Journal of Criminal Law and Criminology

Volume 101 | Issue 4 Article 2

Fall 2011

# Redistributive Policing

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0091-4169/12/10104-1171
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 101, No. 4
 *Printed in U.S.A.*

# REDISTRIBUTIVE POLICING

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*Police departments have broad policymaking discretion to arrest some offenders and permit others to engage in criminal misconduct. The way police departments exercise this discretion has harmful distributive consequences. Yet, courts do virtually nothing to constrain departmental discretion. This is because constitutional criminal procedure is preoccupied with individual officer discretion and assumes that the most significant decision moment an officer faces is distinguishing guilt from innocence. I argue that this framing obscures the vast policymaking discretion police departments wield and the central choice they confront: distinguishing among the guilty. This Article identifies the mechanics and anti-egalitarian consequences of departmental discretion. Departmental discretion has three dimensions: geographic deployment, enforcement priority, and enforcement tactics. Through these policy choices, police departments are able to distribute the costs and benefits of proactive policing within jurisdictions. Case studies of narcotics enforcement and quality-of-life policing concretely demonstrate how departmental choices create inegalitarian distributive consequences. I argue that courts and other public institutions ought to prevent such consequences. This prescription requires conceptualizing arrests, and proactive policing more generally, in terms of distributive justice. Unlike dominant theories of criminal enforcement, distributive justice offers a normative vision that privileges democratic equality. Distributive justice suggests that, for crimes that are subject to proactive policing, probable cause alone should not justify arrest. Rather, police departments should also be required to demonstrate that*

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*a given arrest is part of an egalitarian distribution of arrests.*

## I. INTRODUCTION

Courts imagine police discretion in terms of the decisionmaking latitude that individual officers enjoy.[1] Officers make choices about whom to stop, search, and arrest. Constitutional criminal procedure attempts to regulate how officers make those choices by prescribing the quantum of information they must possess regarding a suspect's likely guilt before they may intrude upon her privacy or liberty.[2] In other words, the judicial approach to police discretion assumes that individual officers are the principal discretion-wielding actors in policing and that the central problem they confront is distinguishing the guilty from the innocent. From this perspective, it follows that any arrest supported by probable cause is a legitimate one.[3]

This Article critiques the narrowly individualistic conception of police discretion that predominates in law, scholarship, and public discourse.[4] Casting the individual officer as the central discretion-wielding agent in policing obfuscates the arrest's role as a policymaking device with broad distributive consequences. If law is to ensure an egalitarian arrest distribution it should treat police departments, not officers, as the primary discretion-wielding actors. Modern police departments exert high degrees of control over individual officers and rely heavily on arrest as an enforcement strategy. The central problem confronting police departments is not distinguishing the guilty from the innocent, but rather distinguishing *among* the guilty. Police departments—i.e., administrators and policymakers—regularly choose to target some offenders and to let others engage in comparable criminal activity without consequence. This is most true in the "proactive policing" context, where the police themselves (as opposed to a victim or some other witness) identify criminal misconduct. Because criminal procedure is hushed about departmental discretion and because retributive, expressivist, and utilitarian theories dominate scholarly discussion of the criminal sanction, departmental discretion is under-

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[1] *See infra* notes 11–29 and accompanying text.

[2] *See infra* notes 37–40 and accompanying text.

[3] The Supreme Court has held exactly that. Whren v. United States, 517 U.S. 806, 813 (1996).

[4] Popular culture is preoccupied with police behavior at the individual officer level: high-speed chases, excessive use of force, and the like are staples for the evening news. And many people experience "the police" in terms of an individual encounter with an officer; typically, that encounter is in the traffic context. *See* MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005, at 1 (Apr. 2007) (finding that more than half of all civilian-police contacts occur in the traffic context).

theorized in legal scholarship. This Article describes departmental discretion's mechanics and anti-egalitarian consequences. It then sketches a normative vision for regulating departmental discretion relying on distributive justice theory.

I argue that three dimensions of departmental discretion bear on how proactive policing arrests are distributed across a jurisdiction: geographic deployment, enforcement priority, and enforcement tactics. How different groups bear the costs and benefits of arrests within a jurisdiction raises serious questions of democratic fairness. For example, narcotics enforcement has swelled America's prison populations with poor men of color.[5] The pool of prospective narcotics offenders in a given city will typically be larger than could ever be arrested with complete enforcement. Offenders' demographic profile will depend on where in a city police target—e.g., the race and class profile of narcotics offenders at an elite, liberal arts college on the urban periphery might be different from that of narcotics offenders in working class neighborhoods closer to the urban core. Departmental choices about geographic deployment, enforcement priority, and enforcement tactics determine whether and how these areas are targeted.[6] I argue that police departments tend to make such choices in a manner that generates unjustified inequality.

Normatively, I argue that courts and scholars should conceptualize arrests, and proactive policing more generally, as a distributive good. Criminal enforcement's moral legitimacy is typically grounded in retributive, expressivist, or utilitarian theories. These theories offer little guidance on how to accommodate egalitarianism in proactive policing. On the other hand, distributive justice's central preoccupation is with how political institutions in a liberal democracy should achieve an egalitarian distribution of the benefits and burdens that collective political existence generates.[7] Distributive justice animates discussions in various policy contexts and I argue that the same should be true for police department discretion. That discretion is most pronounced in the proactive policing context where there are few legal or political checks on departmental discretion. Distributive justice suggests that the mere fact of a criminal law

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[5] *See* MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 67, 104, 112–13 (1995); *infra* Part III.B.1 (discussing a case study focusing on narcotics enforcement in Seattle).

[6] Individual officer bias would have no bearing on the arrestees' demographic profile. *See* JOHN C. LAMBERTH, LAMBERTH CONSULTING, DATA COLLECTION AND BENCHMARKING OF THE BIAS POLICING PROJECT: FINAL REPORT FOR THE METROPOLITAN POLICE DEPARTMENT IN THE DISTRICT OF COLUMBIA 57 (2006) (finding no evidence of profiling apparent in minority neighborhoods).

[7] *See infra* notes 271–272 and accompanying text.

violation is insufficient to legitimate proactive policing arrests. The costs and benefits of arrest distribution, just as with other policy choices, should be shared equally amongst all communities within a jurisdiction. Distributive justice principles also dovetail with a representation-reinforcing theory of judicial review. In tandem, the two suggest a much more active role for courts in constraining police departments' discretion to ration arrests.

The Article proceeds in three parts. Part II demonstrates how scholars and courts have addressed the police "discretion problem." Legal scholars have not systematically accounted for how departmental discretion operates. This is unsurprising given that constitutional criminal procedure has narrowly conceptualized police discretion in terms of individual officers' assessments of individual suspects' likely guilt. Part III argues that departmental policies regarding geographic deployment, enforcement priority, and enforcement tactics drive proactive policing's anti-egalitarian consequences. Case studies on narcotics enforcement and quality-of-life policing demonstrate departmental choices' salience in producing inequality. Part IV evaluates departmental discretion through the lens of distributive justice and concludes that where popular politics is unable to prevent the unequal distribution of proactive policing arrests, courts should do so.

## II. THE "DISCRETION PROBLEM"

Scholars and courts tend to localize the "discretion problem" to the moments leading up to and during contact between individual officers and civilians. This conceptualization decouples police discretion from distributive justice—most significantly, it avoids the question of whether arrest policies' benefits and burdens are fairly distributed across a jurisdiction.[8] This Section accounts for the decoupling. It begins with scholars rather than courts. It was scholars, beginning in the late 1950s, who identified a "discretion problem." They suggested that police departments delegated excess policymaking discretion to individual officers and those officers, in turn, used that discretion inconsistently if not abusively. Courts and more recent scholarship have continued to echo that conceptualization.

### A. THE "DISCOVERY" OF POLICE DISCRETION

Scholars "discovered" the discretion problem in the 1950s.[9] In 1956,

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[8] *See infra* Part IV.A.

[9] SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990, at 6–7 (1993) (summarizing early research).

the American Bar Foundation (ABF) issued a report concluding that considerable discretion existed in policing.[10] "Discovery" is a curious metaphor for describing an endemic feature of policing. But, prior to the ABF report, scholars and lawyers tended to embrace the mythology of "complete enforcement"—i.e., the notion that police attempt to apprehend each and every violator of the criminal code.[11] For early law and society scholars, the discretion problem brought the disjuncture between law and social practice into stark relief. Early discretion scholars problematized the disjuncture at its most primary level: the individual officer.

Early discretion scholars cast the discretion problem in terms of an inverted pyramid. Ordinarily, one would expect the most senior members of a governmental institution to enjoy the greatest discretion. In police departments, early police scholars contended, discretionary latitude appeared to increase *down* the line of command.[12] Kenneth Culp Davis argued that this, in effect, rendered individual patrol officers "policy makers" for their beats.[13] Davis noted that many police departments did not have policy manuals at all and, for those that did, the manuals said nothing about enforcement priorities.[14] Taking cover under the rhetorical blanket of "full enforcement," police department administrators deferred almost completely to patrolmen to decide when and against whom to enforce criminal laws.[15] The absence of departmental intelligence as to crime's distribution or the nature of officers' practices compounded the discretion problem.[16] In the absence of departmental directives, patrol officers were free to devise enforcement protocol based on hunch, habit, and bias.[17] The early scholars were particularly troubled by officers' decisions *not to* enforce criminal laws because these decisions were entirely invisible to

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[10] *See* Michael Tonry, *Foreword* to DISCRETION IN CRIMINAL JUSTICE, at xiii–xiv (Lloyd E. Ohlin & Frank J. Remington eds., 1993) (discussing the origins and influence of the ABF report).

[11] KENNETH CULP DAVIS, POLICE DISCRETION, at iv (1975).

[12] DAVIS, *supra* note 11, at v, 47, 99, 139; Tonry, *supra* note 10, at xiv–xv (summarizing ABF survey); JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR 7 (1968).

[13] DAVIS, *supra* note 11, at 99, 139.

[14] *Id.* at 32–38.

[15] *Id.* at 52–53 ("The police assume full enforcement is required by [statute and ordinance], and when insufficient resources or good sense requires nonenforcement they also assume that they must do what they can to conceal the nonenforcement. So the only open enforcement policy is one of full enforcement . . . . Because of the false pretense of full enforcement, no studies are ever made to guide the formulation of enforcement policy.").

[16] *Id.* at 41, 44.

[17] *See id.* at 46–47. "Hunches" and "habits" may be a more polite way of talking about biases to the extent that officers' expectations of criminality are racialized. *See* L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2042–52 (2011) (reviewing the science of implicit bias).

supervisors.[18]

Early discretion scholarship reflects the mid-twentieth century's scholarly zeitgeist. Intellectuals were preoccupied with identifying the "authoritarian personality" in its various guises.[19] The vivid memories of fascism's horrors impelled scholars to scrutinize the psychological predilections of individuals who might be particularly susceptible to populist totalitarianism. Police officers figured prominently as examples of the authoritarian personality.[20] True to the times, intellectuals were not particularly moved by popular democracy's capacity for restraining the authoritarian personality. The ground between popular democracy and populist totalitarianism seemed precariously slippery.[21] It is no wonder that intellectuals—the early police discretion scholars among them—were quick to posit political insulation, technocratic rationalization, and professionalization as the best approaches to containing and directing the authoritarian personality towards benevolent ends.[22]

According to the early scholars, the locus of the discretion problem was the individual patrolman and the locus of the solution was departmental control. Early scholars posited departmental authority as the best mechanism for restraining and guiding individual officers. Kenneth Culp Davis, for example, argued that police departments should promulgate regulations following public comment, much like administrative agencies do.[23] Other early scholars concurred, arguing for various combinations of external and internal rules regulating police officer discretion.[24] The analogy between an administrative agency and a municipal police department is far from perfect.[25] The differences between the two may

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[18] Wayne R. LaFave, *Police Rule Making and the Fourth Amendment: The Role of Courts*, *in* DISCRETION IN CRIMINAL JUSTICE, *supra* note 10, at 214–15 (characterizing early scholars' concerns).

[19] T.W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY 1–11 (1950); *see also* DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 29–30 (2008).

[20] SKLANSKY, *supra* note 19, at 30, 39–43.

[21] *Id.* at 18–21 (discussing pluralist scholars' anxieties about mass politics).

[22] *Id.* at 36–37.

[23] *See* DAVIS, *supra* note 11, at 100, 106, 113–20. Davis argued that individual officers should have discretion to make decisions in individual situations, but should not have discretion to make "policy." *Id.* at 99, 139. He didn't, however, precisely articulate the difference between these two things.

[24] *See, e.g.*, GEORGE E. BERKLEY, THE DEMOCRATIC POLICEMAN 29, 135–36 (1969) (arguing for internal rules with public comment); WALKER, *supra* note 9, at 154 (arguing for better departmental control over individual officers); Wayne R. LaFave, *Controlling Discretion by Administrative Regulations*, 89 MICH. L. REV. 442, 504–08 (1990) (arguing constitutional rules should encourage departments to create regulations).

[25] *See* Ronald J. Allen, *The Police And Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 96–97 (1976).

explain why police departments have, by and large, not heeded the early scholars' recommendations.[26] More significant for my purposes, however, is that early scholars embraced an officer–department dualism. That dualism defined the field and continues to inform how contemporary scholars theorize the discretion problem.

Although early scholars noted that non-white communities might bear the brunt of the discretion problem's harmful consequences,[27] their concern about discretion was not expressed in terms of racial disparity so much as fear of general arbitrariness.[28] Even though contemporary legal scholarship on policing squarely addresses race, it echoes the early scholars' officer–department dualism, positing increased departmental regulation as the answer to the discretion problem.[29] Moments of poorly calibrated officer discretion saturate popular discourse: police shootings, high-speed chases, and the like make for good news. Even scholars who insist on race's centrality in structuring law enforcement priority and protocol tend to reproduce the officer–department dichotomy. Despite being considerably more sophisticated around race than early discretion scholarship,[30] much contemporary criminal procedure scholarship still takes the individual officer as the most relevant unit of analysis.[31] Similarly, contemporary race

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[26] Although most large metropolitan police departments now have policy manuals, those manuals tend to focus on narrow personnel issues and not on enforcement priority or protocol as the early scholars had hoped. *See* GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS 180–83 (1996); *see also* Elizabeth Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 159 (2009) (discussing internal police regulation of undercover operations).

[27] *See, e.g.*, DAVIS, *supra* note 11, at iii, 113–20.

[28] *See id.* at 15. The early scholars' work addressed race in passing. *See id.* at 161–62; JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 77–80 (3d ed. 1994) (describing research based on fieldwork conducted in 1962). The absence seems jarring particularly given the salience of racial unrest at the time and the police's role in fomenting it. *See* THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 301–07 (1968).

[29] *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 506–15 (2003) (noting that organizational culture accounts for officer behavior and arguing that it accounts for use of excessive force); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1140–41, 1156, 1167–69 (2000) (noting that excessive officer discretion leads to racial disparity and excessive force and suggesting department regulations as one possible solution); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 331, 373–74 (1998) (suggesting that officers are inclined to think that black motorists are more likely to have contraband).

[30] *See, e.g.*, Richardson, *supra* note 17, at 2052–53 (arguing that recent psychological theories regarding "implicit bias" explain why police offers may inordinately target minorities); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 987–88 (1999) (using psychological theories of cognition to account for how officers perceive race).

[31] *See* Hadar Aviram & Daniel L. Portman, *Inequitable Enforcement: Introducing the*

scholars tend to characterize departmental responsibility in terms of "omission"—e.g., failing to regulate rogue officers or eradicate "cultures" of racism.[32]

Some scholars have recognized that police departments are significant discretion-wielding actors.[33] That recognition is implicit in work addressing the relationship between arrest disparity and narcotics enforcement[34] as well as in work addressing "overenforcement" in minority communities.[35] Scholars, however, have not systematically analyzed the incidents of departmental discretion or how those incidents specifically relate to egalitarianism. This may be because scholars take their cues from courts and constitutional criminal procedure is not especially concerned with departmental discretion.

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*Concept of Equity into Constitutional Review of Law Enforcement*, 61 HASTINGS L.J. 413, 424 (2009) (noting factors that bear on an officer's decision to arrest or pursue investigation); Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 75 (2009) (noting that "motivating officers to set aside inappropriate biases" is among the key solutions to racially disproportionate targeting); Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 233 (arguing that technological innovation might be a solution to "the potential dangers associated with the discretion afforded to police officers in their day-to-day activities"); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1007 (2009) (criticizing Supreme Court cases for allowing "profiling by law enforcement officers to go largely unchecked"); Maclin, *supra* note 29, at 378 (criticizing the probable cause requirement because it "fails to diminish the discretion possessed by officers, but may actually facilitate arbitrary seizures"); Richardson, *supra* note 17, at 2092–97 (proposing changes in training and hiring that will reduce officer bias); Thompson, *supra* note 30, at 1002 ("Officers must offer race-neutral reasons for their conduct to survive constitutional scrutiny.").

[32] *See, e.g.*, Armacost, *supra* note 29, at 523; Capers, *supra* note 31, at 75; Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 54 (arguing that improper training and supervision lead to racial profiling).

[33] *See* SKLANSKY, *supra* note 19, at 176–77 (noting that massive individual and departmental discretion is unavoidable); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2038 (2008).

[34] Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 265–67 (2002) (noting disparity in narcotics arrests); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1820 (1998) (stating that aggressive narcotics policing in poor, minority neighborhoods tends to be an inexpensive way to generate arrests).

[35] *See* Tracey L. Meares, Place *and Crime*, 73 CHI.-KENT L. REV. 669, 695 (1998) (arguing that overenforcement and underenforcement in minority communities undermine social cohesion and norms); Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside The Legitimate Investigative Sphere,"* 94 CALIF. L. REV. 617, 665 (2006) (proposing a solution to overenforcement that uses non-deputized municipal actors to police minor offenses); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1720, 1772 (2006) (criticizing policy choices that lead to the related phenomenon of underenforcement and overenforcement of criminal laws in minority communities).

B. COURTS

Constitutional criminal procedure's modern origin is rooted in federal courts' efforts to contain racist, mob justice in the pre-civil rights South.[36] In other words, promoting egalitarianism was among the Court's chief purposes in creating modern criminal procedure. Over time, criminal procedure has increasingly focused on how individual police officers differentiate guilty from innocent individuals. Ironically, that preoccupation has led criminal procedure away from questions of egalitarianism.

*1. Fourth Amendment*

The Fourth Amendment regulates officer discretion with a view to limiting searches and seizures that might unduly burden the "innocent."[37] The Court has organized Fourth Amendment jurisprudence around how officers distinguish the prospectively innocent from the prospectively guilty. The Court has done so to the exclusion of how individual officers, let alone departments, distinguish between categories of offenders. And the Court has altogether written race out of Fourth Amendment jurisprudence.

The Fourth Amendment's requirement of "individualized suspicion" highlights why courts conceptualize the discretion problem around individualized citizen–officer interactions. The Fourth Amendment requires that an officer have either "probable cause," or at least "reasonable suspicion based on articulable facts," that a crime has occurred (or will occur) before the officer can legally detain and search an individual or her property.[38] In theory, individualized suspicion ensures a quantum of certainty regarding criminal activity that protects innocent citizens from the inconvenience and indignity of a police search or seizure.[39] Whether individualized suspicion exists is a judgment to be made by a particular

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[36] *See* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1306 (1982); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 56–57 (2000). In the early cases, the Supreme Court used the Fourteenth Amendment to reverse convictions of poor black defendants who were very likely innocent of criminal wrongdoing. *See* Klarman, *supra*, at 53, 57, 61.

[37] *See* William J. Stuntz, *Waiving Rights in Criminal Procedure*, 77 VA. L. REV. 761, 765 (1989) (arguing that the Fourth Amendment is interpreted to protect innocent third parties).

[38] *Compare* Katz v. United States, 389 U.S. 347, 357 (1967) (holding a search conducted without a warrant based on probable cause is per se unreasonable), *with* Terry v. Ohio, 392 U.S. 1, 21 (1968) (holding that individualized suspicion based on articulable facts justifies police intrusion as an exception to the warrant requirement). Because it is a less stringent standard, "individualized suspicion" permits a less intrusive police invasion than does "probable cause." *Terry*, 392 U.S. at 27 (holding that police intrusion on the grounds of "individualized suspicion" must be limited to a search for weapons only).

[39] *See Katz*, 389 U.S. at 357.

officer.[40]

Under the Fourth Amendment, courts are agnostic on whether the police target one group of offenders as opposed to another. The Court has interpreted the Fourth Amendment to be "transubstantive"—i.e., it does not require that intrusions upon liberty or privacy be calibrated to the suspected offense's severity.[41] Once an officer has probable cause to believe that an individual is committing a crime, however minor, the officer may detain and search the suspected offender. The Court has made it clear that it will not use the Fourth Amendment to restrain even outrageous exercises of police authority if there is any basis in the criminal code to think that a crime is occurring.[42] The sheer number of criminal laws means that police have considerable discretion in choosing among different kinds of offenders. As discussed in detail in Part III below, that discretion is not best conceptualized at the individual officer level.

If there is individualized suspicion to believe that any crime has occurred, the Fourth Amendment is agnostic as to whether race animated the police's enforcement decisions.[43] In *Whren v. United States,* the Court held that an officer's subjective motivation for detaining an individual is irrelevant to whether there was a Fourth Amendment violation.[44] In *Whren*, undercover narcotics officers had probable cause to believe that Whren had

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[40] *See, e.g.*, *Terry*, 392 U.S. at 21 ("[T]he *police officer* must be able to point to specific and articulable facts which . . . reasonably warrant [an] intrusion." (emphasis added)).

[41] *See, e.g.*, William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 869–70 (2001) (arguing that the Fourth Amendment search standard should account for the substantive seriousness of the offense being investigated); *accord* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 32–35 (1997) (arguing that the Fourth Amendment standard should be linked to the importance of the government's purpose in searching).

[42] Atwater v. City of Lago Vista, 532 U.S. 318, 325–26 (2001) (holding that the Fourth Amendment permits an officer to arrest for violating a seatbelt law).

[43] *See* Whren v. United States, 517 U.S. 806, 813 (1996).

[44] *Id.* The Court has, in a limited subset of search cases, distinguished between an officer's subjective motivation and a department's "programmatic purpose." *See* City of Indianapolis v. Edmond, 531 U.S. 32, 44–45 (2000) (distinguishing *Whren*). Police may conduct searches without individualized suspicion when the search advances a public welfare function that, in the first instance, is not simply "crime control." *Id.*; *see also* Illinois v. Lidster, 540 U.S. 419, 424–25 (2004) (finding a suspicionless checkpoint stop permissible where the purpose was to obtain information regarding a hit and run that had already occurred); Mich. Dep't of State v. Sitz, 496 U.S. 444, 455 (1990) (finding a suspicionless stop at a drunk driving checkpoint permissible because of the state's interest in preventing unsafe driving); Camara v. Mun. Court, 387 U.S. 523, 539 (1967) (finding a municipal health and safety inspection permissible without individualized suspicion because the purpose was not punitive). No published opinion, however, suggests that a court has ever scrutinized a police department's reasons for arresting one group of offenders versus another under the guise of ascertaining the department's primary purpose.

committed a minor traffic violation. But the facts surrounding the detention suggested that the real reason the officers pulled Whren over was not for the relatively minor traffic violation, but because the officers thought Whren, an African-American male, had narcotics in his vehicle.[45] Departmental regulations prohibited undercover narcotics officers from enforcing minor traffic violations.[46] Whren argued that, absent the officers' stereotype-driven assumption that black motorists are likely to have narcotics, they would not have stopped him at all. The Court rejected Whren's argument that the "pretextual" stop violated the Fourth Amendment.[47]

*Whren* emblematizes the Court's refusal to use the Fourth Amendment to regulate race-based stops or promote adherence to departmental regulations.[48] In *Whren*, the Court made clear that there would be no Fourth Amendment consequence if individual officers violate departmental regulations.[49] This, in tandem with the Court's transubstantive application of the Fourth Amendment, means that the Fourth Amendment has no role in regulating enforcement choices that have racial disparity. In *Whren*, the Court noted that the Fourteenth Amendment is the only constitutional check on such discretion.[50]

### *2. Fourteenth Amendment*

Nominally, courts are willing to address the racial consequences of police discretion under the Fourteenth Amendment, but practically, courts have limited its application by localizing the inquiry to the moment of contact between individual police officers and citizens. Much like in the Fourth Amendment context, the "discretion problem" is cognizable as a Fourteenth Amendment problem when realized at the individual level.[51]

Equal protection claims have been most successfully advanced in the context of traffic stops where police use minor traffic infractions as a device

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[45] *Whren*, 517 U.S. at 809.

[46] *Id.* at 815.

[47] *Id.* at 813.

[48] *See* LaFave, *supra* note 24, at 504–08.

[49] *Whren*, 517 U.S. at 815; *see also* Bertine v. Colorado, 479 U.S. 367, 374 (1987) (approving a police regulation that allowed officers discretion on whether to conduct suspicionless inventory searches).

[50] *Whren*, 517 U.S. at 813 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

[51] The Court has increasingly individualized equality rights in general. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (reasoning that the Equal Protection Clause "protect[s] *persons*, not *groups*"). This is true even in a context like voting rights where no individual could conceivably have "the right" to select the winning candidate. *See* Miller v. Johnson, 515 U.S. 900, 911–12 (1995).

for searching otherwise innocent minority motorists for narcotics.[52] Advocates for the campaign against racial profiling on the nation's highways organized their legal and political message around the indignity and inconvenience of profiling on "innocent" minority motorists.[53] Race is a bad proxy for guilt.[54] And the "driving while black" (DWB) campaign was successful only to the extent that it helped cement the pithy, popular wisdom that profiling is "wrong." The DWB campaign, however, may very well have consolidated popular and legal disinterest in how the police parse the guilty from the guilty.[55]

To challenge how the police parse the guilty from the guilty, a defendant must demonstrate that the police enforced a criminal law against him because of his membership in a protected class, e.g., race.[56] In order to prevail on a "selective enforcement claim," one must prove disparate impact and intentional discrimination.[57] "Disparate impact" means that

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[52] *See, e.g.*, Chavez v. Ill. State Police, 251 F.3d 612, 623–25 (7th Cir. 2001) (describing plaintiffs); ACLU OF N. CAL., THE CALIFORNIA DWB REPORT: A REPORT FROM THE HIGHWAYS, TRENCHES AND HALLS OF POWER IN CALIFORNIA 15–40 (2002), *available at* http://www.aclunc.org/library/publications/asset_upload_file305_3517.pdf (detailing individual profiling narratives); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 564–65 (1997) (describing the allegations in Complaint, Wilkins v. Md. State Police, Civil No. MJG-93-468 (D. Md. 1993)); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 270–75 (1999) (detailing the evidence of innocent, middle-class African-American victims of profiling). By "successful," I mean that such litigation has generated several settlement agreements. *See* Press Release, ACLU of N. Cal., In Landmark Racial Profiling Settlement, Arizona Law Enforcement Agents Agree to Major Reforms (Feb. 2, 2005), *available at* http://www.aclu.org/racial-justice/landmark-racial-profiling-settlement-arizona-law-enforcement-agents-agree-major-refor; Press Release, ACLU of N. Cal., In Landmark Racial Profiling Settlement, California Highway Patrol Agrees to Major Reforms (Feb. 27, 2003), http://www.aclunc.org/news/press_releases/in_landmark_racial_profiling_settlement,_california_highway_patrol_agrees_to_major_reforms.shtml.

[53] *See* Devon Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1034–35 (2002).

[54] *See* BERNARD E. HARCOURT, AGAINST PREDICTION 119 (2007) (noting a study of traffic stops that indicates a higher "hit rate" for white drivers than minority drivers).

[55] *See* R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 593–94 (2003). Even where there is documented racial disparity in stop and search rates, it does not necessarily follow that there is racial disparity in arrest rates. *Compare* Bernard Harcourt, *Henry Louis Gates and Racial Profiling: What's the Problem?* 2–3 (John M. Olin Law & Econ., Working Paper No. 482, 2009), *available at* http://ssrn.com/abstract=1474809 (summarizing profiling studies), *with* Jeffrey Fagan et al., *An Analysis of the NYPD's Stop-and-Frisk Policy in the Context of Claims of Racial Bias*, 102 J. AM. STATISTICAL ASS'N 813, 815–16 (2007) (summarizing New York's stop and frisk study).

[56] *See* United States v. Armstrong, 517 U.S. 456, 465 (1996).

[57] *See id.* (noting that selective enforcement claims are governed by "ordinary equal

there is a universe of "similarly situated" offenders, i.e., offenders who are not members of the protected group *and* against whom the police did not enforce the criminal law at issue. For example, a minority motorist who alleges selective enforcement of the speed limit would have to demonstrate that law enforcement permitted white individuals to speed with impunity while enforcing the speed limit against minority motorists. To succeed, the minority challenger would also have to prove that the police intentionally targeted minority motorists on account of their race. Proving racial animus or "intent" is difficult.[58] It is more difficult to establish a case of selective enforcement than other kinds of discrimination because the Court has made it difficult to even obtain discovery.[59]

The Supreme Court has held that, to obtain discovery for a selective enforcement claim in a criminal case, a defendant must demonstrate that "similarly situated defendants of other races could have been prosecuted, but were not."[60] To satisfy the "similarly situated" requirement, courts have required defendants to produce evidence of offenders who are virtually identical to the defendant in every regard save for race.[61] In *United States v. Barlow*, for instance, the Seventh Circuit elided the requirement for individualized suspicion with that for similarly situated offenders.[62] Barlow argued that federal agents targeted black passengers for investigation at Chicago's main train station. Rejecting his selective enforcement claim, the Seventh Circuit stated that, to be similarly situated, white offenders would have had to engage in the same microbehaviors ("i.e., looking nervously over their shoulders") that the arresting officers claimed drew their attention to Barlow.[63] Such a narrow interpretation of the similarly situated requirement makes it virtually impossible to obtain discovery regarding, let alone to challenge, how police officers weigh various factors in distinguishing different categories of offenders. For example, a criminal defendant might charge that the police more intensively enforce narcotics laws in a particular neighborhood on account of race. There will, however,

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protection standards").

[58] *Id.* at 463–64 (noting the standard for proving a claim is "demanding").

[59] In *United States v. Armstrong*, the Court held that defendants must show disparate impact just to obtain discovery relating to their claim of selective enforcement. *Id.* at 465. The Court made it clear that its purpose in so requiring was to make selective enforcement claims more difficult. *Id.* at 464–66; *see also* United States v. Bass, 536 U.S. 862, 863–64 (2002) (per curiam) (noting that statistics showing blacks are charged with death-eligible offenses more frequently than whites does not constitute evidence of disparate impact).

[60] *Armstrong*, 517 U.S. at 468.

[61] *See* United States v. Barlow, 310 F.3d 1007, 1012 (7th Cir. 2002); United States v. Turner, 104 F.3d 1180, 1185 (9th Cir. 1997).

[62] *Barlow*, 310 F.3d at 1012.

[63] *Id.*

always be a host of racial and non-racial differences that characterize offender populations across geographic boundaries. The Ninth Circuit foreclosed just such an inquiry in *United States v. Turner*.[64] A selective enforcement claim is viable only in the unlikely event that there is a white offender virtually identical to the defendant who the arresting officer chose not to target.[65] As a practical matter, individual officers are rarely in such a position.

Challenging police discretion under the Fourteenth Amendment is most plausible under the Due Process Clause. So-called vagueness challenges are rare, and the Court's opinions further demonstrate the extent to which it has organized criminal procedure around the individual officer–citizen encounter.

The Court will declare a criminal statute void for vagueness if it is insufficiently specific to apprise an ordinary person of the conduct that the legislature has criminalized.[66] That is to say that the vague statute does not adequately distinguish guilty from innocent conduct and "entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat."[67] The Court has been particularly skeptical of anti-loitering-type statutes because of fear that police enforce such laws against minorities and political dissenters.[68] The Court has used vagueness doctrine as a kind of surrogate for equal protection: vagueness doctrine allows the Court to control for prospective racial harms that excessive officer discretion may engender without having to address race squarely.[69]

In its most recent opinion voiding for vagueness, the Court invalidated a Chicago gang-loitering ordinance.[70] The ordinance permitted law enforcement to arrest suspected gang members for failing to disperse on command.[71] The Court rejected Chicago's argument that departmental

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[64] *See Turner*, 104 F.3d at 1185 (noting that similarly situated white offenders would have to be "gang members who sold large quantities of crack"); *see also* United States v. Alcaraz-Arellano, 302 F. Supp. 2d 1217, 1232 (D. Kan. 2004) (explaining that, to be similarly situated, white offenders had to display the same indicators of drug trafficking that minority defendants did).

[65] *See* United States v. Dixon, 486 F. Supp. 2d 40, 46 (D.D.C. 2007) (noting that to qualify as similarly situated offenders must have been overlooked by the same officers that arrested defendant).

[66] *See* Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972).

[67] City of Chicago v. Morales, 527 U.S. 41, 60 (1999) (quoting Kolender v. Lawson, 461 U.S. 352, 360 (1983)).

[68] *See Papachristou*, 405 U.S. at 163.

[69] Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 647 (1997).

[70] *Morales*, 527 U.S. at 51.

[71] *Id.* at 47.

regulations restricting enforcement sufficed to control individual officer discretion.[72] Instead, choices about where and how to enforce accounted for the high number of minority arrests pursuant to the ordinance.[73] Nonetheless, the opinion casts the "discretion problem" as one of individual officers haphazardly enforcing an ordinance that fails to adequately distinguish the innocent from the guilty. However, as noted by Debra Livingston in detail,[74] even narrowly drafted criminal laws permit considerable officer discretion, particularly when considered as an entire body of law.[75] *Morales* is deeply flawed because it assumes both the primacy of individual officer discretion in generating racial harm and that statutory language has the unmediated capacity to constrain police discretion. Neither is true.

## III. DEPARTMENTAL DISCRETION

Scholars have documented that minorities and the poor are more likely to be arrested and incarcerated than non-minorities and the middle class.[76] This Section demonstrates that such disparities are not the simple consequence of law-breaking patterns or individual officers' biases.[77] How arrests are distributed across a jurisdiction is not the aggregate effect of

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[72] *Id.* at 62–64.

[73] *See infra* Part III.B.2.ii.

[74] Livingston, *supra* note 69, at 616–17, 629, 650.

[75] *See infra* notes 142–159 and accompanying text. Ironically, Professor Livingston argues that the answer to excessive discretion in the order-maintenance context is to pass more criminal laws authorizing order maintenance. *See* Livingston, *supra* note 69, at 560, 626, 635–36.

[76] *See, e.g.*, TONRY, *supra* note 5, at 67, 104, 112–13.

[77] Criminology tends to suggest that "attitudinal factors," such as racial animus, do not play a significant role in explaining how patrol officers exercise their arrest authority. *See* Geoffrey P. Alpert et al., *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 CRIMINOLOGY 407, 426 (2005) (concluding that race predicts how officers form suspicions, but not how they make arrest decisions); Allison T. Chappell et al., *The Organizational Determinants of Police Arrest Decisions*, 52 CRIME & DELINQ. 287, 302 (2006) (concluding that situational determinants are more important than structural ones); Robert E. Worden, *Situational and Attitudinal Explanations of Police Behavior: A Theoretical Reappraisal and Empirical Assessment*, 23 LAW & SOC'Y REV. 667, 702 (1989) (noting empirical studies that suggest officers' attitudes do not inform their arrest decisionmaking). Rather, "situational factors" go much farther in explaining officer choices. *See* Douglas A. Smith et al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234, 246–47 (1984) (discussing how class issues and the tendency of police to attach pejorative traits to minority suspects may contribute to racial disparities in arrests); *see also* Scott W. Phillips & Sean P. Varano, *Police Criminal Charging Decisions: An Examination of Post-Arrest Decision Making*, 36 J. CRIM. JUST. 307, 308 (2008) (summarizing previous research on situational factors and arrest decisions).

individual officers' discretionary decisions. Rather, it is departmental choices—choices made by policymakers and administrators—that determine how arrests are distributed. This picture of departmental discretion suggests that many categories of arrests should be conceived as distributive phenomena. Departmental choices create benefits and burdens for individuals and communities. Accordingly, police departments should calibrate those choices to achieve egalitarian results. That discussion is taken up in Part IV.

Subsection A below shows how, in the proactive policing context, departmental policies regarding geographic deployment, enforcement priority, and enforcement tactics determine how the benefits and burdens of policing are distributed. Modern policing relies heavily on arrests as a crime-control strategy. That strategy, coupled with the dramatic expansion of *mala prohibita* offenses, has conferred enormous discretion upon police departments to decide when, where, and by what means (if at all) to enforce criminal laws. Subsection B illustrates how departmental discretion drives inequality in the narcotics and quality-of-life contexts.

### A. DEPARTMENTAL DISCRETION AND PROACTIVE POLICING

The proactive policing model relies on departmental decisionmakers' discretion—i.e., the discretion of policymakers and administrators above the individual officer level—to determine how arrests are distributed across a jurisdiction and, by extension, arrestees' demographic profile. In proactive policing, the police themselves must generate knowledge and enforcement priorities regarding crime. This model is in contrast to "reactive" policing, where the police respond to specific reports of criminal misconduct, typically made by victims or witnesses.

"Vice," public nuisance, and traffic crimes are examples of proactive policing. These crimes do not typically involve a particularized victim. Some related crimes, such as drunk driving, are distinct from vice and minor crimes because they create inordinate risk of generating a particularized victim. In stark contrast, the victims of vice crimes are often complicit in or responsible for the criminalized activity, as in the hapless drug addict who might be cast as a "victim" of narcotics trafficking. Victims of vice crimes may also be members of a community who are exposed to illicit activity's secondary consequences, such as increased property crimes associated with narcotics or the aesthetic harms associated with graffiti.[78] But, such "victims" are not particularized in the same way

[78] Some would suggest that "community policing" is the best way to address the needs of such victims. In theory, community policing "seeks to address the causes of crime and reduce the fear of crime and social disorder through problem-solving strategies and police-

as is typically true in reactive policing.[79] This distinction matters because arrest disparity for victim-initiated crimes has remained relatively stable since the 1970s.[80] Proactive policing, particularly narcotics enforcement, accounts for the massive increases in minority incarceration rates since the 1970s.[81] In the proactive policing context, departmental discretion shapes arrest outcomes.[82]

Departmental discretion operates in three related dimensions: geographic deployment, enforcement priority, and enforcement tactics. Geographic deployment refers to where in a jurisdiction officers are deployed. Urban police departments are typically segmented into precincts.[83] Patrol officers are typically assigned not only to a particular precinct, but to details that have specified geographic boundaries.[84] Specialized units may also be assigned to particular precincts. This, for example, would likely be true for undercover units focusing on small-scale narcotics transactions or other minor crimes.[85] Given the entrenched patterns of economic and racial segregation in most American cities,[86]

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community partnerships." *See* MATTHEW J. HICKMAN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, COMMUNITY POLICING IN LOCAL POLICE DEPARTMENTS, 1997 AND 1999, at 1 (rev. 2003). In practice, however, there is considerable variation and debate as to what community policing means. *See* Edward R. Maguire & Charles M. Katz, *Community Policing, Loose Coupling, and Sensemaking in American Police Agencies*, 19 JUST. Q. 503, 510–11 (2002). While many departments report that they are engaged in "community policing," this claim may only be loosely related to what the department is actually doing. *See id.* at 530. Federal grant-reporting requirements may also have created incentives for departments to report that they are doing community policing when they are not. *See id.*

[79] "Victim" as a social category is, in part, constituted through state action. "Harm" and "victims" seem to be ever widening social categories. *See* BERNARD E. HARCOURT, ILLUSION OF ORDER 212 (2001); *see also* JONATHAN SIMON, GOVERNING THROUGH CRIME 75–110 (2007).

[80] TONRY, *supra* note 5, at 112–13 (explaining that the war on drugs, not violent crime rates, accounts for dramatic increases in the black incarceration rate).

[81] *Id.* at 4, 6 (arguing that federal policymakers in the Reagan and Bush administrations knew racial disparity would result from the federal "war on drugs"); DAVID GARLAND, THE CULTURE OF CONTROL 132 (2001).

[82] *Cf.* WILSON, *supra* note 12, at 86, 100 (arguing that departmental discretion has a marked impact on policing vice and minor crimes).

[83] For example, the New York Police Department (NYPD) is divided into numerous precincts. *See Precincts*, NYPD, http://www.nyc.gov/html/nypd/html/home/precincts.shtml (last visited Aug. 25, 2011).

[84] EDWARD CONLON, BLUE BLOOD 4 (2004).

[85] *Id.* at 149 (noting that anti-crime teams that focus on street-level narcotics operate at the precinct level in the NYPD); Tal Klement & Elizabeth Siggins, *A Window of Opportunity: Addressing The Complexities of the Relationship Between Drug Enforcement and Racial Disparity in Seattle*, 1 SEATTLE J. SOC. JUST. 165, 193 (2003) (noting the same for Seattle).

[86] *See* LAMBERTH, *supra* note 6, at 57; Capers, *supra* note 31, at 47.

different precincts will often encompass populations with different demographic profiles.[87] How police departments distribute police officers among and within precincts will play a significant role in determining the demographic profile of arrestees. This does not simply mean that arrestees will be "whiter" in whiter precincts (or more minority in minority precincts).[88] Officers may be deployed inordinately in a white precinct because its residents have political clout and believe that minorities are largely responsible for crime in the precinct.[89] But the mere presence of police officers in a particular place does not, by itself, mean that there will be arrests at all, let alone minority arrests.[90]

Departmental decisions regarding enforcement priority will determine what kinds of crimes (if any) officers in a particular location will concentrate on. The range of criminalized conduct is vast.[91] It is, therefore, common for police to systematically overlook an entire range of crimes, particularly minor, *malum in se* ones.[92] It may well be that a particular community's mores permit certain forms of criminalized misconduct.[93] If such conduct is also viewed as unimportant by the police department, officers will have little incentive to enforce against it.[94] A departmental decision to begin enforcing against erstwhile unenforced, minor crimes will have a significant effect on individual officers' behavior.[95] This has proven particularly true where a department's choices are part of a wider policy program to interdict "disorderly" behavior under the rubric of "quality-of-life" policing.[96] Another common example is in the narcotics context: departments may elect to focus on particular narcotics over others for a host

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[87] *See, e.g.*, Klement & Siggins, *supra* note 85, at 195–98, 249 nn.39, 42, 45 & 48 (describing demographic profiles of the Seattle Police Department's four precincts).

[88] *See id*. at 197–98, 249 n.48 (noting that 60% of those arrested in Seattle's West Precinct for a drug violation were non-white even though the vast majority of residents in the precinct are white).

[89] *Id.* at 205.

[90] *See, e.g.*, Kimberly D. Hassell, *Variations in Police Patrol Practices*, 30 POLICING 257, 268 (2007) (noting that policing tactics may vary considerably among precincts in one police department).

[91] *See infra* Part III.A.2 (discussing "overcriminalization").

[92] While rarely memorialized in official policy, selective non-enforcement of the criminal code is a long-recognized fact of policing. *See supra* notes 12–18 and accompanying text.

[93] *See* SUDHIR ALLADI VENKATESH, OFF THE BOOKS 79, 359–60 (2006) (noting that residents of some inner city communities accept "backroom negotiation" between police and gang leaders that would not be tolerated in middle-class communities).

[94] *See id.* at 359.

[95] *See* WILSON, *supra* note 12, at 100.

[96] *See infra* Part III.B.2.i (discussing a quality-of-life policing case study).

of reasons, or none at all.[97]

Departmental decisions regarding enforcement priority are tightly braided with decisions about enforcement tactics. The former determines *what* misconduct to focus upon while the latter determines *how* to focus upon it. Making arrests is, in and of itself, a significant tactical choice. Police departments have a host of other tactics available, and maintaining a uniform police presence in a park may better deter homeless people from sleeping there than does arresting the occasional sleeper. A department might elect to increase arrest rates for particular kinds of conduct in different ways. For example, a department might incentivize patrol officers to make more arrests than they ordinarily would.[98] Patrol represents the largest portion of a department's sworn force.[99] Typically, patrol officers tend towards leniency and make fewer arrests than they have opportunities to make.[100] A departmental decision requiring patrol officers to make arrests can very quickly change that, as occurred in New York City when it adopted a version of "broken windows" policing in the 1990s.[101] Departments may also create (or enlarge) specialized, arrest-intensive units for particular categories of offenses. For example, undercover units that focus on street crimes will generate significantly more arrests per officer than does patrol.[102] Choices about whether to carry out one kind of operation or another will also have consequences for the volume and nature of arrests. For example, buy-bust operations targeting street-level narcotics transactions are likely to yield more arrests (but less contraband) over time than warrant-based operations targeting indoor transactions.[103]

The specific processes by which the three modes of departmental discretion operate are often opaque. Take a department's decision to

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[97] *See infra* Part III.B.1 (discussing a narcotics enforcement case study).

[98] *See, e.g.*, Klement & Siggins, *supra* note 85, at 199. This may be why patrol officers are typically the subject of observational criminological studies. *See, e.g.*, Alpert et al., *supra* note 77, at 426; Douglas A. Smith et al., *Equity & Discretionary Justice: Race and Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234, 239 (1984).

[99] *See* DAVID E. BARLOW & MELISSA HICKMAN BARLOW, POLICE IN A MULTICULTURAL SOCIETY 14 (2000) (discussing a study that found patrol officers spend less than 15% of on-duty time fighting crime); *see also* CONLON, *supra* note 84, at 158 ("On patrol, [officers] dealt with the fluid whole of peoples' lives," not just "criminals."). Even calls for service tend not to be arrest-intensive. *See* David Weisburd & John E. Eck, *What Can Police Do to Reduce Crime, Disorder, and Fear?*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 44, 49–51, 57 (2009).

[100] *See* WILSON, *supra* note 12, at 49.

[101] *See infra* Part III.B.2.i.

[102] *See, e.g.*, CONLON, *supra* note 84, at 158 (comparing the author's work on a street-crimes unit to that he did while on patrol).

[103] *See, e.g.*, Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 122–23 (2006).

generate more arrests through its patrol unit.[104] To the extent that patrol officers are directed to make more arrests, it is often unclear as to how that mandate is transmitted. Police departments are loath to admit that officers have "arrest quotas." But, it periodically emerges that a particular department has quotas (or the functional equivalent thereof).[105] Sometimes it is possible to ascertain how senior department personnel make choices about officer deployment and enforcement priority,[106] but that is rare. A host of budget and personnel decisions might account for why one precinct has more undercover street-crimes officers than another.[107]

Neither politics nor law compels police departments to be transparent about how they exercise discretion. The history of modern policing suggests why this is true. Bureaucratization and political insulation are the modern police department's birth traits.[108] Rationalized by a new "crime control" ethos in the mid-twentieth century,[109] the institutional shifts that gave rise to the modern police department generated new capacity for the kinds of choices described above. Bureaucratization and political insulation also deepened departments' commitment to using arrests to achieve crime control while a steadily expanding criminal code increased the opportunities

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[104] *See infra* Part III.B.2.i (discussing quality-of-life policing).

[105] *See* Alice Gendar, *NYPD Captain Allegedly Caught in Arrest Quota Fixing*, N.Y. DAILY NEWS (Nov. 17, 2007, 4:00 AM), http://www.nydailynews.com/news/ny_crime/2007/11/14/2007-11-14_nypd_captain_allegedly_caught_in_arrest_-1.html; Jim Hoffer, *N.Y.P.D. Officers Under "Quota" Pressure*, WABC (March 3, 2010), http://abclocal.go.com/wabc/story?section=news/investigators&id=7307336; John Marzulli, *We Fabricated Drug Charges Against Innocent People to Meet Arrest Quotas, Former Detective Testifies*, N.Y. DAILY NEWS (Oct. 13, 2011), http://articles.nydailynews.com/2011-10-13/news/30291567_1_nypd-narcotics-detective-false-arrest-suit-henry-tavarez; Graham Rayman, *The NYPD Tapes: Inside Bed-Stuy's 81st Precinct*, VILLAGE VOICE, May 4, 2010, at 12; *see also* Michael Murray, *Why Arrest Quotas Are Wrong*, POLICEMAN'S BENEVOLENT ASSOC. MAG. (Spring 2005), *available at* http://www.nycpba.org/publications/mag-05-spring/murray.html.

[106] *See infra* Part III.B.2.ii.

[107] *See infra* Part III.B.2.i. Even those criminologists that study departments' organizational structure offer few clues as to how departmental decisions are made. *See generally* EDWARD R. MAGUIRE, ORGANIZATIONAL STRUCTURE IN AMERICAN POLICE AGENCIES 31, 76, 90, 99 (2003) (hypothesizing as to why different departments have different structures).

[108] *See* SKLANSKY, *supra* note 19, at 35–36; *but see* John P. Crank & Robert Langworthy, *An Institutional Perspective of Policing*, 83 J. CRIM. L. CRIMINOLOGY 338, 342 (1992) (explaining that "legitimacy" is best understood in terms of police departments' relationship with other powerful actors whose decisions affect the continued flow of resources to the department).

[109] "Crime control" here is intended as a narrative about police purpose that police departments project and in which there is widespread belief. John P. Crank, *Institutional Theory of the Police: A Review of the State of the Art*, 26 POLICING: INT'L J. POLICE STRATEGIES MGMT. 186, 189, 194 (2003) (referring to such narratives as mythologies).

for doing so.

*1. Bureaucratization and Political Insulation*

Modern police departments are hierarchical, command-and-control institutions that rely heavily on arrests in order to demonstrate their effectiveness. Paradoxically, in the proactive policing context, arrests often serve as measures for both crime-control exigency and crime-control success.[110]

The modern, urban police department took form in the mid-twentieth century. Its birth history is well documented, so only a caption version is provided here.[111] Well into the twentieth century, urban police departments were cogs in urban machine politics.[112] Police departments were prime sources of patronage jobs.[113] The beat cop was as much a sub-local functionary for the political machine as he was a watchman ensuring some measure of order on his beat.[114] He enjoyed substantial discretion to enforce or not enforce the criminal code as necessary to maintain a level of order consistent with community mores. Depending on the neighborhood, this frequently entailed permitting a fair amount of criminal misconduct.[115] As political functionary, the beat cop was the political machine's agent, gathering and dispensing information for his own benefit and the machine's sustenance.[116] The beat cop had a granular knowledge of the landscape and those who populated it. And arrests were not the preferred, let alone mandated, technique for controlling crime.[117]

Corruption was an endemic feature of watchman-style policing and was among the most salient rallying cries for reformers in the twentieth

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[110] *See* Harcourt, *supra* note 55, at 18 (quoting the former New Jersey attorney general); TONRY, *supra* note 5, at 106.

[111] *See, e.g.*, BARLOW & BARLOW, *supra* note 99, at 19–46; SKLANSKY, *supra* note 19, at 31–36.

[112] *See* BARLOW & BARLOW, *supra* note 99, at 31.

[113] *See id.*

[114] *See* ELI B. SILVERMAN, NYPD BATTLES CRIME 27 (1999) (describing the NYPD in early twentieth century); WILSON, *supra* note 12, at 31–32; *see also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 149–50 (1993) (describing policing in the nineteenth century).

[115] *See* SILVERMAN, *supra* note 114, at 27. This dynamic still prevails in poor, urban communities. *See* VENKATESH, *supra* note 93, at 7–8, 200–04 (arguing that police do not enforce law to the hilt when community mores do not permit it); Natapoff, *supra* note 35, at 1747.

[116] *See* LUC SANTE, LOW LIFE 237–43 (1991) (describing NYPD in the nineteenth century).

[117] *See* WILSON, *supra* note 12, at 49.

century.[118] The structure of big-city politics in the nineteenth and early twentieth centuries encouraged police officers to disregard crime for a price.[119] This was in grave misstep with Americans' increasing anxieties about crime and cities during the post-war period.[120] It was in that vein that the first wave of discretion scholars focused on big-city beat cops.[121] Professor Sklansky has persuasively argued that police reform in the mid-twentieth century resonated with a new ethos of post-war, American democracy: "pluralism." Pluralist democracy checked the potential danger of populist fanaticism by insulating technocratic decisionmaking apparatuses from mass politics.[122]

The chief mandate for reformed police departments was "crime control." And Chief William Parker's Los Angeles Police Department (LAPD) in the 1950s was a progenitor of the new model for urban police departments: a crime-control technocracy.[123] Rigidly hierarchical, it relied on centralized command for its squad-car-bound force. The LAPD's leadership, as would be true of the "reformed" police departments in other big cities, enjoyed considerable autonomy from elected office holders.[124] This arrangement continues to define police departments in many big, American cities.[125] This is not to say that modern police departments

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[118] *See* SANTE, *supra* note 116, at 240 (describing bribery in the NYPD); *see also* GARLAND, *supra* note 81, at 114–15 (describing police "professionalization"); SKLANSKY, *supra* note 19, at 35–36 (discussing the Wickersham Commission and reform movement).

[119] *See* MIKE ROYKO, BOSS: RICHARD J. DALEY OF CHICAGO 107–13 (2d ed. 1988) (describing corruption in Chicago); SILVERMAN, *supra* note 114, at 27–28 (describing corruption in New York City).

[120] *See* GARLAND, *supra* note 81, 152–54; SIMON, *supra* note 79, at 90–93; Stuntz, *supra* note 33, at 2000–05 (discussing "white flight" from cities and fear of crime).

[121] *See, e.g.*, DAVIS, *supra* note 11, at 41 (discussing the Chicago Police Department).

[122] SKLANSKY, *supra* note 19, at 34–38.

[123] *See* SKLANSKY, *supra* note 19, at 36; *see also* MIKE DAVIS, CITY OF QUARTZ 250–51 (2d ed. 2006).

[124] *See id.* at 36–37.

[125] Most police departments are controlled at the municipal level. *See* MATTHEW J. HICKMAN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, LOCAL POLICE DEPARTMENT 1 (2003). And in the largest American cities, police chiefs are appointed, not elected. *See* Pelpia Trip, *More Information on Dallas Police Chief David Kunkle*, CW33 NEWS (Nov. 11, 2009), http://www.the33tv.com/news/kdaf-dallas-police-chief-david-kunkle-story,0,5569866.story; Letter from Frank Fairbanks, Phoenix City Manager, to Jack Harris, Chief of Phoenix Police Dep't (May 5, 2009), *available at* http://www.phoenix.gov/police/public_safety_manager_duties.pdf; Press Release, City of Houston, Mayor Bill White Announces Police Chief Nominee (Feb. 27, 2004), *available at* http://www.houstontx.gov/mayor/press/20040227.html; Press Release, City of San Jose, National Search for Police Chief Ends in San Jose (Jan. 6, 2004), *available at* http://www.sanjoseca.gov/cityManager/releases/2004-01-06_policechief.pdf; CITY OF SAN DIEGO, MANAGER'S REPORT, No. 03-164 (July 25, 2003), *available at* http://docs.sandiego.gov/reportstocouncil/2003/03-164.pdf; *Office of the Chief*, CITY OF SAN ANTONIO POLICE, http://www.sanantonio.gov/sapd/office.asp#LEGAL

operate without political constraint.[126] In order for senior personnel to maintain their positions and for the department to maximize its funding stream, it must demonstrate that it is advancing crime control. The audiences for such demonstrations of legitimacy are typically other institutional actors,[127] although it might on occasion be the general public—especially when a heinous crime captures public attention or when there is a generalized sense that crime is "out of control." In the latter case, creating the impression that a department is controlling crime need not mean that it is actually doing so.[128] Similarly, making arrests need not mean that a police department is actually reducing crime.[129]

Arrest is not only a key instrument in the modern police department's crime-control arsenal, it is an emblem of whether a police department is satisfying its crime-control mandate. Influenced by Fordist theories of industrial efficiency and postwar anxiety about popular democracy,[130] the new policing ethos abstracted crime control from the life of any particular neighborhood. The new ethos engendered what has become a broadly shared sense that making arrests is, itself, tantamount to crime control.[131] That arrests have this symbolic significance flows from the premium modern policing places on both crime control and measurability. Arrests,

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(last visited Sept. 27, 2011); *Office of the Chief of Police*, LAPD, http://www.lapdonline.org/inside_the_lapd/content_basic_view/834 (last visited Sept. 27, 2011); *Profile of Charles Ramsey*, PHILA. POLICE DEP'T, www.phillypolice.com/about/leadership/charles-h-ramsey/ (last visited Sept. 27, 2011); *Profile of Raymond W. Kelly*, NYPD, http://www.nyc.gov/html/nypd/html/administration/headquarters_co.shtml (last visited Sept. 27, 2011); *Superintendent's Office*, CHI. POLICE DEP'T, https://portal.chicagopolice.org/portal/page/portal/ClearPath/About%20CPD/Bureaus/Superintendent%27s%20Office (last visited Sept. 27, 2011).

[126] *See, e.g.*, Crank & Langworthy, *supra* note 108, at 342.

[127] *See id.* (describing these actors as "sovereigns").

[128] *See* Crank, *supra* note 109, at 194 (summarizing research on the creation of specialized gang units).

[129] HARCOURT, *supra* note 54, at 122–25 (explaining that whether racial targeting decreases crime depends on the relative elasticity of different groups to policing).

[130] *See* SKLANSKY, *supra* note 19, at 26.

[131] *See* HARCOURT, *supra* note 54, at 113, 139 (noting that academics have modeled police "success" in narcotics interdiction context by "hit rate," which is the identification of an arrestable offense). This view is not universal. At least some argue that the "community policing" movement expressly questions this view and centralization more generally. *See* KELLING & COLES, *supra* note 26, at 158, 165 (advocating for community policing that entails greater officer discretion vis-à-vis the police department). Community policing was supposed to deemphasize arrests in favor of community engagement and more holistic approaches to community problem solving. *See id*. In practice, though, many police departments have enacted "community policing" in a top-down fashion that is a hallmark of a centralized police bureaucracy. *See* SILVERMAN, *supra* note 114, at 17.

like certain kinds of crime, are readily measurable.[132] Some crime is parsed, catalogued, and studied by severity and distribution.[133] The kinds of crimes that most readily lend to measurement, however, are the same victim- or witness-reported crimes that reactive policing is organized around. The preeminent measure of unreported crime in the United States is the Department of Justice's Crime Victims' Survey.[134] As the title suggests, the DOJ conducts a telephonic survey designed to estimate how many victims there are of certain enumerated crimes. The survey does not include the vice or minor crimes that proactive policing is typically concerned with.[135] On the other hand, the Uniform Crime Reports, which tabulate arrests, do include data for vice or minor crimes.[136]

Arrests play a contradictory and circular role in proactive policing. They are often held out both as proof of the need for crime control and as evidence of police enforcement's efficacy.[137] This contradiction is apparent with narcotics enforcement, where a high minority-arrest rate is used to show that the minority-offense rate is high.[138] Even the Supreme Court has indulged in this circularity.[139] The self-reinforcing nature of arrest rates in the proactive policing context likely entrenches the institutional arrangements that reproduce racial disparity. For example, take specialization. Modern, urban police departments tend to have a range of specialized units for narcotics, gangs, street crimes, domestic violence, and

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[132] *See* HARCOURT, *supra* note 54, at 124.

[133] Data is a hallmark of modern policing; the federal Uniform Crime Records came into existence after World War II. Compstat may represent the culmination of this process. *See* GARLAND, *supra* note 81, at 115 (discussing "computerization" and the use of the information technology in the 1980s and 1990s). Compstat is a data-driven application that allows police departments to track the geographic distribution of criminal incidents and complaints. *See* SILVERMAN, *supra* note 114, at 103–04. The NYPD pioneered Compstat in the 1990s and it has subsequently spread to numerous other urban law enforcement agencies. *Id.* at 123–24. *But see* William K. Rashbaum, *Retired Officers Raise Questions on Crime Data*, N.Y. TIMES, Feb. 6, 2010, at A1 (reporting that precinct commanders and administrators manipulated Compstat data to favorably impact crime rate statistics for their precinct); *but cf*. Justin Fenton, *Baltimore Police Idle Comstat Meetings*, BALT. SUN (Apr. 9, 2010), http://articles.baltimoresun.com/2010-04-09/news/bal-md.ci.comstat08apr09_1_comstat-police-department-s-operations-anthony-guglielmi (reporting on Baltimore Police Department's suspensions of Compstat use due to the "staff friction" it caused).

[134] *See* U.S. DEP'T OF JUSTICE, THE NATION'S TWO CRIME MEASURES (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ntcm.pdf.

[135] *Id.*

[136] *Id.*

[137] Harcourt, *supra* note 55, at 18. It is not state officials that are the only ones responsible for engaging in such circularity. *See, e.g.*, Marc Lacey, *U.S. Cites 175 Arrests of Traffickers in Drug Ring*, N.Y. TIMES, Sept. 18, 2008, at A15.

[138] *See* TONRY, *supra* note 5, at 106.

[139] *See* United States v. Armstrong, 517 U.S. 456, 469–70 (1996).

drunk driving. Arrest and specialization dovetail in that specialized units are often arrest-intensive.[140] Once created, a specialized unit will tend to generate arrests and intelligence that reinforce its very existence. If specialized undercover narcotics units are concentrated in minority neighborhoods, those units will generate arrests and intelligence regarding minority narcotics activity. This may create the impression that minorities inordinately engage in narcotics activity, which, in turn, may impel even more minority arrests.[141]

It is in the proactive policing context that police departments have the greatest discretion in shaping demographic outcomes. This is not just because of modern police departments' institutional structure, but because legislatures have generated a vast range of opportunities for police departments to make such choices.

### *2. Expansive Enforcement Opportunity*

Legislatures have created virtually bottomless pools of prospective offenders by creating evermore *mala prohibita* offenses. Doing so has amplified departmental discretion.

Federal and state criminal codes achieved binding-busting girth in the twentieth century. In most jurisdictions, the number of crimes increased twofold, if not substantially more.[142] Some of the growth is attributable to the need (or perceived need) to regulate new, modern behaviors such as vehicular crimes and identity theft. But legislatures have also demonstrated remarkable capacity for proliferating redundant crimes.[143] Legal scholars have criticized the phenomenon, referring to it as "overcriminalization."[144] The term captures both the sheer number of crimes and the vast swaths of behavior those crimes encompass. And much of that behavior is not *malum in se*, as in paradigmatic crimes such as murder, robbery, and the like. For example, narcotics convictions account for most of the dramatic increase in

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[140] *See, e.g.*, CONLON, *supra* note 84, at 158 (contrasting drug details with patrols); HARRY G. LEVINE & DEBORAH PETERSON SMALL, MARIJUANA ARREST CRUSADE 20 (2008) (stating that one-half of marijuana arrests in New York are made by specialized units); Jennifer R. Wynn, *Can Zero Tolerance Last? Voices From Inside the Precinct*, *in* ZERO TOLERANCE 107, 112 (Andrea McArdle & Tanya Erzen eds., 2001) (noting that a small number of officers made the most arrests in NYPD). *But cf*. Fagan et. al., *supra* note 55, at 815–16, 820 (noting that stops tend not to produce arrests).

[141] *See* HARCOURT, *supra* note 54, at 149 (discussing "ratchet effect").

[142] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 514–15 (2001) (describing state and federal criminal codes).

[143] *See* Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 527–28 (2000) (describing the numerous incarnations of assault and larceny in California).

[144] *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 713 & n.49 (2005) (citing numerous criticisms of the phenomenon).

incarceration rates in the United States since the 1970s.[145]

Overcriminalization increases opportunities for enforcement (and non-enforcement) of the criminal code. Overcriminalization adds an exclamation point to the long-acknowledged fact that complete enforcement of the criminal code is chimerical.[146] This is readily apparent with vice crimes. Take narcotics distribution: at any given moment there are far more individuals engaged in narcotics distribution than law enforcement can possibly apprehend. The facial homogeneity of "narcotics distribution" as codified[147] is belied by the diversity of behaviors to which it applies. It applies in equal measure to the suburbanite who sells cocaine out of his home for cash, the club-goer who gives ecstasy tabs to his friends in exchange for drinks, and the chronically homeless addict who sells crack on the street in kind. Each of these examples, technically, constitutes the same criminal offense: narcotics distribution. Legislatures, however, rarely provide any guidance to police departments on how to prioritize amongst different offenders.[148]

Bloated criminal codes create a set of opportunities to indirectly address social problems, which are not criminalized per se. These opportunities exist in three dimensions. The surfeit of criminal laws allows police departments to arrest individuals (1) whose behavior is perceived as troublesome, but is not directly criminalized, e.g., in the 1990s, the NYPD aggressively used pedestrian and traffic obstruction laws against panhandlers, an activity that was not directly criminalized;[149] (2) who are likely to engage in more serious criminalized behaviors in the future, e.g., avoiding the collateral, violent crimes associated with narcotics is often proffered as justification for aggressively enforcing narcotics laws;[150] and

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[145] *See* GARLAND, *supra* note 81, at 132; *see also* TONRY, *supra* note 5, at 49 (discussing the racial disparities in arrest and incarceration rates, which are particularly pronounced for drug offenses).

[146] *See supra* notes 9–16 and accompanying text.

[147] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11352 (West 2000).

[148] *See* Stuntz, *supra* note 142, at 529–33 (describing incentives that lead legislators to define crimes broadly and leave it to police and prosecutors to exercise enforcement discretion). Mandatory arrest laws in the domestic violence context are the rare exception. Weisburd & Eck, *supra* note 99, at 51.

[149] Tanya Erzen, *Turnstile Jumpers and Broken Windows: Policing Disorder in New York City* app, *in* ZERO TOLERANCE, *supra* note 140, at 19, 35–36 (quoting sections from the NYPD Quality of Life Enforcement Options Reference Guide); HARCOURT, *supra* note 79, at 40, 102, 128 (2001) (recounting when New York City tried to criminalize panhandling, but the ordinance was deemed an unconstitutional violation of the First Amendment).

[150] *See* Klement & Siggins, *supra* note 85, at 211; *see also* HARCOURT, *supra* note 79, at 40, 102, 128 (expounding an analogous rationale for arresting aggressive panhandlers in New York City); Jim Dwyer, *Whites Smoke Pot, but Blacks Are Arrested*, N.Y. TIMES, Dec. 23, 2009, at A24.

(3) who have likely engaged in serious criminal activity that cannot be readily proved, e.g., charging Al Capone with tax evasion.[151]

Legislators have every incentive to leave it to prosecutors and police to liberally exercise their discretion *not to* enforce the criminal code.[152] And courts are almost completely agnostic as to how they go about it.[153] Professor Stuntz has persuasively argued that it is full enforcement's impossibility that enables relentless passage of new criminal laws.[154] Taking a hard-line stance on crime defines political orthodoxy for both the left and right in the United States.[155] Passing a criminal law is the most visible way for legislators to substantiate their commitment to protecting the public, and the impossibility of full enforcement insulates legislators from the risk that new criminal laws will be politically unpalatable to large swaths of middle-class voters.[156] According to Professor Stuntz, "criminal law" is no longer even law per se, but just a "veil" for the distribution of discretionary power to punish.[157]

It is ironic that overcriminalization has amplified law enforcement's discretionary authority because it is the public's distrust of discretion that has animated the increasing sweep and severity of legislatures' criminal enactments. However, the most demonized forms of discretion have been those that the public imagines as introducing leniency into the system.[158] Departmental discretion is not imagined in such terms.[159]

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[151] *See* Stuntz, *supra* note 33, at 2019–20 (describing the Boston Police Department's use of narcotics laws to arrest gang members believed to have been responsible for substantial violent crime).

[152] *See* Stuntz, *supra* note 142, at 575–77.

[153] *See, e.g.*, Whren v. United States, 517 U.S. 806, 818 (1996) ("[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement.").

[154] *See* Stuntz, *supra* note 142, at 575–77 (noting that strict federal sentencing guidelines emblematize hostility towards judicial discretion).

[155] *See, e.g.*, SIMON, *supra* note 79, at 59, 75, 102 (describing America's increasing punitiveness as driving from the political left and right); Stuntz, *supra* note 33, at 2008–10 (same). Even liberal Democrats must declaim their commitment to aggressively expanding and enforcing criminal law. SIMON, *supra* note 79, at 49–52, 58–59 (describing Presidents Kennedy's, Johnson's, and Clinton's uses of crime as a political issue).

[156] Stuntz, *supra* note 142, at 528, 532–33. Most legislators have no interest in compelling enforcement of those portions of the code criminalizing "marginal middle-class behavior." *Id.* at 509; *see also id.* at 516–17 (listing examples of statutes criminalizing trifling conduct).

[157] *Id.* at 599.

[158] SIMON, *supra* note 79, at 165. Judicial discretion in sentencing is a prime example of this phenomenon. *See* GARLAND, *supra* note 81, at 59–61.

[159] *See* GARLAND, *supra* note 81, at 132 (describing increased punitiveness); LaFave, *supra* note 18, at 215 (describing the invisibility of police discretion).

B. PROACTIVE POLICING CASE STUDIES

Police departments enjoy considerable, unchecked authority to make policy as to how criminal laws are enforced. Racial disparity in narcotics and quality-of-life enforcement illustrate how departmental discretion can generate inegalitarian consequences.

The racial disparity in proactive policing arrests cannot, prima facie, be defended in terms of "colorblindness." Scholars acknowledge that proactive policing has driven racial disparity.[160] Both proactive policing and reactive policing generate arrest disparity, but the latter is less troubling because victims play a substantial role in accounting for offenders' demographic profile.[161] In an ideal world, arrestee demographics would perfectly mirror offender demographics. A racial group's overrepresentation amongst offenders would perfectly account for its overrepresentation amongst arrestees.[162] To the extent that crimes of violence are often intraracial,[163] doing justice by minority victims should mean a higher arrest rate for minority suspects.[164] Unfortunately, white crime victims inspire greater sympathy from individual police officers and police departments.[165] All of this suggests that arrest disparity for victim-reported crimes might even be higher without inspiring serious equality concerns.[166] The same is not true in the proactive context.

Arrest disparity in proactive policing is not readily explicable in terms of minority offense rates.[167] The case studies that follow illustrate how

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[160] TONRY, *supra* note 5, at 4, 6, 67 (arguing that differential arrest rate drives differential incarceration rate); Beckett et al., *supra* note 103, at 109; William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 834–35 (2006).

[161] Colorblindness is a fair metaphor for describing the police's enforcement priorities in the reactive context if: (1) individuals across demographic categories consistently alert the police to victimization *and* (2) the police consistently and symmetrically responded to victim-reported crimes. Neither one of these is completely true. There is a gap between reported crime and actual crime. *See* U.S. DEP'T OF JUSTICE, *supra* note 134.

[162] This is a false ideal to the extent that entrenched patterns of economic and social marginalization engender violence and other criminal misconduct. *See, e.g.*, THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 28, at 266–74.

[163] *See, e.g.*, ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS, BLACK VICTIMS OF VIOLENT CRIME 5 (2007).

[164] *See* Terrance J. Taylor et al., *Racial Bias in Case Processing: Does Victim Race Affect Police Clearance of Violent Crime Incidents?*, 26 JUST. Q. 562, 583 (2009) (noting the modestly lower violent-crime-clearance rate for black-on-black crime).

[165] *See* Smith et al., *supra* note 77, at 248; *see also* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 76–135 (1997) (detailing the history of unequal enforcement).

[166] *See* Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 87 (2003) (arguing that equal protection should oblige police to provide equal security from law breakers).

[167] *See* Robert J. Sampson & Stephen Raudenbush, *Seeing Disorder: Neighborhood*

deployment decisions, enforcement priorities, and enforcement tactics yield dramatic racial disparity.

### *1. Narcotics Enforcement*

Departmental decisions regarding geographic deployment, enforcement priority, and enforcement tactics have led the Seattle Police Department (SPD) to arrest an inordinately high number of black offenders. In particular, the SPD's use of arrest-intensive, buy-bust operations in downtown Seattle targeting crack cocaine transactions yielded a black-arrest rate that far exceeds black participation in unlawful narcotics transactions. I focus on Seattle because there is more information about the demographic profile of offenders and police department decisionmaking there than for other cities.[168]

Narcotics convictions in Seattle, like most other places in the United States, have accounted for a dramatic spike in the incarceration of poor people of color since the 1970s.[169] Professor Tonry has argued that the racial disparity engendered by the war on drugs is the direct consequence of differential arrest rates.[170] That is to say that police practices, not prosecutorial or judicial discrimination, tend to account for increases in minority incarceration.[171] Police, who make arrests, determine the pool of offenders that generate indictments and convictions. Typically, it is difficult to find quantitative proof for the claim that narcotics arrests yield unjustifiable racial disparity. This is for two reasons: (1) it is difficult to construct a demographic profile of the offender population, because

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*Stigma and the Social Construction of "Broken Windows*," 67 SOC. PSYCHOL. Q. 319, 323 (2004); Stuntz, *supra* note 33, at 2022 (noting that it is politically easier to enforce laws against poor minority communities); *see also* Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 812–14 (1999) (arguing that the social distinction between "law-abiding" and "lawless" is racialized).

[168] *See generally* Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons From Seattle*, 52 SOC. PROBS. 419 (2005); Beckett et al., *supra* note 103; Klement & Siggins, *supra* note 85. Information is available on narcotics enforcement practices in Seattle in part because of litigation challenging racial disparity and the SPD's narcotics enforcement practices. *See* State v. Johnson, No. 52123-3-I, 2005 WL 353314 (Wash. Ct. App. Feb. 14, 2005). I helped represent the defendants in that litigation for a brief period.

[169] *See* TONRY, *supra* note 5, at 4, 6, 112; Klement & Siggins, *supra* note 85, at 177–78, 191 (noting minority overrepresentation amongst narcotics arrestees in 1999 and a proportional increase in drug arrests in comparison to total arrests throughout 1990s).

[170] TONRY, *supra* note 5, at 112–13.

[171] *Id.* at 51, 74; *see also* WASH. STATE MINORITY & JUSTICE COMM'N, THE IMPACT OF RACE & ETHNICITY ON CHARGING AND SENTENCING PROCESSES FOR DRUG OFFENDERS IN THREE COUNTIES OF WASHINGTON STATE 43 (1999).

narcotics offenders are not likely to offer themselves up for demographers to count, and (2) there is little information on how and why police organize their enforcement priorities and tactics.[172]

African-Americans are dramatically overrepresented amongst those arrested for narcotics offenses in Seattle. From January 1999 until April 2001, 64.2% of those arrested for narcotics delivery in Seattle were African-American.[173] During that period, African-Americans constituted only 8.4% of Seattle's population and were also a minority amongst Seattle's drug users and sellers.[174] Public health data, in conjunction with ethnographic and survey data, tends to suggest that drug sellers are white in roughly the same proportion as drug users in Seattle.[175] Seattle's drug-using and drug-selling populations are significantly whiter than in most other American cities.[176] This is unsurprising given that Seattle's general population is more white than most other American cities.[177] Seattle also is reputed for its heroin problem, and the demographic profile of heroin users in Seattle is overwhelmingly white.[178] The same is, by and large, true for other narcotics.[179] African-Americans are, however, overrepresented among crack users and sellers,[180] but whites still represent approximately half of all crack users in Seattle.[181] This is to say that the demographic profile of drug users in Seattle is largely white. The same holds true for drug sellers.[182] This is consistent with national trends and crack's appeal to poor people.[183] There is little to suggest that crack use represents a

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[172] *See* TONRY, *supra* note 5, at 107 (noting that evidence regarding policing practices tends to be anecdotal).

[173] Beckett et al., *supra* note 103, at 118 (reporting on data collected for methamphetamine, heroin, powder cocaine, crack cocaine, and ecstasy because these drugs are treated comparably for punishment purposes). African-Americans are comparably overrepresented amongst those arrested for drug possession. *See* Beckett et al., *supra* note 168, at 427.

[174] *Id.* at 426.

[175] *Compare* Beckett et al., *supra* note 103, at 119, *with* Beckett et al., *supra* note 168, at 427.

[176] Beckett et al., *supra* note 168, at 424, 427.

[177] *Id.* (stating that 70.1% of Seattle residents are white).

[178] *Id.* at 424, 426.

[179] *Id.* at 427.

[180] *See* Beckett et al., *supra* note 103, at 119.

[181] Beckett et al., *supra* note 168, at 427.

[182] This is not to say that "drug sellers" and "drug buyers" are separate and discrete communities.

[183] On average, Seattle's blacks are significantly poorer than its whites. *See* Office of the Exec., *Per Capita Income in King County by Race/Ethnicity, As a Percent of County Average (2009)*, KING COUNTY (Oct. 16, 2011), http://www.kingcounty.gov/exec/PSB/BenchmarkProgram/Economy/EC02_Income/PerCapitaIncomeRaceChart.aspx (reporting that per capita income of the county's white residents is more than twice that of its

particularly serious public safety problem in Seattle in relation to other narcotics, particularly heroin.[184] Nonetheless, the Seattle Police Department focuses its enforcement energies on crack transactions, and that focus, in turn, drives the stark racial disparity in its arrest rates.

Institutional discretion substantially accounts for the arrest disparity described above. At least one trial-court judge found that the most relevant decisionmakers were at the institutional level.[185] Professor Beckett's work also suggests that institutional-level decisionmaking drives racial disparity in narcotics arrests in Seattle.

The SPD opted for an arrest-intensive narcotics enforcement strategy that relied upon specialized undercover units. As is true for many big-city police departments, patrol does not generate high numbers of arrests (for any sort of offense) per officer in Seattle.[186] Specialized narcotics units, on the other hand, generate high numbers of arrests per officer; this is particularly true of units that focus on street-level narcotics transactions. These units typically focus on "retail" transactions, where other specialized units, often called "Narcotics" or something similar, tend to focus on larger distributors further up the supply chain.[187]

For those officers assigned to work street-level details, making arrests is, quite literally, their daily work.[188] In the SPD, "Anti-Crime Teams" focus on street-level narcotics enforcement,[189] and "buy-bust" is among their staple tactics.[190] In a buy-bust, an undercover officer purchases a small quantity of narcotics using marked currency. Upon completing the transaction, the undercover officer alerts the "arrest team" with a prearranged signal. The arrest team then proceeds to arrest the seller and any individuals who might have helped facilitate the transaction. Although effective at generating arrests, buy-bust operations are labor-intensive. A

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black residents).

[184] Beckett et al., *supra* note 168, at 434.

[185] *See* State v. Johnson, No. 52123-3-I, 2005 WL 353314, at *7 (Wash. Ct. App. Feb. 14, 2005) (affirming the trial court's determination that relevant decisionmakers could be in central command).

[186] *See* Klement & Siggins, *supra* note 85, at 195. To the extent that patrol generates substantial numbers of arrests, it is typically because so many officers are dedicated to such units. Patrol typically generates traffic-related arrests (whether for traffic-related offenses, narcotics, or other contraband), but making arrests is a small fraction of what the unit (and individual officers in the unit) do. *See id.*

[187] *See id.* at 192–94.

[188] *See* CONLON, *supra* note 84, at 157–58 (describing the NYPD).

[189] *See* Klement & Siggins, *supra* note 85, at 195.

[190] *See* Troy Duster, *Pattern, Purpose, and Race in the Drug War: The Crisis of Credibility in Criminal Justice*, *in* CRACK IN AMERICA 260, 265 (Craig Reinarman & Harry G. Levine eds., 1997) (noting prevalence of buy-bust operations in various American cities).

buy-bust in Seattle often involves upwards of ten officers and generates six to ten arrests.[191] The capacity for any precinct to regularly carry out buy-busts depends on whether it has sufficient officer resources to do so and what the enforcement mandate for the particular precinct happens to be.[192]

Historically, the SPD has used undercover buy-bust operations most heavily in the downtown precinct where African-American narcotics sellers are concentrated.[193] The vast majority of narcotics arrests made in Seattle occur downtown.[194] The Anti-Crime Teams in the downtown precinct are afforded the resources and charged with doing narcotics enforcement.[195] Although there is considerable outdoor narcotics activity in downtown Seattle, there is also considerable outdoor activity in other parts of the city, not to mention indoor activity.[196] There are, however, significantly more African-American participants in outdoor drug transactions in downtown Seattle than in other parts of the city.[197] SPD's focus on making outdoor arrests downtown generates the stark racial disparity in narcotics arrests. But use of arrest-intensive specialization and geographic concentration do not entirely account for the disparity.

The SPD appears to target its enforcement effort on crack transactions as opposed to other comparable narcotics.[198] This is particularly surprising given the prevalence of heroin and Seattle's reputation for being a "heroin city."[199] The SPD's narcotics enforcement tactics directed at both indoor and outdoor narcotics transactions inordinately target crack.[200] In fact, Professor Beckett estimates that nearly 50% of all indoor enforcement

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[191] *See* Klement & Siggins, *supra* note 85, at 198.

[192] *See id.*

[193] *See* Beckett et al., *supra* note 168, at 45 (noting that 65% of buy-busts were concentrated in three downtown census tracts); Klement & Siggins, *supra* note 85, at 196 (noting that fewer buy-bust operations occur in the southern suburban areas).

[194] *See* Klement & Siggins, *supra* note 85, at 197–98 (noting that 54% of all narcotics arrests were made in the West Precinct, which includes downtown).

[195] *See id.* at 198.

[196] *See* Beckett et al., *supra* note 103, at 122–23. Indoor enforcement, although more time-consuming in absolute terms because of the warrant requirement, tends to be more "productive" when measured in terms of arrests and contraband seized per officer hour. *Id.* at 121.

[197] *Id.*

[198] *See id.* at 123 (arguing that the focus on crack drives disparity); Beckett et al., *supra* note 168, at 435.

[199] *See* Vanessa Ho, *Drug Is Infiltrating All Walks of Seattle Life*, SEATTLE POST-INTELLIGENCER, Apr. 13, 2000, at A1.

[200] Beckett et al., *supra* note 103, at 123, 125. Beckett's analysis suggests that individual officer discretion also plays a role in targeting crack. Her study revealed that some individual officers tend to ask for crack when carrying out a buy-bust. *See* Beckett et al., *supra* note 168, at 429.

operations in Seattle are for crack-related transactions.[201] And, this far exceeds estimates for the proportion of total narcotics transactions that crack accounts for.[202]

The SPD has offered some justifications for the racial disparity in narcotics arrest rates. Those justifications focus on the uniqueness of the downtown precinct, the heightened dangers created by outdoor narcotics transactions, and the administrative difficulties of carrying out indoor narcotics enforcement.[203] None of these justifications completely explains Professor Beckett's conclusions. Even if they did, it would only beg the question of whether the SPD was fairly balancing competing goals, by asking whether the department's choices to focus on crack, prioritize outdoor transactions downtown, and use arrests (as opposed to other deterrence-based tactics) sensibly promote security, public health, or some other community benefit. That sort of balancing is not for any particular officer to carry out. It is squarely within the department's discretionary ambit.

### *2. Quality-of-Life Policing*

Quality-of-life policing sounds euphemistic when considered from the vantage of the countless minority arrestees against whom it has been directed. Such policing places a high premium on arresting individuals because of their contribution to "disorder" rather than violating any law per se.[204] Again, the three incidents of institutional discretion—geographic deployment, enforcement priority, and enforcement tactics—substantially account for arrest disparity.

Quality-of-life or "order-maintenance" policing has its theoretical mooring in James Wilson and George Kelling's now-iconic "broken windows" argument.[205] Numerous scholars have described it, so only a brief summary is needed here.[206] Wilson and Kelling argued that the dominant crime-control strategies of the late twentieth century failed, not only on their own terms, but more generally in making "citizens" feel more secure.[207] Instead of focusing on isolated instances of crime, the broken

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[201] Beckett et al., *supra* note 103, at 125.

[202] *Id.* (estimating that 25% of total drug transactions are for crack).

[203] *See* State v. Johnson, No. 52123-3-I, 2005 WL 353314, at *7 (Wash. Ct. App. Feb. 14, 2005).

[204] *See* HARCOURT, *supra* note 79, at 128.

[205] James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29.

[206] *See, e.g.*, HARCOURT, *supra* note 79, at 128.

[207] KELLING & COLES, *supra* note 26, at 70–71. The broken windows theory is not necessarily built upon an inclusive conceptualization of citizenship. For a discussion of how

windows theory suggests that law enforcement should minimize "low-level disorder."[208] Panhandling, graffiti, vandalized buildings, street prostitution, low-level narcotics transactions, squeegeeing, and the like engender public fear.[209] Disorder engenders fear, withdrawal from public space, and serious crime.[210] Urban anonymity fuels disorder and is, in turn, fueled by disorder: if left unchecked, the feedback loop yields an ever-accelerating descent into criminogenic pathology.[211] Normatively, the broken windows theory supports the diversion of police resources from 911 call-and-response and incident-driven crime solving to "order maintenance," i.e., the containment and elimination of "low-level disorder."[212] The broken windows theory counsels in favor of directing resources towards proactive policing, in which institutional discretion has the greatest sway in determining arrestee demographics.[213] In its theoretical formulation, however, the broken windows hypothesis does not necessarily counsel in favor of making more arrests.[214] Rather, it stresses the importance of deterring disorder by increasing the police's visible presence in a neighborhood through increased patrols, greater police–citizen contact, and remedying the signs of disorder.[215] Both Kelling and Wilson candidly acknowledge that the exercise of institutional discretion is the key in creating and shaping an order-maintenance policing strategy.[216]

The most notable implementation of order-maintenance policing was in New York City in the 1990s. Contrary to the theory, however, the NYPD opted for an arrest-intensive version of order-maintenance policing dubbed "zero tolerance."[217] During the 1990s, the NYPD dramatically

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broken windows assumes and reproduces relations of class dominance, see HARCOURT, *supra* note 79, at 215–16 (quoting KELLING & COLES, *supra* note 26). That an individual's feelings of "security" should be a priority for law enforcement represents a recent innovation in policing theory and one that also assumes and reproduces relations of class dominance. *See* GARLAND, *supra* note 81, at 152–54.

[208] KELLING & COLES, *supra* note 26, at 15.

[209] *Id.*

[210] *Id.* at 15–16, 20, 242.

[211] *Id.* at 20. The relationships between "disorder" and fear or insecurity were based exclusively on the authors' limited observations and informed conjecture. *See, e.g.*, *id.* at 26–27, 236–37.

[212] *Id.* at 15.

[213] *See* WILSON, *supra* note 12, at 86, 100.

[214] KELLING & COLES, *supra* note 26, at 23, 84.

[215] *Id.* at 19.

[216] *Id.* at 170; *cf.* WILSON, *supra* note 12, at 100 (noting the extent to which institutional discretion shapes vice enforcement).

[217] *See* HARCOURT, *supra* note 79, at 101; Wynn, *supra* note 140, at 107. The proponents of the broken windows theory hardly seemed upset with the arrest-intensive interpretation of their theory. *See* KELLING & COLES, *supra* note 26, at 158–70 (praising NYPD's order-

increased the number of misdemeanor arrests in what was billed as an effort to "retake" New York City's public spaces for law-abiding citizens.[218] Although much-touted for reducing crime in New York City,[219] quantitative evidence suggests that factors other than quality-of-life policing account for the drop.[220] What is clear, however, is that the vast majority of arrestees were minorities.[221] The police assessment was, of course, that arrestee demographics mirror offender demographics.[222] Analyzing how institutional discretion operates in this context goes a long way in undermining that claim.

i. New York City

Upon taking office, Mayor Giuliani and Police Commissioner William Bratton consciously adopted the broken window theory's core premise: proactively enforcing against minor crimes decreases more serious crimes and makes communities feel more secure.[223] The NYPD has elected to enforce against minor crimes using arrest-intensive tactics.

The mayor and police commissioner used the expressions "quality-of life-policing," "zero tolerance," and "order maintenance" interchangeably.[224] Both also believed that aggressively and proactively enforcing against minor crimes would forestall more serious crimes later and create greater "order." New York City's criminal code, like most others, was replete with crimes that typically went unenforced. The Bratton NYPD sought to enforce many of these laws both to interdict the specific behavior criminalized and to contain "disorderly" persons not otherwise engaging in criminalized conduct.[225] The NYPD explicitly prioritized enforcement against low-level narcotics offenses in public, prostitution, graffiti, public intoxication, public urination, and a host of pedestrian and

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maintenance policing strategy).

[218] *See* WILLIAM BRATTON WITH PETER KNOBLER, TURNAROUND 228 (1998); HARCOURT, *supra* note 79, at 10 (noting misdemeanor arrests jumped 50% between 1993 and 1996 despite a constant complaint rate).

[219] *See, e.g.*, BRATTON, *supra* note 218, at 259, 280, 289; Eli B. Silverman, *Crime in New York: A Success Story*, PUB. PERSP., June-July 1997, at 3.

[220] *See, e.g.*, Bernard Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 277 (2006).

[221] Andrew Golub et al., Does Quality-of-Life Policing Widen the Net? 11 (Aug. 13, 2002) (unpublished manuscript), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/198996.pdf.

[222] *See* HARCOURT, *supra* note 79, at 174 (quoting Commissioner Safir).

[223] *See id.* 185–86 (quoting Giuliani); BRATTON, *supra* note 218, at 138, 152, 179.

[224] *See* HARCOURT, *supra* note 79, at 50.

[225] *See* Erzen, *supra* note 149, at 35–36; HARCOURT, *supra* note 79, at 101–02.

traffic violations.[226] Aggressive enforcement against such minor crimes was explicitly premised upon the expectation of discovering crimes unrelated to the reason for arrest or, alternatively, preempting commission of more serious criminal acts later. For example, the man arrested for turnstile jumping sometimes turned out to have an outstanding warrant for failing to appear in court or the man arrested for drinking beer in public sometimes turned out to possess an unregistered firearm.[227]

Departmental decisionmakers in no uncertain terms communicated to line officers that they were to use their arrest power to effect the department's quality-of-life agenda. Many officers understood this mandate to mean arrest first, ask questions later.[228] Departmental decisionmakers, however, did more than just communicate the importance of enforcing against minor crimes. Rather, the NYPD's order-maintenance program embraced an incapacitation scheme that sought to take the "disorderly" off the streets altogether. As discussed below, the designation "disorderly" is far from objective, particularly given the extent to which race and class shape perceptions of disorder.[229] Towards that end, the department privileged high arrest rates as the rubric of success and tailored geographic deployment and used specialized units accordingly.

To execute its order-maintenance scheme, the NYPD relied upon arrest-intensive, specialized units and created new incentives for patrol officers to make more arrests.[230] Targeting low-level narcotics transactions in public spaces was a high priority for the NYPD under Bratton. The department increased its spending on arrest-intensive narcotics units.[231] The department also increased the number of officers and times of day that the specialized units engaged in undercover operations such as buy-bust operations.[232] Later in the 1990s, under Commissioner Howard Safir, the department increased the number of officers in specialized street-crimes units with a principal mandate of weapons interdiction.[233] The street-crimes units made aggressive use of stop-and-frisk tactics in their efforts. The tactics were controversial because of the impact on innocent minority

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[226] BRATTON, *supra* note 218, at 227–29.

[227] *See id.* at 168, 214, 229.

[228] *See* Wynn, *supra* note 140, at 109–11.

[229] *See* Sampson & Raudenbush, *supra* note 167, at 323.

[230] *See* Wynn, *supra* note 140, at 111 (citing George L. Kelling & William J. Bratton, *Declining Crime Rates: Insiders' Views of the New York City Story*, 88 J. CRIM. L & CRIMINOLOGY 1217 (1998)).

[231] *See* BRATTON, *supra* note 218, at 227–28.

[232] *Id.*; *see supra* notes 186–197 and accompanying text (discussing racial disparity generated by Seattle Police Department's reliance on buy-bust operations).

[233] *See* HARCOURT, *supra* note 79, at 50.

pedestrians.[234] The arrestee demographic deserves as much scrutiny. The focus on low-level marijuana arrests has continued to the present day.[235] The NYPD arrested a record 40,300 individuals in 2008 for misdemeanor marijuana offenses.[236] The vast majority of these arrestees were minorities, and specialized undercover narcotics units made nearly half of the arrests.[237] The NYPD's reliance on arrest-intensive specialized units was not simply limited to guns and narcotics.[238] Undercover street-crimes units were directed to arrest individuals for a host of quality-of-life crimes. Among the more notable examples was the apprehension of turnstile jumpers.[239]

Under its zero-tolerance mandate, the NYPD converted patrol into a more arrest-intensive unit than is typically true.[240] The department accomplished this by requiring patrol officers to arrest where they had previously issued citations and by using officer's arrest figures as a measure of occupational success. Many of the misdemeanors that were at the heart of New York City's order-maintenance scheme had erstwhile been offenses for which officers, in their discretion, issued citations or simply ignored.[241] This was true for various "public nuisances" such as drinking, public urination, panhandling, prostitution, and smoking marijuana.[242] The zero-tolerance mandate for such disorderly persons was to take them off the street. Patrol officers were no longer to be lenient upon encountering such persons. Not only did the department instruct patrol officers to make more arrests,[243] but management was supposed to monitor arrest numbers generated by individual patrol officers.[244] At least some patrol officers

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[234] *See generally* ELIOT SPITZER, THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES (1999) (discussing disparate impact of the NYPD's stop and frisk practices on minorities).

[235] *See* Dwyer, *supra* note 150.

[236] *Id.*

[237] *Id.*

[238] Some have argued that the NYPD's aggressive stop-and-frisk policing played a significant role in reducing New York City's homicide rate in the mid-1990s. *See, e.g.*, Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against* Terry v. Ohio, 43 TEX. TECH L. REV. 299, 326–28 (2010) (extrapolating from studies of intensive patrol in specific, high-crime locations).

[239] *See* SILVERMAN, *supra* note 114, at 3.

[240] BRATTON, *supra* note 218, at 227; *see also* Wynn, *supra* note 140, at 111 (citing Kelling & Bratton, *supra* note 230); Judith A. Greene, *Zero Tolerance: A Case Study of Police Policies and Practices in New York City*, 45 CRIME & DELINQ. 171, 175 (1999) (citing BRATTON, *supra* note 218, at 227).

[241] BRATTON, *supra* note 218, at xv, 153, 155, 229.

[242] *Id.* at 228–29; Andrew Golub et al., *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL'Y 131, 131 (2007).

[243] *See* LEVINE & SMALL, *supra* note 140, at 18.

[244] *See* WYNN, *supra* note 140, at 112.

understood this to mean that they should arrest whenever encountering a "disorderly" person.[245] Unsurprisingly, the effects of the new arrest-intensive approach were not evenly distributed across the city.

To understand why misdemeanor narcotics arrestees were inordinately minorities, the NYPD's enforcement priorities and use of arrests must be understood in conjunction with geographic deployment decisions.[246] There is mixed evidence on whether, given an opportunity, any particular individual NYPD officer would elect to arrest a minority offender over a white one.[247] But, as discussed, patterns of residential segregation make individual officer discretion less of a factor than institutional discretion in accounting for arrestee demographics. New York City is no exception. There have been multiple studies focusing on misdemeanor marijuana-possession arrests, a hallmark of zero-tolerance policing.[248] The studies conclude that, from the late 1990s onward, the NYPD has targeted poor minority communities for misdemeanor arrests.[249] Although no one has undertaken a comprehensive study of the geographic distribution of quality-of-life arrests in New York City, the number of minorities involved in marijuana arrests suggests that the NYPD directed arrest-intensive policing at minorities.

The spatial logic of zero-tolerance policing in New York City revolved around the twin axes of high crime and disorder. The two were often elided, but the former was identified through quantitative measures while the latter was not. Under Bratton, the NYPD began using Compstat, a computerized tool for tracking crime reports and arrests.[250] Because Compstat only accounts for reported crime, it did not necessarily create a

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[245] *See id.* at 118–19.

[246] HARCOURT, *supra* note 79, at 10 (discussing misdemeanor arrests in New York City). Researchers have found that the demographic profile of those arrested for quality-of-life type offenses is similar to that of those arrested for more serious offenses. In both cases the profile is largely minority. Quality-of-life policing, thus, did not shift the demographic profile of arrestees. It increased the number of misdemeanors arrestees across the board. *See* Golub et al., *supra* note 221, at 15.

[247] *See* Fagan et al., *supra* note 55, at 820 (noting that officers are more likely to arrest a white individual than an individual of a minority once stop has been effected).

[248] *See* LEVINE & SMALL, *supra* note 140; Golub et. al., *supra* note 242; Andrew Golub et al., *Smoking Marijuana in Public: The Spatial and Policy Shift in New York City Arrests 1992-2003*, 3 HARM REDUCTION J. no. 22, Aug. 4, 2006, *available at* http://www.harmreductionjournal.com/content/pdf/1477-7517-3-22.pdf.

[249] *See* Golub et. al., *supra* note 248, at 23. The study notes, however, that in the early 1990s, the NYPD focused its enforcement efforts in lower Manhattan. The demographic profile of arrestees was nonetheless overwhelmingly minority, suggesting an inordinately minority offender population or racial bias (whether implicit or explicit) on the part of individual officers. *See id*. at 9, 23.

[250] *See* BRATTON, *supra* note 218, at 233–39.

portrait of low-level crimes that are at the core of the broken windows theory.[251] Nonetheless, because the broken window theory posits a direct relationship between quality-of-life crimes and more serious crimes, the department targeted "high crime" areas—low income, minority neighborhoods tend to have higher rates of reported crime than other neighborhoods—for zero-tolerance policing.[252] This targeting was based on the assumption that incapacitating low-level offenders would have ameliorative effects on serious crime, even if particular reported incidents of serious crime went unsolved.

Even more troubling is the extent to which generic notions of disorder animated zero-tolerance policing. The authors of the broken windows theory suggest a highly impressionistic understanding of disorder. Their conception is shot through with middle-class assumptions of what urban decay looks like.[253] While the theory of order maintenance assumes that "disorder" can be objectively distinguished from "order,"[254] both are deeply subjective.[255] Based on survey data, Sampson and Raudenbush have concluded that the racial and economic makeup of a neighborhood go much further in predicting observers' perceptions of disorder than does any objective standard of disorder.[256] One's ability to recognize disorder is a product of cultural cognition and, accordingly, structured by race and class affinities—affinities that one might not consciously espouse.[257] There is limited, anecdotal evidence to suggest that the NYPD, like other police departments, made deployment decisions based on just such perceptions of "disorder."[258]

ii. Chicago's Anti-Gang Ordinance

Although Chicago did not embrace as comprehensive a zero-tolerance policing program as New York City did, it did target gangs with an anti-loitering ordinance that might be considered an example of order-maintenance policing.[259]

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[251] Compstat also creates incentives for police to underreport crimes. *See* Rayman, *supra* note 105.

[252] *See* LEVINE & SMALL, *supra* note 140, at 48 (noting and criticizing NYPD's claim that low-level marijuana enforcement reduces more serious crime).

[253] *See* HARCOURT, *supra* note 79, at 215–16 (quoting Wilson & Kelling, *supra* note 205).

[254] *See id.* at 132–34.

[255] *See generally* Sampson & Raudenbush, *supra* note 167 (discussing the connection between perception and disorder).

[256] *See id.* at 323.

[257] *See id.* at 320.

[258] *See id.*

[259] *See* HARCOURT, *supra* note 79, at 1–3.

The ordinance, enacted in 1992, became the subject of the Supreme Court's opinion in *Chicago v. Morales*.[260] The ordinance empowered the police to order known gang members found "loitering in any public place with one or more other persons" to disperse.[261] The city council assumed that there was a causal relationship between loitering and more serious crimes.[262] It further empowered the police to arrest anyone failing to obey the dispersal command.[263] Before it was finally held unconstitutional, the police arrested 42,000 persons for violating the ordinance.[264] The Supreme Court struck the ordinance down on due process grounds, explaining that the generic prohibition of "loitering" encompasses much "innocent conduct" and thus leaves "lawmaking to the moment-to-moment judgment of the policeman on his beat."[265]

The Chicago gang ordinance highlights institutional discretion's relationship with racial disparity in arrest rates. The department's role in making deployment decisions likely had significantly more to do with the demographic profile of arrestees than did any individual officer's exercise of discretion. A departmental general order directed district commanders to designate those areas, frequented by gang members, in which the ordinance would be enforced.[266] In *Morales*, the Court rejected Chicago's argument that the police department's general order sufficiently limited individual officer discretion.[267] The Court may have been right to reject the argument as a technical matter, but the notion that simply replacing the word "loitering" in the ordinance with more specific words would prevent arbitrary or racially skewed enforcement is implausible. Even without the ordinance, there were already numerous laws on the books that permitted similar kinds of order-maintenance policing.[268] Changing the statute's wording essentially solved the vagueness problem. Fine-grained lexical distinctions in law tend not to have significant impact on an individual

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[260] *See* City of Chicago v. Morales, 527 U.S. 41 (1999).

[261] *Id*. at 41.

[262] City of Chicago v. Morales, 687 N.E.2d 53, 58 (Ill. 1997) (quoting ordinance preamble). Before the Supreme Court, Chicago argued that the ordinance actually prevented a substantial number of more serious crimes. *See Morales*, 527 U.S. at 48. Subsequent research, however, calls this conclusion into question. *See* HARCOURT, *supra* note 79, 104–06 (citing Stephen J. Schulhofer & Albert W. Alschuler, *Getting the Facts Straight: Crime Trends, Community Support, and the Police Enforcement of 'Social Norms*,*'* LAW & SOC'Y REV. (2000)).

[263] *Morales*, 687 N.E.2d at 58.

[264] *Morales*, 527 U.S. at 49 (relying on the City of Chicago's brief).

[265] *Id.* at 60 (quoting Kolender v. Lawson, 461 U.S. 352, 360 (1983)).

[266] *Id.* at 48.

[267] *Id.* at 62.

[268] *Id.* at 52.

officer's decisionmaking in the field.[269] However, personnel policies and orders from senior command do, particularly in the proactive policing context.[270] To the extent that the Chicago Police Department directs officers to go to particular areas and make arrests, individual officers will do so. And to the extent that the individuals loitering on the street are all young men of color, it is inevitable that the arrestees will be as well. The decisive moments of discretionary decisionmaking will have occurred before the arresting officers even leave the precinct station.

*Morales*, like criminal procedure generally, tells us virtually nothing about how to understand the relationship between departmental discretion and race, let alone how that relationship ought to be calibrated to serve democratic principles.

## IV. POLICING POLICE DEPARTMENTS

Distributive justice theory suggests a much more active role for courts and prosecutors in regulating the three dimensions of departmental discretion identified in Part III. In proactive policing, police departments have considerable discretion to ration arrests as they see fit. These departmental choices generate winners and losers, with significant distributive consequences. This Section argues that the law should treat proactive policing arrests as distributive goods. It follows that departmental discretion should be regulated to control for inegalitarian consequences.

### A. ARREST AS A DISTRIBUTIVE PHENOMENON

Distributive justice is concerned with how democratic institutions in a community of autonomous individuals should ensure equal distributions of rights, resources, and obligations.[271] This Subsection will show that arrest

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[269] *See, e.g.*, Stephen D. Mastrofski, *Organizational Determinants of Police Discretion: The Case of Drinking-Driving*, 15 J. CRIM. JUST. 387, 394 (1987) (arguing that the existence of criminal law is only one factor in explaining officer decisionmaking); Meghan Stroshine, *The Influence of "Working Rules" on Police Suspicion and Discretionary Decision Making*, 11 POLICE Q. 315, 320 (2008) (noting that police rely on "rules of thumb" rather than legal specifics).

[270] *See* WILSON, *supra* note 12, at 49.

[271] *See, e.g.*, BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 3–4 (1980); JOHN RAWLS, A THEORY OF JUSTICE 3–6 (Harvard Univ. Press rev. ed. 1999) (1971); *see also* Samuel Scheffler, *The Morality of Criminal Law*, 88 CAL. L. REV. 965, 966 (2000) (noting that distributive justice is preoccupied with institutionally defined entitlements and presumes no desert preceding such). Rawls and Ackerman represent contemporary examples of the social-contract tradition, which presupposes that self-possessed individuals can make agreements. For a discussion of the implicit identity assumptions upon which such theory depends, see Nirej S. Sekhon, *Equality & Identity Hierarchy*, 3 N.Y.U. J. L. & LIBERTY 349, 364–70 (2008).

policy can implicate all three. Arrest policy can impinge upon the right to be free of discrimination, limit economic and social opportunities, and differentially enforce the obligation to abide by the law. Part III showed that arrest is not the inevitable consequence of law-breaking; this is most acutely true in the proactive policing context. There, enforcement opportunities far exceed enforcement resources and departments have substantial discretion to selectively apply those resources. Because this is true, evaluating whether a police department employs its arrest discretion justly is not reducible to the question of whether each individual arrest is carried out lawfully. In contrast to the dominant theories of criminal punishment, distributive justice focuses on whether institutional policies spread costs and benefits across a heterogeneous citizenry in an egalitarian manner. I argue that arrest distribution will be egalitarian when it is in keeping with what the relevant political community *would have* authorized had its members: (1) possessed accurate information regarding the prevalence and distribution of criminal misconduct, and (2) been willing to absorb the range of costs associated with arrests in proportion to actual law-breaking in their immediate social orbit—members of the relevant community would make choices expecting enforcement intensity to impact their family members, neighbors, colleagues, etc., in strict proportion to the actual law-breaking that occurs amongst those individuals.

Dominant theories of the criminal sanction offer little guidance on whether or how egalitarian principles should structure criminal law enforcement. By "dominant," I mean utilitarian, retributive, and expressivist theories.[272] It is beyond this paper's scope to offer more than a cursory account of each. Expressivism and retribution justify criminal enforcement by reference to a community's moral norms, i.e., criminal sanction is the social expression of moral condemnation.[273] Retributive theories typically assume Kantian notions of moral agency and responsibility—the criminal sanction ought to be imposed in accordance with an individual's moral desert.[274] Expressivist theories, on the other hand, view condemnation as a means for communities to reaffirm their own foundational, moral tenets.[275] Morally anchored conceptualizations of the criminal sanction suggest that the police ought to pursue offenders in order

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[272] *See, e.g.*, JOHN KAPLAN ET. AL., CRIMINAL LAW CASES & MATERIALS 31–71 (6th ed. 2008).

[273] *See, e.g.*, JOEL FEINBERG, *The Expressive Function of Punishment*, *in* DOING & DESERVING 95, 99–100 (1970) (citing Henry Hart, *The Aims of Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 408 (1958)).

[274] *See* John Rawls, *Two Concepts of Rules*, 64 PHIL. R. 3, 5 (1955).

[275] *See, e.g.*, FEINBERG, *supra* note 273, at 115 (arguing that punishment is a ritualized disavowal of the offending act).

of moral depravity. Only at the highest level of generality is it true that police departments actually do this; for example, most police departments would prioritize homicide investigations over petty theft investigations. That said, *within* the context of proactive policing, there is little to suggest that police departments are able to rank priorities according to moral exigency. It is unsurprising that moral exigency is an unwieldy mechanism for allocating scarce resources. In a pluralistic society, moral questions are the source of contentious disagreement.[276] For petty narcotics, quality-of-life, and other minor crimes, offenders' moral depravity affords limited justification for imposition of the criminal sanction at all, let alone providing a guide for allocating scarce enforcement resources between different target groups.

At first glance, utilitarian theories seem more promising for regulating police discretion because they are explicitly concerned with costs and benefits. Utilitarianism, however, is largely concerned with maximizing the latter and minimizing the former without regard for how either is distributed across members of a community. Utilitarianism is not preoccupied with whether any particular distribution is, in and of itself, equitable. Even when concerned with policing's negative effects upon disadvantaged populations, utilitarian approaches instrumentalize those effects, casting them in terms of optimal deterrence. For example, some have argued that overly aggressive policing undermines the police's legitimacy in poor neighborhoods and, consequently, erodes residents' commitment to abiding by the law and cooperating with the police.[277] The most salient concern here is preventing law-breaking in poor communities.[278] Distributive concerns are not important in and of themselves, but only to the extent that they consolidate law enforcement's legitimacy and, correspondingly, poor communities' willingness to cooperate with law enforcement. Put more generally, a utilitarian approach to policing will counsel in favor of enforcing against those offenders where deterrence is obtained most efficiently. Such an approach need not target those offenses or offenders that impose the greatest costs upon the relevant community. Utilitarianism, however, does overlap with distributive justice to the extent that both direct institutions to take a broad and thorough account of policies' costs and benefits. Distributive justice, however, seeks to ensure an egalitarian distribution of both costs and benefits as an end, in and of itself.

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[276] *See, e.g.*, Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 433, 477 (1999) (discussing how political dialogue around expressive values is contentious).

[277] *See, e.g.*, Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003).

[278] *See, e.g.*, Meares, *supra* note 35, at 681–82 (arguing that a lack of well-entrenched norms in poor communities accounts for failure to comply with law).

While criminal procedure scholars have noted that policing has a redistributive dimension,[279] no one has systematically analyzed policing through the lens of distributive justice.[280] Professor Stuntz, for example, has noted that policing is redistributive because the most intensive policing does not occur in those neighborhoods that foot most of the tax bill.[281] Professor Sklansky has suggested that policing should promote egalitarianism.[282] Neither, however, specifically addresses what distributive justice theory might require of police departments.[283]

Both utilitarianism and distributive justice require identification of proactive policing's costs and benefits. As shorthand, one might think of security as policing's primary benefit.[284] On the other side of the scale, policing imposes obvious costs on taxpayers and the individuals who are arrested.[285] The analysis of costs, however, should not end there. Policing generates a host of additional, less-obvious costs that recent scholarship has identified. Those costs include arrests' long-term consequences upon arrestees' earning and productive capacities, the collateral consequences upon arrestees' families and communities, and the consequences upon crime control itself.[286] Scholars have persuasively argued that focusing law

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[279] *See, e.g.*, David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1821 (2005); Stuntz, *supra* note 160, at 823, 832.

[280] *See, e.g.*, Stuntz, *supra* note 160, at 832. By the same token, distributive justice theorists have not focused on criminal justice. For example, Bruce Ackerman devotes only a handful of pages to criminal law, *see* ACKERMAN, *supra* note 271, at 83–88, while John Rawls devotes none at all, *see* RAWLS, *supra* note 271. One notable exception is Sharon Dolovich's extrapolation from Rawls. Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307 (2004). Dolovich attempts to make up for Rawls's silence on criminal justice by identifying the foundational agreements that a modified Rawlsian "original position" would have generated regarding criminal justice. *Id.* at 326–28. Dolovich does not speak to arrest policy specifically, but does identify abstract principles governing punishment. *See id.* at 408–09.

[281] *See* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2149 (2002).

[282] *See* Sklansky, *supra* note 279, at 1821–22 (discussing how privatization of police functions threatens egalitarianism).

[283] *See id.*; *see also* Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 326 (2004) (arguing for greater use of cost-benefit analysis in criminal law); Stuntz, *supra* note 280, at 823 (noting that police undertake cost-benefit analysis when deciding where to devote proactive policing resources).

[284] By "security" I mean some objective measure of harm prevention, not simply the amelioration of individuals' subjective fear. The latter tends to be exaggerated and racialized in ways that drive some of the institutional dynamics described in this Article. *See, e.g.*, SIMON, *supra* note 79, at 75–76.

[285] *See* Stuntz, *supra* note 281, at 2164–66.

[286] *See* Brown, *supra* note 283, at 345–48 (summarizing research on costs of criminal law enforcement).

enforcement upon specific groups may actually increase crime rates.[287] That police departments consistently get the cost-benefit balance egregiously wrong, particularly *within* minority neighborhoods,[288] is likely because police overlook the less obvious, less easily quantified costs of what they do. Quantifying these costs presents a challenge to any utilitarian approach, but particularly those that suggest technocratic regulation of the police, i.e., an approach which assumes that a bureaucratic regulator can weigh costs and benefits with some empirical certainty.[289] The problem is that many of the "costs" and "benefits" at play in policing require value judgments about competing priorities. Such costs and benefits, by definition, resist quantification, presenting themselves as incommensurate. That is to say that utilitarian approaches may call for the impossible task of balancing what are essentially expressivist commitments.[290] For example, consider how an administrative rulemaker would balance the costs and benefits of arresting juvenile taggers. What if some of the taggers produce murals that many residents actually think of as public art? How should enforcing against tagging be balanced against other crimes?

Distributive justice recognizes the inherently political nature of such judgments.[291] It is appropriate to leave such difficult, value-laden questions to the political process, so long as that process operates within specified constraints. Distributive justice imposes limitations upon the democratic process such that it cannot be used to advance majoritarian (or parochial) interests that undermine fundamental liberal principles, including egalitarianism.[292] The state may not distribute benefits or burdens on the basis of morally irrelevant social attributes, even if supported by a democratic majority.[293] Thus there must be constraints on the democratic

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[287] *See, e.g.*, HARCOURT, *supra* note 54, at 122–25 (discussing the connection between racial targeting decreasing crime and the dependency on the relative elasticity of different groups to policing); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 6 OHIO ST. J. CRIM. L. 231, 233–36 (2008) (discussing how overenforcing criminal laws may erode community support for the police, which, in turn, leads to increased crime).

[288] *See, e.g.*, Tracey L. Meares & Dan M. Kahan, *When Rights Are Wrong: The Paradox of Unwanted Rights*, *in* URGENT TIMES 3, 20–21 (Tracey L. Meares & Dan M Kahan eds., 1999) (criticizing civil libertarians for focusing on minority crime suspects' rights at the expense of minority crime victims' rights); Meares, *supra* note 35, at 696–702 (arguing that police overenforce narcotics and minor crimes in minority communities, but generally underenforce serious crimes); Natapoff, *supra* note 35, at 1772 (arguing the same).

[289] *Cf.* Brown, *supra* note 283, at 352–57.

[290] *Cf.* Kahan, *supra* note 276, at 427–28.

[291] *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 3–4 (1993).

[292] *See id.* at xxiii–l, 41.

[293] *See* RAWLS, *supra* note 271, at 129.

process that forbid infringement on fundamental rights and equality.[294] As discussed in the next subsection, this notion resonates with a democratic-representation-reinforcing theory of judicial review. Before considering the courts' role in regulating police department discretion, however, one must understand what an equal distribution of arrests should entail.

Distributive justice does not require absolute equality. John Rawls's two principles of justice, for example, permit inequality within roughly defined limits.[295] The first principle requires the "most extensive scheme of equal basic liberties" that are consistent with organized coexistence.[296] The second principle requires that any social and economic inequality be organized such that it inures to everyone's benefit.[297] The first principle permits deprivations of liberty for those who have grievously impinged upon others' basic liberties, so that equal liberties are permitted only as far as is consistent with *everyone* having those liberties.[298] Punishing violent crimes or crimes against property, for example, would be consistent with the first principle.[299] The second principle permits inequality to the extent that those who are uniquely productive or talented may take a larger share of the economic pie if their activities expand the pie for all, particularly the disadvantaged.[300] Distributive justice will be served when democratic institutions solve problems within the bounds suggested by the two principles of justice. That process will generate winners and losers, but distributive justice limits the bases upon which distinctions may be made and the scope of any resulting inequalities.

Distributive justice suggests two basic points about when the political process will yield outcomes consistent with Rawls's two principles of justice: when participants are well-informed and imagine themselves as both the potential beneficiaries and cost-bearers of their political choices.[301] Put differently, popular politics will yield egalitarian outcomes when

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[294] *See* RAWLS, *supra* note 291, at 41.

[295] These two principles anchor Rawls's entire conception of liberal justice. RAWLS, *supra* note 271, at 10–14.

[296] *Id.* at 53.

[297] *Id.*

[298] *Id.* Equal liberty for all, by definition, cannot include the freedom to restrict others' liberty.

[299] While Rawls himself is not explicit about this, Professor Dolovich has persuasively demonstrated that, with slight modifications, Rawls's model generates principles of punishment. Dolovich, *supra* note 280, at 328 (noting modification for partial compliance).

[300] RAWLS, *supra* note 271, at 65–66.

[301] *Id.* at 314–15 (describing an idealized legislative process). The principles of justice are themselves generated by an idealized democratic deliberation. *Id.* at 15 (describing the "original position").

citizens are well-informed and "other regarding."[302] To imagine oneself as a potential beneficiary or cost-bearer requires citizens to have the capacity for imagining themselves in the shoes of their co-citizens, particularly those who are less advantaged.[303] This, of course, is a highly idealized vision of citizenship and political community—these ideals are intended to serve both as a model for our political institutions and for identifying the specific constraints that should be imposed upon such political institutions and processes.[304] Of course our *is* is a far cry from Rawls's *ought*. That is doubly true for the politics of criminal justice.

The actual politics of crime in the United States scarcely resembles these liberal ideals.[305] Professor Stuntz has described America's politics of crime as "pathological."[306] Jonathan Simon has convincingly argued that middle-class voters imagine their political agency in a language of "victimhood" that presupposes a racialized divide between criminals and victims.[307] Political discourse around crime has expressly cast "criminals" as poor minorities—Michelle Alexander has recently described how that has been an express tactic of political campaigns since the 1960s.[308] And it has been a successful tactic—at least, if one imagines "success" in terms of winning office.[309] This politics plays a substantial role in producing the glaring disparities in arrest rates for non-violent crime.[310] Michael Tonry has suggested that the political expendability and rhetorical criminalization of poor, urban minorities made them the most obvious "enemy" in the war

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[302] *See* ACKERMAN, *supra* note 271, at 6–7, 11, 72–73 (explaining that idealized liberalism is one in which individuals work out distributive questions through dialogue without recourse to claims of superiority); RAWLS, *supra* note 271, at 118–19 ("They must choose principles the consequences of which they are prepared to live with whatever generation they turn out to belong to."). In his later work, Rawls described the relation that prevails between members of the political community as "civic friendship." RAWLS, *supra* note 291, at xlix.

[303] *See* RAWLS, *supra* note 271, at 453; *see also* JURGEN HABERMAS, THE INCLUSION OF THE OTHER 96 (1998) (noting that Rawls's "original position" actually describes a state of intersubjective connection between all members of the political community); Dolovich, *supra* note 280, at 332–34 (describing the "veil of ignorance").

[304] *See, e.g.*, RAWLS, *supra* note 291, at 25–26 (noting that the original position is an analytical device and should not be confused with the actual political world).

[305] *See* Dolovich, *supra* note 280, at 430–40.

[306] *See* Stuntz, *supra* note 142, at 505; *see also* Stuntz, *supra* note 33, at 2003 (arguing that the suburbanization-generated white voting block undermines egalitarianism).

[307] SIMON, *supra* note 79, at 76.

[308] MICHELLE ALEXANDER, THE NEW JIM CROW 43–45 (2010) (describing the Republican Party's use of criminal justice as a racial "wedge" issue in the 1960s).

[309] *Id.* at 44–47.

[310] *Id.* at 44–56.

on drugs.[311] This has all played out in a broader context marked by increased hostility to welfarism. Middle-class voters' hostility to welfare has choked public services for the poor and impelled the withdrawal of such state agencies from the poorest neighborhoods. Loic Waquant has convincingly shown that American cities have left it almost exclusively to police to "manage" the poor.[312]

Some criminal justice scholars have posited that local communities approximate the liberal ideal because of the associations between victims, offenders, and other residents.[313] Many have criticized this view of localism.[314] First, it assumes that police departments are politically accountable, which is not necessarily true.[315] Second, "process failure" is not unique to large political communities—majorities and minorities can form in small communities, and the former can be very parochial.[316] And third, police authority is not delimited in sub-local terms, but rather in terms of the larger political unit; i.e., police departments are city or county agencies. Contests over departmental discretion will often implicate the interests of multiple sub-local communities.[317] For example, intensive concentration of police resources in one neighborhood may come at the expense of deploying resources in another or even result in crime being displaced to another neighborhood. There is little reason to think that voters in American cities will behave in a manner that is consistent with

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[311] TONRY, *supra* note 5, at 112–13.

[312] LOIC WAQUANT, URBAN OUTCASTS 12, 30–34 (2008).

[313] *See* Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis Of Criminal Procedure*, 86 GEO. L.J. 1153, 1161, 1182 (1998); *see also* Stuntz, *supra* note 33, at 2031–32 (arguing for more local control over criminal justice system). *But see* Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 385–86 (2001) (arguing that the social norms scholars do not adequately address how to define a "community"); Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467, 508–14 (2003) (criticizing the "social norms" approach to policing the "inner city").

[314] *See, e.g.*, Alafair Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 1005, 1010 (2003); David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarhip*, 87 GEO. L.J. 1059, 1086 (1999) ("[O]nce one looks beyond romanticized invocations of 'the community,' it becomes apparent that no community is united on these issues."); Schragger, *supra* note 313, at 416–58; Weisberg, *supra* note 313, at 508–14.

[315] *See* WILSON, *supra* note 12, at 230–33; *supra* note 125 and accompanying text.

[316] *See* VENKATESH, *supra* note 93, at 72 (noting that community policing meetings favored those with "social clout" in the neighborhood); Schragger, *supra* note 313, at 445 ("[T]he disenfranchised and marginal are almost never considered members of any community.").

[317] *See* Schragger, *supra* note 313, at 470–71 ("[W]hat is called 'local' is always 'interlocal.'").

liberal principles of equality,[318] although a few might.[319]

All of this is to say that popular politics are not likely to act as a meaningful constraint on police departments. It should be up to legal institutions to make up for that.

### B. "POLITICAL FAILURE" AND DEPARTMENTAL DISCRETION

Distributive justice principles suggest that law ought to guarantee an egalitarian distribution of proactive policing's costs and benefits when majoritarian politics cannot. Building on the discussion above, this Subsection shows that courts should ensure that members of the relevant political community (1) bear a fair share of proactive policing's costs, including those associated with arrest, and (2) have full information as to crime's occurrence and the demographic profile generated by proactive policing arrests.

Rawls himself suggested that it may be up to the "judicial virtues [of] impartiality and considerateness" to effect liberal justice in the real world.[320] His ambition was to formulate an "objective" measure of liberal justice that could be held up to our own political institutions.[321] Where they fail to live up to those standards, we might reasonably expect that the judicial virtues would save us. This hope resonates with other liberal conceptions of judicial review,[322] including John Ely's.[323] In his famous formulation, Ely argues that constitutional courts ought to constrain political majorities' ability to systematically impose costs upon a disfavored minority.[324] Because minorities cannot use the political process to challenge such an imposition, Ely argues that constitutional courts should disallow it. This is tantamount to empowering courts to compel the outcome that *would have* resulted had the majority behaved in a manner consistent with idealized democratic fairness—i.e., a manner in which

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[318] *See* Stuntz, *supra* note 33, at 2003.

[319] A number of jurisdictions have passed laws directing law enforcement to de-prioritize enforcement against marijuana possession. *See* Phillip Smith, *Lowest Law Enforcement Priority Marijuana Initiatives Face the Voters in Five Cities*, DRUG WAR CHRON. (Oct. 26, 2006, 5:51 PM), http://stopthedrugwar.org/chronicle/459/marijuana_lowest_enforcement_priority_initiatives.

[320] RAWLS, *supra* note 271, at 453.

[321] *Id.*

[322] ACKERMAN, *supra* note 271, at 311.

[323] JOHN HART ELY, DEMOCRACY AND DISTRUST 136 (1980) (establishing that a distributive scheme that is just requires judicial analysis of the process that produced it). *But see* Kahan & Meares, *supra* note 313, at 1161, 1172 (arguing that police departments are accountable to minorities as evidenced by the number of black political leaders and police officers).

[324] ELY, *supra* note 323, at 151.

individual citizens, given full information, impose only those costs that they themselves would be willing to bear.[325]

The obligation to distribute policing costs equitably ought to require police departments to make arrests in proportion to the rate of specific criminal misconduct in specific areas. Police departments should not arrest offenders in one community while allowing those in another community to engage in similar conduct with impunity.[326] That is to say, law should regulate police departments' geographic deployment, enforcement priority, and tactical policies in order to minimize disparate impact on minority offenders. For example, where drug crimes regularly occur in both wealthy and poor sections of a city, law enforcement should be required to make arrests in both parts of town. The same would hold true for all minor crimes that are the subject of proactive policing. If arrest-intensive units are to be deployed against low-income minorities for narcotics possession offenses,[327] then so should they be against middle-class offenders who engage in comparable conduct. Not only will this outcome, in and of itself, be consistent with egalitarianism, it will also enhance popular democracy's capacity for producing egalitarian results. If the costs of proactive policing are evenly distributed, one would expect the political process to be a greater source of equality-enhancing pressure upon police departments—i.e., if politically empowered citizens dislike the effects of proactive policing in their communities, they are likely to bring their political power to bear on police departments and, perhaps more importantly, on legislatures to criminalize in a more restrained and circumspect way.[328]

An egalitarian mandate also counsels against making geographic deployment and enforcement priority choices based on highly subjective, impressionistic criteria such as the "disorderliness" of a neighborhood. As discussed above, social science research suggests that race and class stereotypes tend to animate such judgments. Because of its emphasis on disorderliness, policymaking regarding quality-of-life policing is particularly vulnerable to bias.[329] An egalitarian mandate would require police departments to make proactive policing arrests in proportion to the actual rates of offense-specific misconduct in particular places. Requiring

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[325] *See id.* at 170 (arguing there is no danger of constitutional infirmity where a majority has elected to impose a cost upon itself).

[326] *Cf.* Stuntz, *supra* note 160, at 826 (suggesting that law ought to pay attention to criminal law outcomes, not just processes).

[327] *See* Dwyer, *supra* note 150.

[328] *Cf.* Illinois v. Lidster, 540 U.S. 419, 426 (2004) (noting police practice that has broad impact is the type that can be challenged through the political process).

[329] *See* Sampson & Raudenbush, *supra* note 167, at 323 (arguing that perceptions of "social disorder" are more a function of race and class assumptions than of actual disorder).

police departments to distribute proactive policing arrests in this manner generates operational questions for which I can only give schematic answers at this point.

Courts and prosecutors should guarantee the equitable distribution of proactive policing arrests. Because they have substantial charging discretion, prosecutors exert indirect control over police departments' arrest choices.[330] If prosecutors refused to charge cases that contribute to an unjustifiably non-white conviction rate, for example, that might induce police departments to calibrate their enforcement choices to produce a balanced arrestee demographic. Prosecutorial regulation, however, is an imperfect solution to the police discretion problem. Whether prosecutors are able to use charging decisions to regulate police discretion will turn on the relationships between the police department, prosecutor's office, and the electorate. Because they are typically elected, prosecutors are likely more influenced by popular politics (and, thus, vulnerable to political failure) than police departments. It may be politically unpalatable for a prosecutor to refuse prosecuting substantial numbers of arrests. Therefore, it is unlikely that many prosecutors would, *sua sponte*, regulate departmental discretion in the manner distributive justice suggests.[331]

Courts should play the central role in preventing police discretion from undermining egalitarianism. Although criminal courts are equipped to interrogate exercises of individual officer discretion, interrogating exercises of institutional discretion will entail a host of evidentiary and other practical challenges. Judging whether a police department distributes arrests equally will require delving into police departments' decisionmaking processes. As with any challenge of institutional practice, such litigation could be time-consuming and complex. Criminal defendants would often have an incentive to litigate such claims in cases generated by proactive policing. It may be that permitting such in the context of ordinary criminal prosecutions would impose a substantial burden on criminal courts; however, this would be most true early on. Over time, one would expect that police departments would begin distributing proactive policing arrests equally or develop the capacity for demonstrating how differential arrest rates were tied to differential offense rates.

Another, less compelling, alternative might be to vest the authority to bring such suits in a federal agency. The Department of Justice currently has the power to bring challenges against police departments that engage in

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[330] *See* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 778 (2003) (describing the relationship between federal prosecutors and enforcement agents).

[331] *See* Stuntz, *supra* note 160, at 836 (suggesting that prosecutors be made to demonstrate equality in charging decisions).

systematic and egregious misconduct.[332] An analogous mechanism to regulate arrest disparity might allow for challenging those police departments that have the worst records for arrest disparity.[333] The federal government is much better equipped than individual defense attorneys or defender agencies to gather the data and develop the metrics that will be necessary to evaluate departmental discretion. However, given the Department of Justice's limited use of § 14141 to date, it is hard to imagine the Department using it aggressively to check arrest disparity, even if empowered to do so.

Critics will charge that courts are ill-equipped to balance competing crime-control priorities and therefore should not second-guess police department policymaking. Judicial review of arrest distribution, however, need not amount to wholesale second-guessing of police department policymaking. Equal enforcement is potentially consistent with a wide array of enforcement (and non-enforcement) decisions. Police departments should be free to constructively use their expertise to make those decisions in the manner that best responds to local conditions, provided that the decisionmaking protocol reflects equality concerns. Courts should ensure the legal adequacy of any given protocol and that any given police department is actually adhering to it. There is a rough precedent for such in the Court's checkpoint cases under the Fourth Amendment. Police are free to carry out stops without individualized suspicion at a fixed checkpoint, provided that it is deployed for a permissible purpose and there is a protocol regulating officer conduct at the checkpoint so as to minimize its intrusiveness for motorists.[334] The Court has not specifically enumerated what kinds of purposes are acceptable or, specifically, how officer discretion is to be circumscribed.[335] Police departments retain discretion to craft such policy as required by circumstances, provided that it is exercised within the general parameters specified by the Court.[336] An equality

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[332] *See* 42 U.S.C. § 14141 (2006); *see also* Stuntz, *supra* note 160, at 828–30 (arguing that § 14141 creates an important tool for regulating police departments).

[333] *See* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2009) (arguing that DOJ ought to enforce § 14141 against the worst offenders first).

[334] *See* Indianapolis v. Edmond, 531 U.S. 32, 47–48 (2000); Mich. Dept. State Police v. Sitz, 496 U.S. 444, 453 (1990) (holding a DUI checkpoint permissible in part because stops were conducted pursuant to department-issued guidelines).

[335] *See Edmond*, 531 U.S. at 44 (leaving it to police departments to use checkpoints for an unspecified range of purposes provided that they are not used for "ordinary crime control"); *see also* Mills v. District of Columbia, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (upholding preliminary injunction of a police checkpoint that restricted entry to a Washington, D.C., neighborhood in which numerous assaults and homicides had occurred).

[336] *But see* Jason Fiebig, Comment, *Police Checkpoints: Lack of Guidance from the Supreme Court Contributes to Disregard of Civil Liberties in the District of Columbia*, 100

mandate would function similarly. Courts would not require that police enforce any specific law in any specific way, but only that whatever proactive policing they elect to do generally comply with an egalitarian arrest mandate.

There are significant informational challenges for regulating arrest disparity. In particular, effective regulation will require developing the capacity for generating three kinds of data: (1) offense rates for particular crimes in particular places, (2) the demographic profile of arrestees by crime and location, and (3) detailed accounts of decisionmaking processes in police departments.[337]

The first category of information presents a challenge in that individuals engaged in criminal activity do not typically offer themselves up for counting. That said, with proper investment, it is possible to develop techniques for estimating offense rates for particular crimes amongst different groups in a city.[338] More than just that, however, it will be important to develop metrics for comparing crime-control exigencies across criminal-law categories. There will be rare instances where police departments enforce against particular crimes while permitting precisely identical conduct in another part of the city. Police departments must often distinguish between offenses that are comparable, but not identical, e.g., crack sales in a park versus ecstasy sales in a club. More difficult yet will be comparisons between different offenses.[339] It may very well be that comparisons between finely distinguished offense definitions is not possible, leaving arrest distribution to be measured in terms of broader categories. Such an approach would recognize that specific manifestations of misconduct might be quite different in one part of a city than from another. However, the categories should not be as broad and impressionistic as "disorderliness."[340] Nor should defining these categories be left entirely to the intuitive judgments of police department policymakers. As discussed above, these judgments should be subject to judicial review.

Departmental discretion receives little attention, in part, because there is little empirical information as to its dimensions and consequences.

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J. CRIM. L. & CRIMINOLOGY 599, 600, 628 (2010) (criticizing the vagueness of Supreme Court cases and arguing that it should review police checkpoints with strict scrutiny).

[337] *See, e.g.*, Stuntz, *supra* note 160, at 834–35 (noting the importance of information collection in the regulation of police).

[338] *See, e.g.*, Beckett et al., *supra* note 168, at 426 (estimating demographic profiles of those engaged in drug selling).

[339] *But see* WILSON, *supra* note 12, at 36 (contending that there is no such thing as like cases in policing).

[340] *See supra* notes 253–258 and accompanying text.

Pointing to a high minority-arrest rate to substantiate a high offense rate is circular.[341] The vast majority of America's police departments do not systematically assemble data for arrests by race, offense, arresting unit, geography, contraband seized, number of individuals arrested in the course of an operation, and number of officer hours required for the operation.[342] Such data would not only help illuminate the relationship between departmental discretion and the demographic profile of arrestees, but also cast light on proactive policing's efficiency. Without such information, it is impossible to address the discretion problem as a matter of equality or efficiency.

Courts can help with the information gap. Among the great triumphs of the racial profiling litigation in the 1990s and early 2000s has been the number of record-keeping agreements that the settlements have engendered.[343] The information has, in turn, spawned considerable research demonstrating the expense and futility of profiling in the traffic context.[344] As discussed above, DWB is not the best analogy for the problem of institutional discretion. It is, however, a study in the cascading political and social effects of increased information flow. DWB litigation generated settlement agreements that bound police departments to collect and disseminate demographic information for traffic stops. That information has, in turn, helped generate greater public scrutiny of police practices.[345] It is only through litigation, whether over Freedom of Information Act requests or substantive challenges to policy or practice,[346] that academics and advocates will secure access to the kinds of data that might prompt greater transparency and information sharing. Increased information sharing by itself is unlikely to guarantee police departments' democratic accountability, but it would be a good start.

If generating the kind of information described above is impracticable or unduly expensive, it may be that randomization offers a second-best approach to achieving equitable arrest distribution. Bernard Harcourt has persuasively advanced randomization as an antidote to racial profiling and, more generally, to the harmful distributive consequences of actuarial,

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[341] *See supra* notes 137–140 and accompanying text.

[342] Even when they do, police departments are not eager to divulge such data. *See, e.g.*, State v. Johnson, No. 52123-3-I, 2005 WL 353314, at *1 (Wash. Ct. App. Feb. 14, 2005).

[343] *See supra* note 52 and accompanying text.

[344] *See* HARCOURT, *supra* note 54, at 118–22 (describing various economic model studies of racial profiling).

[345] *See, e.g.*, Dwyer, *supra* note 150; Sam Skolnik, *Drug Arrests Target Blacks Most Often*, SEATTLE POST-INTELLIGENCER, May 15, 2001, at B1.

[346] *See Johnson*, 2005 WL 353314 at *1. *Cf.* Mark Mazzetti & Scott Shane, *Memos Spell Out Brutal C.I.A. Mode of Interrogation*, N.Y. TIMES, April 17, 2009, at A1 (describing the role of ACLU litigation in compelling disclosure of information).

predictive technique in criminal justice.[347] Randomization entails using a randomized procedure for selecting targets of criminal enforcement, and Harcourt's examples include random numerical ordering of highway vehicle stops or random selection of Social Security numbers for tax audits.[348] Randomization is primarily directed at ameliorating prediction's harmful consequences, such as disproportionate stops of minority motorists.[349] It is not explicitly concerned with policing's benefits. Notwithstanding, randomization could be a step in the direction of managing proactive policing's negative distributive consequences.

The proposal here, of course, breaks dramatically with existing constitutional criminal procedure and equal protection jurisprudence.[350] The Supreme Court has rejected disparate impact as a basis for equal protection claims in most instances,[351] and more generally, it has rejected Ely's vision of the Fourteenth Amendment as a device for correcting political process failure.[352] The Court is also unsympathetic to civil rights claims in which the guilty challenge their convictions.[353] In that vein, the Court is particularly reluctant to entertain selective enforcement claims that question law enforcement discretion.[354] The Court's jurisprudence is symptomatic of guilt's exaggerated moral import in legal and political discussion. That jurisprudence pays no heed to departmental discretion's severe distributive consequences.

## V. CONCLUSION

This Article has sought to reconceptualize policing in two ways. First, courts and scholars ought to consider police departments as discretion-wielding agents separate and apart from individual officers. Departmental discretion determines how arrests are distributed across a jurisdiction. Geographic deployment, enforcement priority, and enforcement tactics are the key dimensions of departmental discretion in the proactive policing

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[347] *See* HARCOURT, *supra* note 54, at 238–39 (noting that any person committing a given crime should have the same probability of getting caught).

[348] *Id.* at 238.

[349] *See id.*

[350] *See supra* Part II.B.

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

[352] *Compare* ELY, *supra* note 323, at 170 (arguing there is no process failure if a majority elects to impose a cost upon itself for the benefit of a minority group), *with* Adarand v. Pena, 515 U.S. 200, 227 (1995) (holding affirmative action programs are to be subjected to strict scrutiny even if the program represents the majority's decision to impose a cost on itself).

[353] *See* Heck v. Humphrey, 512 U.S. 477, 487 (1994) (refusing to permit 42 U.S.C. § 1983 claims that "necessarily imply the invalidity of [a] conviction").

[354] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 465 (1996); Whren v. United States, 517 U.S. 806, 813 (1996).

context. Conceptualizing policing in terms of these choices brings the relationship between departmental discretion and egalitarianism into stark relief. That proactive policing generates a dramatically high minority-arrest rate suggests that police departments are not making these choices with sensitivity to equality. Neither courts nor legislatures give departments direction on how to distribute proactive policing arrests. That should change.

Second, distributive justice principles ought to guide the regulation of departmental discretion in the proactive policing context. Distributive justice suggests that police departments should distribute the benefits and burdens associated with proactive policing in a manner that promotes egalitarianism. John Ely's theory of judicial review and courts' already central role in regulating criminal justice counsel in favor of courts guaranteeing the egalitarian distribution of police departments' punitive power.

Over the last forty years, the United States has relied upon criminal law enforcement as opposed to social welfare policies to address the complicated problems that beset America's poorest urban communities.[355] That political and legal fact makes it all the more pressing that police departments advance crime control in a manner that is equality-enhancing. Distributive justice also lays the groundwork for questioning whether police departments are well-suited for addressing the range of social problems they currently face.[356]

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[355] *See* WAQUANT, *supra* note 312, at 12, 30–34.

[356] For an interesting approach to the question of policing minor crime in poor neighborhoods, see Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere*,*"* 94 CAL. L. REV. 617, 665 (2006) (arguing for a "role-based" solution to the problem of police legitimacy in minority communities that involves reserving "muscular" policing for responding to calls, while relying on other municipal officials to respond to less serious conduct).