as their racial or ethnic heritage.").

as private entities,[333] the administrative concept of legality limits its use in two important ways.

The legality principle requires that enforcement authorities draw only those classifications which are compatible with the main purpose of the law being enforced. In light of this, police enforcing traffic laws should aim to improve safety on the roads, not to find drugs. [334] Thus, under legality analysis, they should not engage in pretext stops. In addition, the statistics upon which the generalization about the group is drawn must be well established, as any findings of public authority must be based on satisfactory evidence.[335] The statistics police claim to rely on have been found to be a self-fulfilling prophecy—law enforcement agencies "rely on arrest data that they themselves generate[] as a result of the discretionary allocation of resources."[336]

Furthermore, recall that the objective ground of unreasonableness can be a sign of an irrelevant consideration or an improper purpose. How can an act be reasonable if it is motivated by an improper aim? Indeed, unreasonableness finds its expression in disproportionate stops of African-Americans at a rate far in excess of what would have been expected based on population, and in excess of what would have been expected based on the percentage of African-Americans committing drug or weapons crimes.[337] Even worse, many of these stops are carried out on the pretext of minor traffic violations for which others are not stopped at

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333. For the use by insurance companies, see Gene Callahan & William Anderson, *The Roots of Racial Profiling*, REASON ONLINE (Aug-Sept. 2001), http://www.reason.com/news/show/28138.html. *See also* Malcolm Gladwell, *Troublemakers*, THE NEW YORKER, Feb 6, 2006, at 38 (explaining what pit bulls can teach us about profiling and arguing that "[w]hen we say that pit bulls are dangerous, we are making a generalization, just as insurance companies use generalizations when they charge young men more for car insurance than the rest of us.").

334. It is important to distinguish between the use of traffic violations as a pretext for drugs search and the use of tax violations in order to deal with crimes motivated by money, such as drug trafficking. As against the improper use of the law in the former case, in the latter the laws are enforced for their purpose. The reason is that income, from whatever source derived (legal or illegal), is taxable income. For example, Al Capone was indicted and convicted in 1931 by the federal government for income tax evasion, after IRS agents put together a solid case against him, even though the police were also after him for other crimes. *See* John J. Binder, *Chicago*, AMERICAN MAFIA.COM,http://www.americanmafia.com/Cities/Chicago.html. Since 1986, "with the passage of the Money Laundering Control Act, organized crime members and many others have been charged and convicted of both tax evasion and money laundering." *Overview – money laundering*, INTERNAL REVENUE SERVICES, http://www.irs.gov/compliance/enforcement/article/0,,id=112999,00.html. Money laundering is in effect tax evasion in progress, as it is the means by which criminals evade paying taxes by concealing the source and the amount of the profit. Since the IRS is authorized to conduct financial investigation, the power is used for the specified purpose of the enabling laws, and it does not matter that an ancillary purpose is also achieved.

335. The evidence must be reasonable to support the findings. *See* WADE & FORSYTH, *supra* note 17, at 312.

336. Zoubek & Susswein, *supra* note 294, at 243 (referring to the findings of the Interim Report, issued by the New Jersey's Attorney General on April 20, 1999 regarding allegations of racial profiling). *Cf.* Butler, *supra* note 241, at 1287 ("Race-based suspicion also generates large pools of black criminals. People tend to find the things for which they look.").

337. *Cf.* SCHAUER, *supra* note 297, at 159.

all. Thus, while random enforcement in the context of traffic violations can be, in some circumstances, legitimate, the "randomness" can by no means be based on racial classification or on other irrelevant considerations. If so, randomness turns into "arbitrariness", "discrimination" or such other defects in the exercise of discretion. Thus, legality insights argue against racial profiling.

2. PROPORTIONALITY

Proportionality is about balancing conflicting interests. In reviewing actions, courts give authorities a margin of deference. However, the extent of this deference depends on the interests at stake.[338] When actions infringe upon fundamental human rights, as in the case of racial profiling, courts should feel less reluctant to review the proportionality of such acts.[339] Validating the practice of pretext causes harm to the presumption of innocence and to the equal protection of the law.

The first subtest of proportionality—suitability—requires that when enforcing the law, administrative authorities employ only those means appropriate to accomplish the relevant objective. The suitability of a measure must be "decided according to objective standards and not according to the subjective judgment" of the administrating authority.[340] When the aim is enforcement, no chosen course of action can completely achieve the aim,[341] and thus the rational connection between the means and the aim depends, to a large extent, on the results.[342] The German Constitutional Court, for example, considers means suitable to attain a given objective "when the desired result can be furthered with its help."[343] However, evidence from a variety of contexts proves that racial profiling is neither an efficient nor an effective tool for fighting crime.[344] Hence the first sub-test of proportionality, which is generally met in cases, is not satisfied in the case of racial profiling.

The second subtest—necessity—requires that there be no less restrictive measures available that would also achieve the goal. Racial profiling is not only an unnecessary measure (its usefulness is far

338. *See* McBride, *supra* note 210, at 33.

339. *See* Lord Hoffmann, *The Influence of the European Principle of Proportionality upon UK Law*, *in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 107, 110 (Evelyn Ellis ed., 1999).

340. EMILIOU, *supra* note 160, at 28.

341. *Cf. id.* at 26 ("[T]he partial realization of the desired end, however, is considered enough.").

342. The uncertainty is significant in the case of pretext stop since we have almost no information about the impact that these police tactics have on innocent citizens. *See* HARRIS, *supra* note 296, at 87-88.

343. EMILIOU, *supra* note 160, at 26.

344. For elaboration of the statistics, see HARRIS, *supra* note 296, at 79-84.

outweighed by intelligence gathering and analysis techniques), but it can, in fact, damage enforcement ability; focusing on those who "look suspicious" takes police attention away from those who "act suspicious."[345] Profiling is by nature over-inclusive. When race is used as a proxy for criminality or dangerousness, profiles based on race will always sweep too widely since a relatively few of any race are criminals.[346] Thus, focusing on the appearance is inefficient and clearly not the least restrictive means to furthering law enforcement.[347]

The third subtest requires a proper balance between the injury to the individual and the gain to the community. Authorities must "avoid acting in a way that will put severe burdens on the life of an individual."[348] The real cost of tactics used for pretext stops is their profound impact on innocent people; racial profiling practices burden innocent individuals of minority groups to a much greater extent than other innocent persons.[349] Furthermore, racial profiling carries with it costs that go beyond psychological hardship and damage, such as impact on the mobility of those subjected to it.[350] Beyond the cost to the individual, racial profiling has costs to society. It corrodes the legitimacy of the rule of law and the entire legal system including the courts,[351] it distorts criminal records and sentencing,[352] and it impedes community policing.[353] Thus, in the absence of crucial evidence that African-Americans are more inclined to carry drugs, the infringement upon the presumption of their innocence definitely exceeds the social benefit of the stops.[354]

Using proportionality as a ground for review leads to the definite conclusion that racial profiling in the form of pretext stops is a disproportionate practice even when it passes the objective test of the Fourth Amendment. Data show that blacks experience higher rates of stops and searches at the hands of white and black officers alike.[355] By

345. Harris, *supra* note 316, at 12.

346. HARRIS, *supra* note 296, at 106.

347. *Cf.* Peter Siggins, "Racial Profiling in the Age of Terrorism", *Markkula Center for Applied Ethics*, http://www.scu.edu/ethics/publications/ethicalperspectives/profiling.html ("If ethnic profiling of middle eastern men is enough to warrant disparate treatment, we accept that all or most middle eastern men have a proclivity for terrorism.").

348. EMILIOU, *supra* note 160, at 34.

349. *Cf.* R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201, 1217 (2004).

350. HARRIS, *supra* note 296, at 102.

351. *Id.* at 117-24.

352. *Id.* at 124-26.

353. *Id.* at 126-28.

354. *Cf.* Callahan & Anderson, *supra* note 333 ("[i]t should be obvious that there's something nutty about a legal system that assumes suspects in murder, robbery, and rape cases are innocent until a trial proves otherwise, but assumes that a landscaper carrying some cash is guilty of drug trafficking.").

355. *See* HARRIS, *supra* note 296, at 101. *Cf.* Butler, *supra* note 241, at 1286 ("I believe that I was stopped because I am black. I have no way of proving this; the officers also are African-American, a fact that perhaps weakens the racialist explanation. If, however, I am right – if my blackness was the reason the officers found me suspicious – the police acted lawfully.").

acknowledging that racial profiling is an administrative and institutional practice and not only a case of individual racism, the normative duality approach can help deal with this problematic phenomenon. Because of its disproportionate nature, racial profiling should be seen as prima facie illegal.

CONCLUSION

The American legal system's division between areas appropriate for constitutional review and those appropriate for administrative review is problematic. In short, it fails to take into account rule of law concerns and thus does not square with the need to keep the powers of government within their legal bounds in order to protect citizens from all abuses of power. In particular, the fact that enforcement authorities are not reviewed under administrative principles results in several legal inconsistencies and situations antithetical to the rule of law.

The normative duality approach suggested in this paper can help remedy this problem. This approach recognizes—as other legal system already have—the inherent connection between constitutional and administrative law as elements of a holistic public law. Adopting normative duality means borrowing, developing, and implementing a layer of administrative insights within constitutional review. A revolution is not required to institute the normative duality approach in American law, as many of the tests (and the rationale for others) already exist in American jurisprudence. Normative duality leaves the superiority of the constitutional rules intact, yet informs the interpretation and implementation of constitutional rules regarding the actions of administrative authorities, including enforcement agencies, with administrative rules.

This approach is "holistic" in a number of ways. First, constitutional and administrative law are viewed together as components of public law. Enforcement authorities are bound by all the rules of public law, which are enforced by judicial review and thus protect against abuses of power. The administrative insights in normative duality also help clarify constitutional review. Administrative rules can help reconcile the doctrines of the Fourth and Fourteenth Amendments regarding selective enforcement and racial profiling, creating a more coherent jurisprudence. Finally, the normative duality approach contributes to the holism between state and federal jurisprudence. Since my suggestion refers to the nature of constitutional review and has nothing to do with the implementation of administrative rules under federal and state statutes, it can be applied in both federal and state courts. In order to serve the lofty goal of protecting the rule of law, it is important that such norms be incorporated into both national and local

review. Normative duality review of enforcement thus should apply to the local police as well as to the federal authorities.

I do not anticipate that the Supreme Court will rush to embrace the approach this article proposes. Rather, it is my hope that the normative duality discussion will stimulate the legal community to think more holistically about public law. After all, while "Click it or Ticket" is a proportional response to a seatbelt violation, "Buckled or Booked" violates the strong public law tradition upon which Western legal systems are based.