Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine

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Abstract

Modern criminal procedure and substantive criminal law are scarce in doctrinal remedies for addressing inequities in the system. This Article presents an argument for invigorating the void-for-vagueness doctrine and rethinking its relevance for addressing the issues of race, inequality, and discrimination in the criminal justice system. Traditionally concerned with the clarity of laws to provide fair warning of prohibited conduct, the vagueness doctrine experienced a marked transformation when the Supreme Court recognized a more substantive value underlying vagueness—preventing discriminatory enforcement. The Article traces the emergence of the equality rationale for vagueness and links the ascendance of this strand with the growing egalitarianism of the First Amendment during the civil rights era. From there, the doctrine was soon grafted to more traditional equal protection concerns. While remaining a doctrine rooted in due process and rule of law principles, the vagueness doctrine became an alternate means of achieving equality within the framework of liberty. In some ways, it offers a more efficacious doctrinal instrument than modern equal protection law for confronting inequality and discrimination in our system of criminal justice. Accordingly, this Article proposes reforms to the Court's current vagueness jurisprudence to maximize its capacity for redressing inequality in the enforcement of criminal laws.

Table of Contents

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INTRODUCTION

The void-for-vagueness doctrine is widely viewed as prohibiting laws defined with insufficient precision in order to provide fair warning to the average citizen.[1] This conception, however, fails to capture a complete picture of the doctrine. During the 1960s, the doctrine underwent a transformation, emerging with an emphasis on the substantive values underlying the doctrine, in particular, equality. The shift from a procedural emphasis on notice to a thicker conception of justice has received little sustained analysis in the literature. This Article explores the emergence of the substantive aspect of vagueness—one that is avowedly concerned with equality in the administration of justice—and examines its role in mediating the discourse of inequality and discrimination. In analyzing the evolution of this aspect of the vagueness doctrine, my aim is to investigate how the doctrine informs an alternative means of enforcing equality that is more accessible than modern equal protection law for judicial decisionmaking and the realization of constitutional values.

Animated by the principle of legality, the vagueness doctrine is rooted in due process concerns that a statute so indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application" is contrary to the notion of fair play and settled rules of law.[2] Of course, the way the vagueness doctrine actually operates reveals that the kind of notice contemplated is more constructive than actual, lending a fictional quality to the notice rationale and suggesting other reasons for the doctrine's continuing relevance.[3] The vagueness doctrine has dual aspects—it is a procedural rule concerned with fair notice, on one hand, and a substantive rule concerned with equality, on the other. Stated in its modern formulation, the vagueness doctrine "requires that a penal statute define the

[1] *See, e.g.*, Anthony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); John C. Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

[2] Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926).

[3] For example, notice can be achieved by the mere publication of the statute's text; there is no deeper obligation on the state to inform people of the law's content or meaning. Even more telling is the settled rule that the clarity of a statute need not be manifest on its face and that subsequent judicial interpretation can cure a statute's imprecision. *See* Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered."). *See also* Skilling v. United States, 130 S. Ct. 2896, 2929–30 (2010); Boos v. Barry, 485 U.S. 312, 330–31 (1988); Chaplinsky v. New Hampshire, 315 U.S. 568, 573–74 (1942).

criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[4] In the latter 20th century, the Supreme Court had gone so far as to privilege the substantive strand of the doctrine as "perhaps the most meaningful aspect of the vagueness doctrine."[5]

In his classic treatment of the vagueness doctrine, Anthony Amsterdam described the influence of other considerations beyond fair notice underlying the Court's vagueness decisions, among them, a concern with prejudicial or overreaching exercises of state authority.[6] Amsterdam argued that the Supreme Court utilized the vagueness doctrine "for curbing legislative invasion of constitutional rights," hypothesizing that the vagueness doctrine acts expressly as a "buffer zone" of protection against potential infringement of First Amendment and other constitutional freedoms.[7] Although Amsterdam's work insightfully described vagueness as an instrument of federal protection of individuals' private interests, his work analyzed neither the formative development of the doctrine during the civil rights period nor its efficacy as a tool for mediating the sensitive issues of race within the modern era courts.

Criminal procedure and substantive criminal law have little to offer in the way of addressing inequities in the system. Current Fourth Amendment doctrine, for instance, precludes any real inquiry into discriminatory enforcement of the law. The Court made this emphatically clear in *Whren v. United States* when it declared that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[8] There are consequences to allocating claims of discriminatory enforcement to the Equal Protection Clause. Because the Court has erected stringent standards in the equal protection doctrine, the barriers to making successful claims are formidable. Enforcing these standards also means that equal protection claims are addressed in rigidly atomistic terms, which exclude a more searching inquiry into broader-based harms.

Given the broad discretion currently enjoyed by criminal prosecutors, concerns of discrimination are particularly acute in the criminal justice system. The modern era has seen an accretion of discretionary power to law enforcement and prosecutors, which originated with reforms to limit the discretion held by judges and corrections authorities that were perceived as favoring criminals. The upshot of these reforms has been to "transfer[ ] effective discretion to law enforcement and prosecutors to decide when to

[4] Kolender v. Lawson, 461 U.S. 352, 357 (1983).
[5] Smith v. Goguen, 415 U.S. 566, 574 (1974).
[6] Amsterdam, *supra* note 1, at 80. R
[7] *Id.* at 75, 87–88.
[8] 517 U.S. 806, 813 (1996).

invoke the decision-making process."[9] Our system has striven rather unsuccessfully to minimize the potential for abuse primarily by erecting safeguards that review prosecutorial and law enforcement decisions for adherence to procedural values. But criminal procedure's protections seem almost ineffectual against lawmakers' unremitting drive to make new crimes that in turn expand prosecutors' charging powers. As William Stuntz observed, "[t]he greater the procedural hurdles the government must overcome, the greater the incentive to widen the criminal net in order to evade them."[10] The vagueness doctrine comes in as a substantive form of constraint to void overreaching laws that trench upon the values of equality and fairness.

This Article argues for conceptualizing vagueness as an instrument for vindicating constitutional principles such as equality. I argue that the vagueness doctrine is an effective tool for examining bias in governmental exercises of authority and taking a systemic approach to remedying discrimination in the criminal justice system.

The Article proceeds in four parts. In Part I, I examine how the vagueness doctrine evolved to encompass a specific interest in combating discriminatory enforcement and took a turn towards vindicating substantive values. The doctrine's transformation is linked to the Court's commitment to equality during the struggle for civil rights. Against this historical backdrop, the vagueness doctrine was often engaged by the Court to decide cases having a racial dimension without directly confronting the racism that gave rise to the controversy.[11] Notably, the decisive turn in the vagueness doctrine was influenced and shaped by the language and rationale of the First Amendment. The ascendancy of this element shifted the doctrine from safeguarding procedural interests to enforcing substantive norms.

Part II examines the difficulties that current equal protection doctrine presents to the vindication of equal rights. In particular, the Court's general reluctance to scrutinize state discretionary authority, coupled with the doctrine's exacting intent standard, hinders a searching inquiry of alleged discriminatory state action.

In Part III, I consider the particular fitness of vagueness as a doctrinal instrument for addressing discriminatory state action in contrast to the current doctrine of equal protection. The vagueness inquiry is concerned with the risk of discriminatory enforcement created by a specific statute. It is a prospective, hypothetical inquiry that imagines indefinite laws as jeopardizing our democratic ideal of equal treatment under the law. Unlike equal protection, the vagueness doctrine does not require judges to single out particular institutional actors for acting unlawfully in order to remedy discrimi-

[9] JONATHAN SIMON, GOVERNING THROUGH CRIME 101–102 (2007).

[10] William J. Stuntz, *Substance, Process and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 19 (1996).

[11] *See infra* Part I.B.2.

nation. Consequently, the vagueness doctrine offers a less divisive and fractious doctrinal framework for examining overreaching and discriminatory exercises of state power.

Part IV suggests that the Court's current vagueness doctrine should be reformed so as to enhance inquiry into issues of unequal enforcement rather than overemphasize textual clarity. I conclude with some thoughts about the role of the vagueness doctrine for achieving synthesis in offering a doctrinal space for examining issues of discrimination outside of the equal protection context. Vagueness decisions that affirm the primacy of equality have an expressive dimension. These decisions reassert limits on the reach of state authority and vivify the importance of the values of equality and non-discrimination in the administration of our criminal laws.

I. Making the Connection: Indefiniteness and Discrimination

In this part, I provide a descriptive account of the Court's success in bridging the rule of law requirements with a substantive commitment to equality. I argue that the rise of the equality rationale in the vagueness doctrine has strong historical roots, grounded in the Court's prominent role in the movement to eradicate racism from American institutions. Following its decision in *Brown v. Board of Education*,[12] the Court faced sustained attacks challenging its ability to protect *Brown* and its capacity for confronting other forms of racial inequality.[13] Facing a crisis of legitimacy, the Court reached for a different strategy that indirectly addressed inequality by means of neutral constitutional standards that did not speak of race, but were nonetheless effective in attacking racially motivated state policies and actions.[14] Vagueness emerged as a powerful doctrinal tool by which the Court could extend its commitment to equality yet abstain from provoking too much open conflict on questions of race. This period crystallized the Justices' view of vagueness as a doctrine with distinctive merits for addressing systemic problems that could not otherwise be redressed more directly.

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[12] 347 U.S. 483 (1954).

[13] Lucas Powe, Jr., The Warren Court and American Politics 85 (2002) (explaining that the attacks against the Court over *Brown* accused the Justices of undermining the states and impugned the Justices as bad lawyers who had "difficulties in properly interpreting the Constitution"). *See also* Michael Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48, 96 (2000) (explaining that the Court's *Brown* decision "crystalliz[ed] . . . southern white resistance to changes in the racial status quo" and "encouraged a racial extremism that rendered it profitable for southern politicians to support, or at least to tolerate, violence against peaceful civil rights demonstrators").

[14] Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority:* Williams v. Georgia *Revisited*, 103 Yale L.J. 1423, 1472 (1994) (describing the backlash effect of *Brown* and the Court's tactics for dealing with race cases without inviting direct confrontation with white southern elites). In *The Negro and the First Amendment*, Harry Kalven provides a compelling account of how this strategy influenced the development of modern First Amendment jurisprudence. Harry Kalven, The Negro and the First Amendment (1965).

Conceptually, a logical connection exists between the principle of legality and the substantive notion of equality. In *Screws v. United States*, Justices Roberts, Frankfurter, and Jackson provided a succinct articulation of the necessity for definite criminal laws to limit the potential for abuse by the government: "As misuse of the criminal machinery is one of the most potent and familiar instruments of arbitrary government, proper regard for the rational requirement of definiteness in criminal statutes is basic to civil liberties."[15] A law written expansively, leaving the contours of its meaning to the predilections of those who enforce the laws, cannot operate equally on every person in the community.[16] Discrimination is a manifestation of the arbitrary exercise of power. To be sure, adherence to the rule of law does not necessarily ensure equality when the substantive content of the rules does not comport with any meaningful notion of equality. However, John Jeffries noted a linkage between the rule of law and the commitment to equality that is embedded in our constitutional heritage because our Constitution demonstrates a commitment to equal protection by "condemn[ing] discrimination on a number of grounds."[17] Jeffries explains, "[g]reater conformity to the rule of law discourages resort to illegitimate criteria of selection and enhances our ability to discover and redress such abuses when they occur."[18] In sum, the rule of law enforces a form of transparency in the way government wields power, requiring accountability in the legal rules and policies that the state enacts upon its citizens.

A. Papachristou *Revisited*

The notion that the vagueness doctrine comprehends a prohibition against discriminatory enforcement received its clearest articulation in the classic case of *Papachristou v. City of Jacksonville*.[19] This case has been lauded as a triumph of the rule of law.[20] Thus, I begin with this 1972 watershed case before reaching back to consider the evolution of the doctrine that

[15] 325 U.S. 91, 149 (1945) (Roberts, Frankfurter & Jackson, JJ., dissenting). In *Screws*, the Court evaluated the clarity of a federal statute used to prosecute officials in Georgia for the brutal beating and death of a young black man. Defendants appealed, arguing that the Civil Rights Act was too vague in criminalizing all violations of the Fourteenth Amendment. The Court agreed that such a construction would render the law lacking in any "ascertainable standard of guilt." *Id.* at 95 (majority opinion). Accordingly, the Court narrowed the Act and ordered a new trial under its limiting construction. *Id.* at 100, 113.

[16] Herbert Packer observed in 1968 that prohibiting ex post facto lawmaking has a "core of good sense," but a more sophisticated view is that this injunction is "necessary in order to secure evenhandedness in the administration of justice and to eliminate the oppressive and arbitrary exercise of official discretion." HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 80 (1968).

[17] Jeffries, *supra* note 1, at 213. **R**

[18] *Id.*

[19] 405 U.S. 156 (1972).

[20] Cass Sunstein designates the void-for-vagueness doctrine as "among the most important guarantees of liberty under law" and *Papachristou* as "the great case . . . which is exemplary on the point." CASS SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 102 (1996).

brought the Court to this point and beyond. At issue in *Papachristou* was the constitutionality of Jacksonville's archaic anti-vagrancy ordinance.[21] The ordinance criminalized a raft of public incivilities from begging, loafing, gambling, and juggling to wandering or strolling about without a lawful purpose.[22] The Court explained that the ordinance was void for vagueness, "both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute' and because it encourages arbitrary and erratic arrests and convictions."[23]

Writing for the Court, Justice Douglas provided a striking factual background that specifically noted the racial makeup of the defendants:

> Papachristou and Calloway are white females. Melton and Johnson are black males. . . . At the time of their arrest the four of them were riding in Calloway's car on the main thoroughfare in Jacksonville. . . . The arresting officers denied that the racial mixture in the car played any part in the decision to make the arrest.[24]

Justice Douglas described another defendant as "a part-time produce worker and part-time organizer for a Negro political group."[25] Aside from describing the race of the defendants in the facts, the Court did not explicitly refer to or discuss the possibility of discrimination behind the officers' conduct.

Although the Court's analysis never confronted the matter of race directly, *Papachristou* is today generally viewed as a case about police racism.[26] As one commentator observed, the decision "is all about low-level interactions between police and the policed in urban areas—and about interactions between police and minorities, in particular."[27] This reading is confirmed by conference discussions in which the Justices emphasized the danger inherent in laws that gave wide latitude to "police or judges . . . to go

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[21] The City of Jacksonville's ordinance provided:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

Papachristou, 405 U.S. at 156–57 n.1.

[22] *Id.*

[23] *Id.* at 162 (citations omitted).

[24] *Id.* at 158–59.

[25] *Id.* at 159.

[26] *See* Stuntz, *supra* note 10, at 21 (describing *Papachristou* as facing the problem of "race-based criminalization" that was more a substantive, rather than a procedural, issue). R

[27] Tracey Meares, Terry *and the Relevance of Politics*, 72 ST. JOHN'S L. REV. 1343, 1345 (1998).

after anyone they do not like."[28] *Papachristou* sounded the death knell for state vagrancy laws passed or enforced by Southern states to perpetuate white supremacy during the Jim Crow era.[29] Though the doctrine is formally concerned with many forms of abuse, it has been applied with broader concerns of racial oppression in mind and has, in fact, operated as a powerful means of sweeping away laws used to enforce racial apartheid.

In discussing the defects of an imprecise law, the Court focused on the law's effect on minority and disadvantaged groups—the poor, the dissenters, the nonconformists, the unpopular—without singling out blacks in particular. Even though the facts of the case suggested race discrimination, the Court avoided emphasizing it. Invoking the writings of iconic American poets, Justice Douglas described strolling, walking, wandering, and loafing as "historically part of the amenities of life" for all Americans, which "have been in part responsible for giving . . . the feeling of independence and self-confidence, the feeling of creativity."[30] Moreover, they have "dignified the right of dissent and have honored the right to be nonconformists."[31] Raising the threat posed by a statute that grants "unfettered discretion" to the police, the Court warned that such a law "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.' "[32]

Although deploying the language of liberty and freedom from oppression, the Court was acutely concerned with racial equality.[33] The Court was well aware that the Jacksonville police were using the vagrancy ordinance to harass minority groups. Douglas plainly noted that people "generally implicated by the terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts."[34] In concluding the opinion, Justice Douglas linked the rule of law principle that animates vagueness to a substantive commitment to equality in the government's exercise of its powers:

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[28] William N. Eskeridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2230 (quoting Douglas Conference Notes for *Papachristou* (Dec. 10, 1971) *in* William O. Douglas Papers, Library of Congress, Container 1559 (O.T. 1971, Opinions, Misc. Mems. No. 70-5064)). Similar observations were made by Justices Burger, Brennan, and Stewart. *Id.*

[29] Vagrancy laws had been used in the Jim Crow South to create a pool of exploitable black laborers for white employers. William Cohen, *Negro Involuntary Servitude in the South*, 42 J. S. HIST. 31 (1976).

[30] *Papachristou*, 405 U.S. at 164.

[31] *Id.*

[32] *Id.* at 168, 170 (quoting Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940)).

[33] Justice Douglas had previously written a law review article commenting on the evils of vagrancy laws and the threat they pose to civil liberties, particularly to those people "from minority groups who are not sufficiently vocal to protect themselves, and who do not have the prestige to prevent an easy laying-on of hands by the police." William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 13 (1960).

[34] *Papachristou*, 405 U.S. at 170.

> [T]he rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.[35]

Justice Douglas's words captured a view that adherence to the rule of law means treating disparate individuals and groups without preference or discrimination. The vagueness doctrine, in operationalizing the rule of law, exerts an equalizing force on disparate entities—the poor and the rich, majorities and minorities. Robert Post has interpreted *Papachristou* as the Court's announcement that "the norms of middle-class virtue are not a constitutionally acceptable basis for ordering the relationship between police and citizen."[36] In Post's account, cases like *Papachristou* reveal the vagueness doctrine as a medium for determining "whether the norms necessary for the validation of the relevant judgment are constitutionally appropriate for the social domain regulated by the legal rule."[37] Viewed in this light, vagueness has a norm-regulating dimension that facilitates evaluation of the appropriate substantive values for structuring interactions between the state and its citizens. The vagueness doctrine thus presents an apt vehicle for achieving substantive goals, because the doctrine compels courts to assess the standards by which legal rules order and enact state authority and to evaluate whether those standards are consonant with fairness and equality.

B. The First Amendment Foundations of Equality in Vagueness

Decisions prior to *Papachristou* sowed the seeds for the Court's full articulation of the discriminatory enforcement view of the vagueness doctrine. The decisions that formed the foundation for this rationale primarily involved the First Amendment and culminated during the social and political context of the civil rights struggle. Many of the First Amendment cases from this period implicated the vagueness doctrine as the Court sought ways to extend its commitment to equality while mediating the virulent resistance of southern authorities. First Amendment law experienced its own transformation during this era as the Court increasingly turned towards expressive liberty as the means for achieving and preserving racial equality.[38]

The vagueness doctrine's transition from a procedural notion of fairness to a substantive one was determined and shaped by the growing egalitarian-

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[35] *Id.* at 171.

[36] Robert Post, *Reconceptualizing Vagueness: Legal Rules and Social Order*, 82 CALIF. L. REV. 491, 498 (1994).

[37] *Id.* at 496.

[38] ROBERT L. TSAI, ELOQUENCE AND REASON 84 (2008) (presenting a theory of First Amendment's development as an instrument for social change).

ism of the First Amendment. The articulation of a substantive equality rationale in vagueness was realized within the framework of extending expressive liberties.[39] As the salience of First Amendment law for achieving equality grew during the 1960s, vagueness also revealed its potential for mediating the thorny questions of race that confronted the Court. Often, the liberty values of the First Amendment were instrumental in shaping a substantive equality rationale in the vagueness doctrine.[40]

1. Setting the Stage: The Pre-Civil Rights Cases

The 1930s marked a turning point in the Court's attitude toward free speech. The Court's growing interest in protecting free expression during this decade set the stage for orienting the vagueness doctrine toward the substantive injustices wrought by institutional racism. The decade also represented a transitional period for the civil rights movement in that the NAACP's aspirations to win equality before the law for people of color—"a nascent, albeit little-fulfilled politics of recognition"—began taking precedence over the "still necessary politics of protection."[41]

Prior to the 1930s, the vagueness doctrine primarily appeared in cases involving economic interests.[42] The doctrine had originated in the substantive due process review of criminal sanctions for violations of economic regulations. The Court employed the doctrine in most of those cases based on the notice rationale that the law did not fairly warn potential wrongdoers of the proscribed conduct.[43] As substantive due process review fell away during the New Deal era, the Court directed its use of the vagueness doctrine towards a different set of statutes, "a broader array of public order and morals statutes and ordinances, many of which . . . touched on people's speech and association."[44]

Stromberg v. California[45] was the first case in which the vagueness doctrine was used to protect political rather than economic rights.[46] *Stromberg* was also "the first case in the history of the Court in which there was an

[39] I am describing a different relationship between the vagueness doctrine and the First Amendment than the one Amsterdam explicated, in which vagueness expressly acts as a "buffer zone" of protection for potential infringement of First Amendment freedoms as well as other freedoms in the Bill of Rights. *See* Amsterdam, *supra* note 1, at 75. R

[40] *See, e.g.*, Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 459 (2010) (describing phenomenon of borrowing in doctrinal development as a means by which courts use one doctrine to promote or enhance the values of another).

[41] Eskeridge, *supra* note 28, at 2082. R

[42] *See, e.g.*, Cline v. Frink Dairy Co., 274 U.S. 445, 459 (1927); Connally v. Gen. Constr. Co., 269 U.S. 385, 390 (1926); United States v. L. Cohen Grocery, 255 U.S. 81, 84 (1921); Kinnane v. Detroit Creamery Co., 255 U.S. 102, 103 (1921); Am. Seeding Mach. Co. v. Kentucky, 236 U.S. 660, 662 (1915); Int'l Harvester Co. v. Kentucky, 234 U.S. 216, 216 (1914); Nash v. United States, 229 U.S. 373, 376 (1913).

[43] Eskeridge, *supra* note 28, at 2226. R

[44] *Id.* at 2226.

[45] 283 U.S. 359 (1931).

[46] Eskeridge, *supra* note 28, at 2226 n.796. R

explicit victory for free speech."[47] Yetta Stromberg was a 19-year-old woman who worked as a counselor at a summer camp where she directed the children in raising and saluting the flag of the Communist Party in a daily ceremony.[48] Stromberg was convicted under a statute that punished the display of any flag "as a sign, symbol, or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character."[49]

The Court invalidated the first clause of the statute criminalizing the display of a flag "as a sign, symbol, or emblem of opposition to organized government," because the uncertainty of the terms jeopardized free political discourse.[50] Notably, the Court linked the substantive value of protecting political dissent with the necessity of having definite laws:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.[51]

The Court deployed the vagueness doctrine as a means for ensuring political accountability and the vitality of a free and democratic society, striking down a law that would stifle advocacy for political change and social reforms. More subtly, the Court was also concerned with the risk of oppressing minority groups through the suppression of dissident speech.

Unease over suppression of political dissent emerged sharply in *Herndon v. Lowry*, which arose from the Communist Party's campaign to organize American blacks.[52] Decided in 1937, the case represents an early intimation that the lack of definite standards is an open invitation for punishing unpopular political speech and, by extension, powerless minorities, and foreshadows later cases emerging from the civil rights movement. Herndon, "a negro member and organizer in the Communist Party," was convicted of attempting to incite insurrection after holding meetings to recruit members for the Communist Party and distributing literature showing the Communist Party's sympathy with equal rights for blacks.[53] He was indicted under the

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[47] HARRY J. KALVEN, A WORTHY TRADITION 167 (1988).

[48] *Stromberg*, 283 U.S. at 362.

[49] *Id.* at 361 (quoting CAL. PENAL CODE § 403a (repealed 1933)).

[50] *Id.* at 369–70. The Court did not strike down the second and third clauses, accepting the state court's construction interpreting those clauses as pertaining to speech that advocated violence and thus could be punished. *Id.*

[51] *Id.* at 369.

[52] 301 U.S. 242, 251 (1937).

[53] *Id.* at 265, 268–69, 275 (Van Devanter, J., dissenting).

section of an old Georgia slave insurrection statute stating that "[a]ny attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection."[54]

There was good reason to believe that Georgia was prosecuting Herndon out of fear that his message of racial equality would gain sympathizers rather than a genuine belief that violence would erupt.[55] In the Court's estimation of the evidence,[56] Herndon's prosecution was tantamount to punishing someone for membership in the Communist Party and for solicitation of members for that party, and thus was "an unwarranted invasion of the right of freedom of speech."[57] The Court invalidated the statute for failing to provide a "sufficiently ascertainable standard of guilt" by which a judge or jury could assess the defendant's conduct as presenting a clear and present danger of violence.[58] Eschewing the notice rationale, the Court declared instead that the law "amount[ed] merely to a dragnet which may enmesh anyone who advocates for a change of government."[59] The statute's lack of clarity was a potential weapon to silence advocacy of political reforms because it "license[d] the jury to create its own standard in each case."[60]

One could well imagine a Southern jury disagreeing with the Communist agenda of racial equality and therefore deciding to convict Herndon for the content of his speech rather than any actual encouragement of violence. In *Herndon*, the Court interpreted the First Amendment's protections to shelter not merely unpopular speech, but speech suggestive of violent opposition as long as it was unfocused and speculative.[61] The case highlights vagueness

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[54] *Id.* at 246 n.2 (majority opinion) (quoting GA. CODE ANN. § 56 (1933)).

[55] As Zechariah Chafee observed:

> My guess is that the men concerned in this prosecution were not worried in the slightest about any plotted insurrection or the possibility of a new Liberia between the Tennessee Valley Authority and the Gulf of Mexico. But they were worried, I suspect, about something else that Herndon really wanted—his demand for equal rights for Negroes. If he got going with that, there was a clear and present danger of racial friction and isolated acts of violence by individuals on both sides. They were afraid, not that the United States Constitution would be overthrown, but that it might be enforced.

ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 392 (1941).

[56] Writing for the majority, Justice Roberts found no evidence that Herndon actually incited any violence by merely holding meetings and recruiting members for the Communist Party. *Herndon*, 301 U.S. at 253. Moreover, he found no evidence that Herndon even expressed the view that a separate, autonomous Negro state should be organized. *Id.* at 261.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 263.

[60] *Id.*

[61] *Id.* at 260. The Court explained that Herndon's activities of inducing others to join the Communist Party did not necessarily mean he incited insurrection in the absence of proof that "he brought the unlawful aims [of the Party] to their notice, that he approved them, or that the fantastic program they envisaged was conceived of by anyone as more than an ultimate ideal." *Id.* at 260–61.

as a tool for ameliorating the discriminatory effects of a law that could be wielded to suppress the expressive activities of minorities or dissenters.

2. The Civil Rights Cases

The Court's decision in *Brown v. Board of Education*[62] catalyzed the civil rights movement and brought forth a surge of civil disobedience and organized demonstrations seeking an end to racial inequality. Many of the conflicts following *Brown* emerged as First Amendment cases and proved fertile ground for the development of the vagueness doctrine. During this period, the Supreme Court invalidated virtually all the convictions of civil rights activists it reviewed, usually for lack of evidence or vagueness in the law.[63] The civil rights movement transformed the Justices' conception of the way citizens exercised their rights of free speech and assembly.[64] Activists engaged in free speech practices that featured large-scale demonstrations, sit-ins, and impact litigation by advocacy organizations such as the NAACP. Those tactics contrasted sharply with the classic image of the lone radical dissenter that was paradigmatic of free speech cases of the previous era.

Amidst those changing conceptions of expression, the Justices' vision of the First Amendment became more trenchantly egalitarian.[65] The developments in the First Amendment area had generative effects on the vagueness doctrine. The unconventional tactics of civil rights protestors drew resistance from southern authorities who countered with draconian, often creative, measures to stymie their efforts. Because the laws used to suppress the expressive conduct of demonstrators were often facially neutral and broadly written, vagueness and free speech doctrine became inevitably entwined. A decision might rest on vagueness grounds even when framed by First Amendment concerns. Through these pathways, the equality rationale in vagueness drew force and cogency from First Amendment law.

The southern opposition to the civil rights movement included a strategy of attacking the NAACP and like organizations to undermine and halt gains in racial equality. Several cases challenging these tactics came before the Court for review.[66] One such case, *NAACP v. Button*, offers a revealing view of the symbiotic relationship between the First Amendment and vagueness doctrines. *Button* concerned the constitutionality of a Virginia law

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[62] 347 U.S. 483 (1954).

[63] *See, e.g.*, Brown v. Louisiana, 383 U.S. 131, 143 (1966); Shuttlesworth v. Birmingham, 382 U.S. 87, 90 (1965); Edwards v. South Carolina, 372 U.S. 229, 238 (1963); Taylor v. Louisiana, 370 U.S. 154, 156 (1962); Garner v. Louisiana, 368 U.S. 157, 204 (1961).

[64] TSAI, *supra* note 38, at 83. R

[65] *See* KALVEN, *supra* note 14; TSAI, *supra* note 38 (explaining that the Court came to "favor expressive liberty" as "simultaneously an antecedent to equality and an efficacious means for realizing it"). R

[66] *See* NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964); NAACP v. Button, 371 U.S. 415 (1963); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Harrison v. NAACP, 360 U.S. 167 (1959); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

prohibiting organizations like the NAACP from compensating attorneys who litigated cases in which the NAACP did not have a direct interest.[67]

Writing for the Court, Justice Brennan began with a groundbreaking view of the First Amendment, describing constitutional litigation of the kind conducted by the NAACP as a form of political expression, "a means for achieving the lawful objectives of equality of treatment by all government . . . for the members of the Negro community in this country."[68] But, rather than directly holding that the First Amendment protected the NAACP's litigation activities, Justice Brennan resorted to a vagueness analysis of the statute. The Court declared that the "objectionable quality" of vagueness was not the lack of fair notice or unconstrained delegation of legislative authority, but "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."[69] As construed by Virginia's high court, the statute would prohibit lawyers and non-lawyers alike from advising and referring someone to counsel for redress of his legal rights. The Court concluded that, "[t]here thus inheres in the statute the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority."[70] To emphasize the point, the Court spoke plainly of the sociopolitical realities behind Virginia's law: "We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought."[71]

With those words, the Justices openly acknowledged the racial animus behind prosecutions of the NAACP. Such sentiments echoed the belief expressed in conference by Justice Black that the Virginia law was part of a scheme to thwart the *Brown* decision and would effectively finish off the NAACP and its efforts to enforce equal rights for blacks if the Court did not strike it down.[72] Justice Douglas's concurrence was openly critical of the discriminatory purpose behind the Virginia law—"to penalize the N.A.A.C.P. because it promotes desegregation of the races."[73] Justice Black particularly highlighted that the amendments to the Virginia law at issue were enacted in 1956, with similar laws passed in Arkansas, Florida, Georgia, Mississippi, South Carolina, and Tennessee following the 1954 *Brown* decision.[74]

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[67] *Button*, 371 U.S. at 417–19.
[68] *Id.* at 429.
[69] *Id.* at 433.
[70] *Id.* at 434.
[71] *Id.* at 435.
[72] THE SUPREME COURT IN CONFERENCE 317 (Del Dickson ed., 2001) (Conference of Nov. 10, 1961 in *Button*). Justices Warren, Douglas, and Brennan voiced similar sentiments during conference. *Id.* at 318–19 (conference of Oct. 12, 1962).
[73] *Button*, 371 U.S. at 445 (Douglas, J., concurring).
[74] *Id.*

Notably, the Court declined to reach the petitioner's equal protection claim. The majority's particular concern about selective enforcement and the adverse impact on the civil rights movement was articulated in the context of enforcing expressive liberty.[75] Specifically, those observations were made under the rubric of vagueness, highlighting the *hypothetical* dangers of discriminatory prosecutions, particularly against the larger cause of racial equality.[76] No doubt the racial motivations behind Virginia's laws informed the Court's view of the way the law would be administered. Even though the vagueness inquiry is structured in the hypothetical, the social and political context imparted a predictive value to the discriminatory way the law could be enforced. Accordingly, vagueness emerged as the antidote for laws of general applicability that could be exploited to halt the progress of equality or become "a weapon of oppression."[77] The Court deployed the vagueness doctrine as a means of addressing a systemic problem of race-based inequality that could not be more directly confronted without further jeopardizing the Court's legitimacy and stoking deeper enmity in the Southern states.

The Court ultimately held under the First Amendment that even if the litigant-recruitment activities of the NAACP were protected, the state did not have any substantial regulatory interest in this context to justify such sweeping prohibitions.[78] For good measure, the Court added that the substance of the NAACP's expressive activities, to further school desegregation, held no particular relevance for its First Amendment ruling.[79] It made an openly egalitarian appeal for the First Amendment, noting that the promise of the Amendment's protections applied without regard to distinctions of "race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered."[80]

In *Button*, vagueness was a means to vindicate equality interests, even as the Court avoided a direct engagement with "considerations of race or racial discrimination" that formed the NAACP's equal protection claim.[81] One also discerns the egalitarian principles of the First Amendment influencing an equality rationale in the vagueness doctrine. The Court's reminder of the First Amendment's egalitarian impulse echoes and reinforces the substantive values of equality and nondiscrimination in vagueness. The First Amendment does not privilege any particular viewpoint or particular group of people but protects the right of any individual to express his ideas and beliefs. Similarly, an imprecise law that lends itself to selective suppression

[75] *Id.* at 444 (majority opinion).
[76] *Id.* at 436.
[77] *Id.*
[78] *Id.* at 444.
[79] *Id.*
[80] *Id.* at 444–45.
[81] *Id.* at 444.

of unpopular or disfavored expression would undermine those values, "however evenhanded its terms appear."[82]

The vagueness doctrine also played a role in the anti-Communist cases of the civil rights period. One tactic of southern resistance involved "pursuing the NAACP under the guise of pursuing Communists."[83] Using laws originally designed to penalize Communist activities and organizations, southern authorities sought to halt the work of civil rights organizations.[84] Seeing the ends to which the anti-Communist measures could be manipulated to persecute minority and politically undesirable groups, the Court voided such measures for vagueness, specifically citing in at least one case the risk of arbitrary enforcement.[85]

In *Cramp v. Board of Public Instruction*, for instance, the Court reviewed a Florida statute requiring state employees to swear an oath that they had never lent "'aid, support, advice, counsel, or influence to the Communist Party.'"[86] The Court evaluated the law as a criminal statute that could expose the oath-taker to prosecution for perjury and found that the "extraordinary ambiguity" of the statutory language could cover a wide range of innocent conduct from voting for the Communist Party to defending the constitutional rights of a Communist in the courts or the press.[87] The Court noted the danger of entrusting such wide latitude to prosecuting authorities: "It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches us that prosecutors too are human."[88] In such instances, the Court deployed vagueness to rein in discriminatory anti-Communist laws, despite its previous line of cases uphold-

[82] *Id.* at 436.

[83] KALVEN, *supra* note 14, at 75. R

[84] In *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961), the NAACP branch in Louisiana refused to comply with a statute requiring every "'non-trading' association affiliated with an out-of-state association" to file an annual affidavit certifying that none of the officers of the affiliate is a member of any "'Communist, Communist-front or subversive organizations, as cited by the House of Congress un-American Activities Committee, or the United States Attorney.'" *Id.* at 294 (quoting LA. REV. STAT. § 14:385 (1958 Supp.)). The Court summarily overturned the law by taking advantage of the poor wording that required the branch organization to file on behalf of the affiliate officers. Justice Douglas, writing for the Court, stated that "[i]t is not consonant with due process to require a person to swear to a fact that he cannot be expected to know or alternatively to refrain from a wholly lawful activity." *Id.* at 295 (citation omitted). *See also* Dombrowski v. Pfister, 380 U.S. 479, 494 (1965) (civil rights activists sought injunction against threatened prosecutions under the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law, which the Court voided as vague).

[85] Baggett v. Bullitt, 377 U.S. 360, 373–74 (1964); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 287–88 (1961).

[86] *Cramp*, 368 U.S. at 279 (quoting FLA. STAT. § 876.05 (1961)).

[87] *Id.* at 286.

[88] *Id.* at 286–87.

ing such measures.[89] In the contemporary milieu, the Court was especially sensitized to prosecutorial abuse in undermining the civil rights agenda.

Another strategy utilized by southern authorities involved the use of facially-neutral public nuisance laws, such as breach-of-the-peace statutes, to repress civil rights demonstrators. Civil rights activists would be charged with some variant of breaching the peace that tended to criminalize the refusal to obey a police officer. The Justices came to view these statutes with skepticism, seeing the potential for abuse as inherent in the broad discretionary authority accorded law enforcement officials. In one of the first such cases to come to the Court's attention, *Edwards v. South Carolina*, the Court overturned the convictions of 187 black students for breach of the peace for engaging in non-violent protest demonstration at the state capitol.[90] The Court declared that the First Amendment protected the peaceful activities of the marchers and other non-violent forms of expressive conduct, no matter how unpopular or controversial those views. In addition to its First Amendment holding, the Court reproached the discriminatory use of an imprecise statute to quell the expression of unpopular ideas.[91] That is, the state could not punish people for assembling to express grievances with broad, discriminatory statutes. The Court recalled Chief Justice Hughes's admonishment in *Stromberg* that vague laws undermine "[t]he maintenance of the opportunity for free political discussion[,] . . . a fundamental principle of our constitutional system."[92]

In *Cox v. Louisiana,* Southern authorities charged a leading civil rights activist, Reverend Elton Cox, with various public nuisance offenses for leading a large demonstration to protest racial segregation.[93] The Court invalidated the breach of the peace statute as unconstitutionally vague. The crime consisted of two elements: "(1) congregating with others 'with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned,' and (2) a refusal to move on after having been ordered to do so by a law enforcement officer."[94] Regarding the first element, the Court reasoned that the definition of breach of the peace, "'to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet,'"[95] infringed on constitutionally protected free speech because it

[89] *See, e.g.*, Lerner v. Casey, 357 U.S. 468, 468–70 (1958); Adler v. Bd. of Educ., 342 U.S. 485, 496 (1952); Garner v. Bd. of Pub. Works, 341 U.S. 716, 724 (1951); Gerende v. Bd. of Supervisors, 341 U.S. 56, 57 (1951); Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 415 (1950).

[90] 372 U.S. 229, 235 (1963).

[91] *Id.* at 236.

[92] *Id.* at 238 (quoting Stromberg v. California, 283 U.S. 359, 369 (1915)).

[93] In *Cox v. Louisiana* (*Cox I*), 379 U.S. 536, 536 (1965), Reverend Cox challenged his convictions for disturbing the peace and obstructing public passage. In the companion case, *Cox v. Louisiana* (*Cox II*), 379 U.S. 559 (1965), an ordinance that banned picketing near courthouses was at issue.

[94] *Cox I*, 379 U.S. at 551 (quoting State v. Cox 156 So. 2d 448, 455 (La. 1963)).

[95] *Id.* (quoting *State v. Cox*, 156 So. 2d at 455).

could punish people for "peacefully expressing unpopular views," as had happened in *Edwards*.[96]

Although the majority did not find the second element of the statute problematic, Justice Black's concurrence articulated a compelling rationale for finding a defect of vagueness in giving the police unlimited power to order people off the streets.[97] Justice Black argued that Louisiana had not given the police the power to enforce "a specific, nondiscriminatory" statute but rather to "make[ ] a decision on [their] own personal judgment that views being expressed on the street are provoking or might provoke a breach of the peace."[98] Justice Black concluded that such a statute "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat."[99]

Cox advanced an argument emphasizing an egalitarian principle in the First Amendment: "[T]o permit a demonstration until it advocates ideas with which the authorities or the general public disagrees is a discriminatory application of the law which contributes both an interference with freedom of speech and a denial of equal protection of the laws."[100] The Court adopted this argument in overturning Cox's conviction for obstructing the sidewalk. The statute on its face prohibited all street assemblies and meetings. However, it was not applied categorically because city officials permitted some parades and meetings to be held at their discretion.[101] The Court concluded that applying the law in this manner was no different than following a statute that expressly left the authorization for peaceful parades or demonstrations in the unbridled discretion of officials.[102] Such a statute endangered a person or a group's right to equal protection of the laws by enabling public officials to "determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups."[103]

In analogizing the obstruction statute to a freewheeling licensing scheme regulating the dissemination of ideas, the Court underscored the likelihood of unequal treatment that could flow from an official's unfettered discretion.[104] The notion that unfettered licensing authority was undesirable

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[96] *Cox I*, 379 U.S. at 551.

[97] *Id.* at 579 (Black, J., concurring). Black reaffirmed his reasoning in *Gregory v. City of Chicago*, 394 U.S. 11, 120 (1969), which was subsequently adopted and privileged in later vagueness cases. *See* Kolender v. Lawson, 461 U.S. 352, 360 (1983); Smith v. Goguen, 415 U.S. 566, 575 (1974).

[98] *Cox I*, 379 U.S. at 579 (Black, J., concurring).

[99] *Id.*

[100] Consolidated Brief for Appellant at 29, *Cox I* and *Cox II* (Nos. 24 & 49), 1964 WL 81196, at *29.

[101] *Cox I*, 379 U.S. at 556 (majority opinion).

[102] *Id.* at 557.

[103] *Id.*

[104] The Court's established line of First Amendment precedents disfavoring broad licensing authority expressed concern with the arbitrary censorship of ideas. *See* Saia v. New York, 334 U.S. 558, 562 (1948) (uncontrolled discretion might suppress free communication of

because it suppressed open discourse and led to discriminatory prosecution of unpopular groups was incisively explained in a 1940 case, *Thornhill v. Alabama*.[105] The defendant in *Thornhill* was convicted for standing on a picket line under an anti-loitering and anti-picketing law.[106] The Court struck down the Alabama statute on the ground that the breadth of its prohibitions abridged First Amendment freedoms.[107] The Court analogized the defect of unconstrained licensing authority to broadly sweeping criminal laws that were not specifically tailored to "aim . . . at evils within the allowable area of state control."[108] The reasoning in *Thornhill* formed an important cornerstone of the substantive aspect of the vagueness doctrine. In its analysis, the Court elaborated on the threats to expressive freedoms posed by overreaching state authority, among them "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."[109]

The vagueness doctrine subsequently adopted and broadened this reasoning beyond expressive liberties. The concern for unpopular or disfavored speech was transformed into a concern for the potential discriminatory treatment of certain kinds of speakers. The Court's articulation in *Thornhill* illu-

ideas); Cantwell v. Connecticut, 310 U.S. 296, 304, 307 (1940) (invalidating a law requiring a license to distribute religious literature because the meaning of "religious" was left to the discretion of a public official); Hague v. C.I.O., 307 U.S. 496, 516 (1939) (striking down ordinance requiring a license from local official for public assembly on streets or highways, and in public parks, or public buildings because it could be made "the instrument of arbitrary suppression of free expression of views on national affairs"); Lovell v. Griffin, 303 U.S. 444, 452 (1938) (held void an ordinance requiring a license for the distribution of literature because it constituted censorship "in its baldest form").

[105] 310 U.S. 88 (1940).

[106] *Id.* at 93. The law punished persons "who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person . . . engaged in a lawful business, for the purpose, or with the intent of influencing, or inducing other persons not to . . . have business dealings with, or be employed by such persons." *Id.* at 91 (quoting ALA. CODE § 3448 (1923)).

[107] *Id.*

[108] *Id.* at 97.

[109] *Id.* The Court explained in *Thornhill*:

> The power of the licensor . . . is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat in its very existence that constitutes the danger to freedom of discussion. . . . A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.

Id. at 97–98 (citations omitted). Justice Black's views expressed in conference for *Cox* echo the reasoning in *Thornhill*, equating a law allowing a police officer to tell someone to move with a licensing law that lacks sufficient standards to prevent discriminatory exercise of discretion. *See* THE SUPREME COURT IN CONFERENCE 325 (DEL DICKSON, ED., 2001) (conference of October 23, 1964 in *Cox*).

minated the layers of systemic concerns that the vagueness doctrine addressed. First, the danger of actual abuse from broad and uncertain laws is ever present and the mere existence of such laws has an expressive effect that infringes on substantive rights and values. Second, collateral injustices can accrue when an overly expansive law punishes activities that are constitutionally protected. Third, the potential for discrimination against certain individuals or groups inheres in the existence of broadly discretionary statutes.

In *Shuttlesworth v. City of Birmingham,* the Court adopted and extended Justice Black's concurrence from *Cox I* in applying a vagueness analysis to a loitering statute.[110] The controversy grew out of an attempted boycott of Birmingham stores to protest discrimination against blacks.[111] A leading civil rights activist, Shuttlesworth, was standing with a group of ten or twelve people outside a department store when he refused a request by an officer to move on and clear the sidewalk.[112]

In examining the ordinance forbidding "any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on,"[113] the Court was confronted with a statute that made the officer on the street the final arbiter of appropriate conduct.[114] The Court noted that the literal terms contained an unquestionable "constitutional vice," in that they did "not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat."[115] Moreover, the Court added that such a law, "with its ever-present potential for arbitrarily suppressing First Amendment liberties, . . . bears the hallmark of a police state."[116] In the era of civil disobedience, the streets had become a contested space for the expression of dissent and the realization of political rights. Embracing this view, the Justices appreciated that control of the streets was synonymous with control of protected liberties. Thus, a convergence materialized between limiting the discretion

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[110] 382 U.S. 87, 90–91 (1965).

[111] *Id.* at 101 (Fortas, J., concurring). The majority opinion gave no credence to the fact that Shuttlesworth was engaged in a civil rights action when he was arrested. Justice Fortas's concurrence pierced through the "fiction" of the majority's factual account and noted that Shuttlesworth was a leading civil rights figure in Birmingham and recognized as such by the arresting officer. *Id.* at 102.

[112] *Id.* at 89 (majority opinion). Shuttlesworth was arrested and convicted of violating two city ordinances. One ordinance prohibited obstructing the sidewalk or refusing to obey a police request to move on. The other ordinance proscribed the refusal or failure to comply with a lawful order of a police officer. *Id.* at 88.

[113] *Id.* at 90 (citing BIRMINGHAM, ALA., GEN. CODE § 1142).

[114] While ultimately overturning Shuttleworth's conviction for loitering, the Court did not strike down the ordinances outright. The Alabama court had given the ordinances limiting constructions by narrowing the ordinance to one preventing obstruction of free passage of a sidewalk. The Court accepted the narrowing interpretation as saving the constitutionality of the ordinances, but rejected it in Shuttlesworth's case because the narrowing construction came too late. *Id.* at 92.

[115] *Id.* at 90 (quoting *Cox II*, 379 U.S. 536, 559, 579 (1965) (Black, J., concurring)).

[116] *Id.* at 90–91.

granted to police officers through narrowly-drawn laws and ensuring the vitality of First Amendment liberties.

The notion that exercise of authority by the officer on the streets posed a threat to the rule of law was further entrenched through Justice Black's influential concurrence in *Gregory v. Chicago*.[117] Black's opinion picked up the threads of his argument in his *Cox I* concurrence. The convictions in *Gregory* arose out of a celebrated demonstration led by Dick Gregory to the home of Mayor Richard Daley protesting the lack of progress in desegregating Chicago's public schools.[118] Justice Black addressed the state's contention that the refusal to obey the police order to disperse was at the crux of the demonstrators' disorderly conduct. He took issue with the assumption that an officer's order was equivalent to a criminal statute: "To let a policeman's command become equivalent to a criminal statute comes dangerously near making our government one of men rather than of laws."[119]

In 1971, a few months after *Papachristou*, the Court decided *Coates v. City of Cincinnati*, invalidating an anti-loitering statute that made it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by."[120] The Court found the ordinance troubling because its violation depended entirely on the subjectivity of the police officer enforcing the law. This was a species of law similar to the "refusal to obey police" statutes in *Cox I* and *Shuttleworth* that made the police the final arbiter of lawful conduct. Consequently, not only did it fail to provide definite standards to guide the behavior of citizens, it was also defective in regulating the enforcement decisions of the police.[121]

The Justices' sensitivity to the racial tensions between blacks and law enforcement heightened the Court's concern regarding the ordinance's lack of guidelines governing police conduct. The Court noted that "[t]he alleged discriminatory enforcement of this [challenged] ordinance figured prominently in the background of the serious civil disturbances that took place in Cincinnati in June 1967."[122] The Court was alluding to the race riots that took place in cities around the country in the summer of 1967.[123]

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[117] 394 U.S. 111 (1968).

[118] Although the marchers proceeded in an orderly fashion, the onlookers became unruly and the police commanded that the demonstrators disperse. Failing to do so, the demonstrators were charged under a disorderly conduct statute. The Court's majority opinion summarily overturned the convictions for lack of evidence that the protestors' conduct was disorderly. *Id.* at 115–16.

[119] *Id.* at 120 (Black, J., concurring).

[120] 402 U.S. 611, 611 n.1 (1971) (quoting CINCINNATI, OHIO, CODE OF ORDINANCES § 901-L6 (1956)).

[121] *Id.* at 614.

[122] *Id.* at 616 n.6 (citing Kerner Commission, Report of the National Advisory Commission on Civil Disorders 26–27 (1968)).

[123] President Lyndon Johnson convened the Kerner Commission, charging it with investigating the causes of the disorder and recommending ways to prevent such occurrences in the future. The Commission concluded grimly that the country was moving toward a polarized

Additionally, the Court invalidated the statute on First Amendment grounds, holding that the ordinance violated the constitutional right of free assembly and association.[124] Within the First Amendment context, the Court raised the specter of arbitrary enforcement.[125] In the Court's view, criminalizing the exercise of the right to assembly merely because its exercise may be annoying "contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens."[126] Notably, the Court's concern with arbitrary enforcement evidently went beyond speech or assembly. Indeed, the Court acknowledged the potential for discrimination against "lifestyle" and "physical appearance."[127] The Court had expanded the First Amendment concerns of suppressing speech to broader concerns of discriminating against individuals based on their way of living or their appearance.

In sum, the civil rights era proved to be a generative period for the transformation of the vagueness doctrine into a vehicle for vindicating substantive principles of equality. That shift was determined in part by historical context and the Court's institutional commitment to equality. Influenced by the growing egalitarian project of the First Amendment during this same period, the vagueness doctrine evolved into a compelling instrument for addressing racial inequality in a systemic way that did not compel a full confrontation with the racist motives of southern authorities. Indeed, buffered by the vagueness doctrine, the Court could acknowledge the oppression and discrimination against blacks as contrary to our constitutional values of equality and our democratic ideal of government by "laws not men."

C. "The More Important Aspect of Vagueness"

The Court soon came forward with a more open acknowledgement that vagueness was an important instrument for vindicating substantive interests. A few months after *Papachristou*, in *Grayned v. City of Rockford*, the Court declared arbitrary and discriminatory enforcement one of the "important values" underlying the vagueness doctrine:

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police-

society—"one black and one white—separate and unequal." KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS PART II Chapter 4 (1968), *available at* http://www.eisenhowerfoundation.org/docs/kerner.pdf. Among the factors the Commission identified as catalyzing the conditions of segregation were the conduct and racist attitudes of law enforcement and the community's perceptions of the police as symbolizing white racism and white oppression. *Id.*

[124] *Coates*, 402 U.S. at 615–16.

[125] *Id.* at 614.

[126] *Id.* at 615–16.

[127] *Id.* at 616.

> man, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[128]

Two years later, the Court entrenched the equality rationale for voiding indefinite statutes in *Smith v. Goguen*.[129] There, the Court declared that, "perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principle element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement."[130] In *Smith*, the Court openly privileged the rationale of preventing discrimination over the procedural value of fair notice in the vagueness doctrine.

Smith involved a vagueness challenge to a Massachusetts flag-misuse statute that punished by fine or imprisonment anyone who "treats contemptuously" the flag of the United States.[131] The defendant "wore a small cloth version of the United States flag sewn to the seat of his trousers."[132] The Court condemned the statute's imprecise language for inviting enforcement based on the personal preferences of the police, the court, or the jury.[133] Not only could the statute be used to target particular kinds of expression, it could be used to punish particular subsets of individuals including dissidents and non-conformists. That is, the potential for discrimination could easily extend beyond speech to the way people lived, to their beliefs, or to how they looked, echoing the Court's concern in *Coates*. The Court quoted Justice Black's concurrence in *Gregory*, noting the direct result of abdicating legislative responsibility is to entrust lawmaking "to the moment-to-moment judgment of the policeman on his beat."[134] The Court was not merely troubled by the abstract violation of separation of powers; it was also concerned with the consequences of unequal administration when the police exercise authority informed by impermissible criteria or motives.

Almost ten years later, in *Kolender v. Lawson*, the Court explicitly affirmed that the more important aspect of the vagueness doctrine is not actual notice to citizens, but the prevention of discriminatory enforcement through minimal guidelines to govern law enforcement.[135] Certainly, the facts of the case reinforced the potential for unequal application. Edward Lawson was a black man of "unconventional" appearance, who had a habit of taking walks, usually late at night and often in predominantly white residential

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[128] 408 U.S. 104, 106, 108–09 (1972).

[129] 415 U.S. 566 (1974).

[130] *Id.* at 574. The Court acknowledged that the fair notice rationale for vagueness carried less weight in the noncommercial arena where "behavior as a general rule is not mapped out in advance on the basis of statutory language." *Id.* at 574 (citing Amsterdam, *supra* note 1, at 82 n.79). **R**

[131] *Id.* at 568 (citing MASS. GEN. LAWS ch. 264, § 5 (1974)).

[132] *Id.*

[133] *Id.* at 575.

[134] *Id.* (quoting Gregory v. City of Chicago, 394 U.S. 111, 120 (1969) (Black, J., concurring)) (internal quotations omitted).

[135] 461 U.S. 352, 457–58 (1983).

neighborhoods.[136] Lawson was stopped numerous times under a statute requiring people who "loiter or wander on the streets" to provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a *Terry* stop.[137] However, the Court's opinion never once mentioned Lawson's race or the circumstances of his numerous detentions, though the Court was undoubtedly aware of them. Those facts were recited in the brief filed on Lawson's behalf.

The Court struck down the statute as unconstitutionally vague, because it encouraged arbitrary enforcement.[138] The Court was not satisfied with the interpretive gloss provided by the state court in defining "credible and reliable identification" to mean identification that is authentic and provides the means for later contacting the person who was stopped.[139] More specific standards were necessary to guide police officers' judgments as to whether a suspect has complied with the identification requirement. As the Court explained, "the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way."[140] The result in *Kolender* cannot be coherently explained by resort to the notice rationale. Under the statute, a person only incurs liability after he refuses to comply with the request for identification. The impetus behind the Court's decision was an abiding concern with the risk of abuse inherent in the police discretion to determine whether a suspect has satisfied the dictates of the statute. Though the Court did not explicitly reference racial prejudice in the opinion, Justice Brennan's concurrence noted the deleterious effect of arbitrary detentions on the existing poor relationship between the police and the public, in this case poor urban communities.[141]

City of Chicago v. Morales is the Court's most recent vagueness decision of note implicating the substantive aspect of that doctrine.[142] *Morales* struck down a Chicago ordinance prohibiting "criminal street gang members" from "remain[ing] in one place 'with no apparent purpose.'"[143] A majority of six Justices agreed that the statute's defect lay in the lack of minimal guidelines to constrain the discretion of law enforcement.[144] The Court found the "no apparent purpose" language of the statute problematic

[136] Brief for Appellee at 8, *Kolender*, 461 U.S. 352 (No. 81-1320). *See also* Jeffries, *supra* note 1, at 218 n.80. R

[137] *Kolender*, 461 U.S. at 353 (citing Terry v. Ohio, 392 U.S. 1 (1968)).

[138] *Id.* at 360–61.

[139] *Id.* at 358.

[140] *Id*.

[141] *Id.* at 366 (Brennan, J., concurring).

[142] 527 U.S. 41 (1999).

[143] *Id.* at 45–46, 53 (quoting CHICAGO, ILL. MUN. CODE § 8-4-015 (1992)).

[144] *Id.* at 60. *Morales* was a fractured decision. Although a majority of the Court agreed that the defect in the statute was the failure to provide minimal guidelines to govern law enforcement, the Court left open questions regarding the notice rationale of vagueness, substantive due process, and standing for facial challenges.

because as a standard "its application depends on whether some purpose is 'apparent' to the officer."[145]

Behind the constitutional issue in *Morales* was the broader question of the problematic relationship between the police and poor inner-city neighborhoods.[146] Of the 40,000 people arrested over the three years the ordinance was in effect, "most . . . were Black or Latino residents of inner-city neighborhoods."[147] *Morales* appeared to fit the mold of the Court's prior vagueness cases that did not make race a central issue. Yet, in contrast to the boldly confident opinion of *Papachristou*, *Morales* is an anemic, fractured decision.[148] Justice Stevens's plurality opinion, joined in full by only two Justices and in part by three others, failed to acknowledge the racial implications of the Chicago ordinance,[149] and refrained from discussing the complexities of police-citizen interactions and race in inner-city neighborhoods. The Court's ruling rested on a narrow, hyper-technical parsing of the words in the loitering ordinance without a consideration of the broader interests at stake. What apparently distinguishes *Morales* from *Papachristou* and earlier vagueness cases is the historical context of the civil rights movement and the strong consensus regarding the urgency of racial injustice that informed the Court's vagueness analyses. In the present age, the terrain has shifted and the Court no longer operates in the same crucible of racial apartheid that shaped the vagueness doctrine. This shift likely accounts, in part, for the uneasy, tentative tenor of the *Morales* decision. Without a common context and purpose to propel the Court's analysis, its analysis appeared abstract, unconvincing, and disconnected from the complex realities of policing and community safety. The Court missed an opportunity to articulate an invigorated vagueness analysis and to engage in a deeper consideration of aspects of the relationship between local police and their communities.

As a doctrine, vagueness should not be discounted simply because *Morales* has disappointed on those grounds. As it has developed, vagueness

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[145] *Id.* at 62.

[146] Neighborhood organizations that supported the ordinance conceded that inner-city minority communities were the primary targets of the law. Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 776 n.2 (1999) (citing Brief for Chicago Neighborhood Organizations as Amici Curiae Supporting Petitioner at 14, *Morales*, 527 U.S. 41 (No. 97-1121)).

[147] *Id.* at 776 (citing Am. Civil Liberties Union of Ill., Background on Chicago's Anti-Gang Loitering Ordinance (1997)).

[148] *Morales* has met with severe criticism from prominent scholars and some law enforcement and activist groups who decried the decision as undermining the efforts of inner-city communities to rid their neighborhood of gang violence. *See generally*, Brief Amicus Curiae of the Chicago Neighborhood Organizations in Support of Petitioner at 1–5, *Morales*, 527 U.S. 41 (No. 97-1121); Tracey L. Meares & Dan M. Kahan, *The Coming Crisis of Criminal Procedure*, 86 GEO. L. J. 1153, 1166, 1171–80 (1998); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197, 209–14 (1998).

[149] Justice Stevens's plurality opinion acknowledged the role vagrancy laws played in American history "to keep former slaves in a state of quasi slavery." *Morales*, 527 U.S. at 53 n.20.

possesses the necessary structural framework for mediating contentious questions of fairness and inequality. In the following sections, I explore reasons why the vagueness doctrine might offer structural and analytical advantages over current equal protection law for addressing discrimination in the administration of criminal laws.

II. The Limitations of Equal Protection

The Supreme Court has made clear that claims of intentionally discriminatory application of the laws belong under the Equal Protection Clause.[150] Equal protection has become a doctrine freighted with polarizing expectations and ideological debates such that its capacity for engaging a searching inquiry into the systemic problems of inequality and discrimination is compromised. This Part discusses the limitations of the equal protection doctrine for addressing discrimination claims generally, and more specifically, considers how claims of prosecutorial discrimination have been stymied under the Court's equal protection jurisprudence. It provides the conceptual context for my broader argument that, although equal protection seems to be at an impasse, vagueness embodies a doctrine that is avowedly concerned with inequality and possesses the capacity for accommodating a longer view of these complex issues.

A. Background

Today showing a violation of the Equal Protection Clause requires proof that government actors intended to discriminate on a prohibited basis. The intent requirement has been most significant in cases challenging the constitutionality of facially neutral laws that effect segregation or disproportionately disadvantage minority groups. The Court enunciated the modern contours of this doctrine in *Washington v. Davis*.[151] In *Davis*, African American applicants claimed that a civil service examination discriminated against them on the basis of race.[152] The Court identified "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[153] Thus, the Court held that proof of disproportionate impact was insufficient to show discriminatory purpose in a facially neutral law.[154] Instead, mindful of widespread invalidation of facially neutral laws, the Court

[150] *See* United States v. Whren, 517 U.S. 806, 813 (1996).
[151] 426 U.S. 229 (1976).
[152] *Id.* at 233.
[153] *Id.* at 240.
[154] *Id.* at 242.

required independent proof of discriminatory purpose,[155] which it defined very specifically in subsequent decisions.[156]

In *Arlington Heights v. Metropolitan Housing Development Corporation*, the Court clarified that "purpose" under the equal protection doctrine refers particularly to a discriminatory state of mind in government officials that rises to the level of a "motivating factor."[157] More pointedly, the Court held a few years later in *Personnel Administrator of Massachusetts v. Feeney*, that proof of a general intent to take the challenged action, and evidence of highly foreseeable disparate impact are not enough.[158] Rather, "'[d]iscriminatory purpose'. . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[159] Hence, the equal protection doctrine requires a litigant to show that an action was taken with the purpose of disadvantaging a protected group.[160] Moreover, as long as the Court can imagine a legitimate motive for the passage of the law in question, it will accept that motive for explaining the existence of the law.[161]

In *Arlington Heights*, Justice Powell described the intent test as requiring a showing of "invidious discriminatory purpose."[162] The Court's language suggests that in the paradigmatic instance, discriminatory purpose must possess an element of ill-will or animosity. As Randall Kennedy observed, "[t]he Justices have demanded proof . . . that officials were 'out to get' a person or group on account of race."[163] This requirement presents an evidentiary, as well as an institutional, obstacle to raising successful equal protection claims. As an evidentiary matter, there exists the problem that "racial attitudes often operate at the margin of consciousness."[164] How is a defendant to provide direct proof of bad motives if government officials truly believe their motives are beyond reproach? It is an impossible task. Even if government officials did in fact act in bad faith, the moral opprobrium associated with being labeled racist or prejudiced makes it highly unlikely that the official will come forward with a frank admission of the illicit motive.

From an institutional decisionmaking perspective, framing the equal protection doctrine thus requires a judge to assess the moral quality of an

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[155] *Id.* at 248.

[156] *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

[157] 429 U.S. at 265–66.

[158] *Feeney*, 442 U.S. 256.

[159] *Id*.

[160] *See, e.g.*, Harris v. McRae, 448 U.S. 297, 323 n.26 (1980).

[161] *See* McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

[162] *Arlington Heights*, 429 U.S. at 266.

[163] Randall Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1405 (1988).

[164] Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978).

official's action and attribute blame to specific decisionmakers. That is, in order to vindicate an equal protection claim, the court must essentially call a government official a racist or a bigot. This aspect of the equal protection doctrine heightens the institutional stakes considerably, with the attendant consequence of reinforcing existing reluctance in judges to find a violation of equal protection.[165]

B. Challenging Discriminatory Prosecutorial Decisions

The rigorous standards of the equal protection doctrine have rendered claims of discriminatory prosecutorial decisions nearly impossible to win. Typically, a legal challenge to a prosecutor's discretionary authority is asserted as a selective prosecution claim under the Equal Protection Clause. The claim is raised by a defendant seeking to dismiss his criminal case on the ground that he has been singled out for prosecution because of race, religion, or some other arbitrary classification.[166] The Court has explicitly applied the intent standard articulated in *Washington v. Davis* to the selective prosecution context.[167] In 1996, the Supreme Court sealed the fate of selective prosecution claims with its decision in *United States v. Armstrong*, which established the applicable standard for discovery in such claims based on race.[168] The case signaled the Court's unremitting deference to prosecutorial discretion and affirmed the rigorous intent standard for proving selective prosecution. By erecting virtually insurmountable barriers to the discovery of selective prosecution claims, the Court signaled that judicial relief for selective prosecution claims was illusory. In *Armstrong*, nine black defendants moved to dismiss the indictment on grounds of selective prosecution, arguing that the United States Attorney prosecuted virtually all African Americans charged with crack offenses in federal court while leaving white defendants to be prosecuted in state court for similar offenses.[169] The defendants sought to discover information, including the identity and race of defendants charged with crack offenses and the United States Attorney's criteria for deciding whether to prosecute in federal court.[170]

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[165] *Id.* at 1164–65. *See also* Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397, 441–42 (describing the search for illicit motivation as "unseemly" and "necessarily characterized by innuendo, gossip and suspicion").

[166] *See* Oyler v. Boles, 368 U.S. 448, 456 (1962) (holding that selective prosecution violates the Constitution only if it is based on an unjustifiable standard such as race, religion, or other arbitrary classification).

[167] Wayte v. United States, 470 U.S. 598, 610 (1985) (holding that evidence of government's awareness that its passive policy of enforcement against men who failed to register for the draft would result in the prosecution of vocal objectors did not prove the government prosecuted Wayte for his protest activities).

[168] 517 U.S. 456, 468 (1996).

[169] United States v. Armstrong, 48 F.3d 1508, 1511 (9th Cir. 1995) (en banc), *rev'd* 517 U.S. 456 (1996) (federal law penalized crack offenses much more severely than the California counterpart).

[170] *Armstrong*, 517 U.S. at 459.

The Supreme Court held that, in order to be entitled to discovery in selective prosecution cases, a defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not. This showing is barely distinguishable from the proof necessary to establish discriminatory effect to prevail on the merits. Presumably, more evidence of discriminatory effect is necessary to prevail on the merits than to obtain discovery. Yet, the Court failed to define the quantum of evidence sufficient to satisfy the threshold of "some evidence" or a "credible showing" to obtain discovery.[171]

Despite the Court's statements that constraints exist on a prosecutor's discretion, the heightened standard imposed for challenging such discretion in selective prosecution claims belies those statements. Given the exacting intent standard for selective prosecution claims, one might expect the Court to enforce a less stringent standard for discovering the very documents critical to proving an equal protection violation. Instead, in *Armstrong*, the Court privileged the state's position, noting the systemic costs to the state of submitting to discovery and reasoned that because the costs for discovery would be similar to responding to a prima facie case, the "justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim."[172]

McCleskey v. Kemp especially reveals the difficulties of mounting an equal protection claim challenging systemic discrimination in the criminal justice system.[173] Decided two years after *Wayte*, the case is a stark example of the Court's unremitting deference to prosecutorial discretion. The Court was presented with highly compelling statistical evidence that Georgia prosecutors were more than twice as likely to seek a death sentence against a black defendant accused of killing a white victim (nearly 70% of the cases) than they were against a white defendant.[174] When black defendants were convicted of killing white victims, they were sentenced to death at nearly twenty-two times the rate of blacks convicted of killing blacks and more than seven times the rate of whites who killed blacks.[175]

Faced with such evidence, the Court, nevertheless, sidestepped any meaningful consideration of the statistical study and its implications for the evenhanded administration of the death penalty. First, the Court denied the evidentiary legitimacy of the social science data that formed the backbone of McCleskey's claim. In the Court's view, even the sophisticated research Baldus conducted did not mean "the study show[ed] that racial considera-

[171] *Id.* at 470 (stating only that "the required threshold" is "a credible showing" and that the proffered study did not constitute "some evidence of differential treatment of similarly situated members of other races or protected classes").

[172] *Id.* at 468.

[173] 481 U.S. 279 (1987).

[174] *Id.* at 287.

[175] *Id.* at 286–87, 327.

tions actually enter[ed] into any sentencing decisions in Georgia."[176] That was because such a study could "only demonstrate a *risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision."[177] Second, the Court narrowed the inquiry to whether specific decisionmakers intentionally discriminated against McCleskey due to his race. It declared that McCleskey could not prevail because he failed to offer "evidence specific to his own case that would support an inference that racial considerations played a part in his sentence."[178] Requiring a showing of particularity presents another obstacle to redressing broad-based discrimination.

Furthermore, the Court articulated additional barriers for challenging prosecutorial decisionmaking, beyond the exacting standards enforced by equal protection. Declaring that McCleskey's claim struck at the "heart of the State's criminal justice system" and the discretionary judgments necessary to implement criminal laws, the Court set a high bar for challenges to prosecutorial discretion, zealously guarding the sanctity of discretionary power.[179] As is evident in *McCleskey*, though the Court may pay lip service to the importance of ensuring equality in the criminal justice system, it does not truly believe this can be accomplished without incurring insupportable social costs. Within the equal protection context, the Court appears willing to accept the level of disparity that inheres in the system, relying on the "capacity of prosecutorial discretion to provide individualized justice [as] 'firmly entrenched in American law.'"[180]

As the foregoing illustrates, equal protection claims, particularly in the criminal justice context, encounter nearly insurmountable obstacles to success. The doctrine is effective in identifying and redressing isolated, overt acts of discrimination rather than broad-based discrimination in complex systems involving diffuse decisionmakers. Equal protection tends to work best when a consensus already exists over the background facts and appropriate outcome, or when exceptionally strong evidence of unequal treatment is available. Most of the time, equal protection claims generate polarizing debates that lead to fractured decisionmaking by the courts.

III. The Virtues of Vagueness

The structural features of the vagueness doctrine facilitate the capacity of courts to vindicate substantive principles in the regulation of governmental power. In this Part, I analyze the features of the vagueness doctrine that render it a salutary framework for addressing and mediating the issues of inequality and discrimination in the justice system. I discern three distinct

[176] *Id.* at 291 n.7.
[177] *Id.*
[178] *Id.* at 292.
[179] *Id.* at 297.
[180] *Id.* at 312 (citation omitted).

virtues to vagueness as a means for redressing inequality. First, vagueness promotes the interests of equality within the supporting framework of liberty. Second, the structure of vagueness facilitates the vindication of equality in judicial decisionmaking by relieving courts of the necessity of ascribing bad faith to institutional actors. Third, vagueness enhances a broad commitment to constitutional values by promoting dialogue between the judiciary and the political branches.

Amsterdam has observed that vagueness analysis represents methodology on several levels:

> Functionally, [vagueness analysis] is a means of securing the Court's control over the methods by which governmental compulsion may be brought to bear on the individual. . . . But structurally vagueness analysis is a method in itself—a patterned methodization of the means which the Court employs to effect this control.[181]

The crux of the vagueness inquiry centers on a hypothetical inquiry that asks whether the authority wielded by the state creates the risk of arbitrary or discriminatory enforcement. The inquiry is an objective one that does not delve into the intent or motives of a specific actor. Moreover, the analysis is structured around probabilities, i.e., the likelihood that a legislative grant of power will lead to the discriminatory exercise of authority. The focus on probability frames the inquiry in terms more reminiscent of social science empiricism or the more familiar "reasonableness" standard. This methodology is a more system-based view that focuses on the *tendency* of a process or regime to produce one kind of outcome versus another. Consequently, vagueness analysis emphasizes the *systemic* harms arising from a particular arrangement of state authority rather than the atomistic concerns that are the locus of inquiry in equal protection. As such, one can see the value of social science research for aiding courts in a deeper inquiry of systemic discrimination through a vagueness analysis.

Instead of requiring harm to be particularized to a specific individual as in the equal protection doctrine, vagueness conceptualizes the *risk* of discrimination as harm in itself. By emphasizing the likelihood of discriminatory outcomes that a legal regime might produce, vagueness analysis shifts the remedial perspective to the broader effects and consequences of the government's policies and practices. This approach situates inequality as a problem inherent in the substance and effect of the state's policies and laws, rather than an anomaly or defect in the character of individual decisionmakers. Consequently, it is the regime of legal rules and government policies that must be made more equitable and not the decisionmakers who need to be reformed or merely the particularized injury that needs to be redressed.

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[181] Amsterdam, *supra* note 1, at 115. **R**

Indeed, because the vagueness doctrine is concerned with how a law might be applied and its likely discriminatory effect, the distinction between selective indifference and purposeful discrimination is immaterial in vagueness. Current equal protection law requires proof of a deliberate effort to injure a protected group, not merely indifference that such harm was likely. Indeed, equal protection is traditionally concerned with proscribing the government's use of race or other illegitimate criterion, rather than affirmatively ensuring the values critical to effective democratic functioning.[182] If either situation leads to a law that invites discriminatory enforcement, vagueness will invalidate the measure. In this respect, vagueness possesses greater breadth than the equal protection doctrine and its narrow proscription against improper classifications rather than a robust imperative to secure equality.

Concerns might be raised by the open-ended inquiry of vagueness that rests on the predictive tendency of a law to be applied discriminatorily or arbitrarily. However, an open and more flexible standard does not necessarily lead to less principled decisionmaking. The vagueness inquiry does not differ greatly from the broad inquiry undertaken in the more familiar First Amendment doctrine. Generally, in First Amendment cases, the Court is chiefly concerned with testing and assessing the substance, effects, and consequences of the policies or practices at issue to determine their validity. The Court will sharply scrutinize laws that curtail First Amendment rights not because of what the law actually does, but because of the law's potential threat to the robust exercise of those rights. The Court will invalidate a law on the theory that any proscription touching upon the First Amendment could have a "chilling effect" on the exercise of those freedoms. As with the vagueness analysis, the Court engages in a hypothetical inquiry about how a statute or policy could potentially inhibit First Amendment liberties.[183] So too, the endeavor is prophylactic in nature, because the Court will strike down the challenged law, anticipating the likelihood that it may be used to undermine First Amendment freedoms. When viewed in the context of other robust doctrines that enforce broad prohibitions, the vagueness doctrine does not appear so objectionable or unmanageable.

Finally, in its vagueness analyses, the Court exhibits a willingness to question the exercise of police power that contrasts markedly with its more

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[182] Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 555 (1977) (arguing that under traditional equal protection, the government's duty is essentially negative in nature—refraining from the use of race—rather than affirmatively accommodating the interests of racial minorities).

[183] *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1587–90 (2010); NAACP v. Button, 371 U.S. 415, 432–33 (1963) ("[T]he existence of a penal statute susceptible of sweeping and improper application . . . may deter [the exercise of First Amendment rights] almost as potently as the actual application of sanctions."); Shelton v. Tucker, 364 U.S. 479, 490 (1960) (stating that legitimate legislative goals "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved"); Talley v. California, 362 U.S. 60, 64 (1960) (holding unconstitutional broad ordinance banning distribution of all handbills that did not carry specific identifying information); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

solicitous attitude toward prosecutorial and law enforcement authority in the equal protection context. The attitude of skepticism towards unconstrained authority is embedded in the discourse of vagueness. This posture is reflective of the doctrine's entwined history with the First Amendment's development during the civil rights era. This historical experience proved that entrusting discretionary authority to law enforcement, prosecutors, and courts to wield according to their will and whim was synonymous with discriminatory abuse of power.

A. Promoting Equality within Liberty

At the core of the vagueness doctrine is the assumption that when governmental power is not constrained, corruption and oppression ensue. Rooted in the doctrine is a conception about the nature of power that is expressed in the rule of law and due process principles. Fundamentally, the vagueness inquiry is preoccupied with the ever-present potential for abuse when coercive powers of the state are left uncontrolled. Consider Justices Roberts's, Frankfurter's, and Jackson's statement in *Screws v. United States* that a "proper regard for the rational requirement of definiteness in criminal statutes is basic to civil liberties," because certainty in the law safeguards our individual freedoms from assaults by arbitrary government.[184] Vagueness is less concerned with how specific individuals wield power than the way structural arrangements of power affect fundamental liberty interests.

The rule of law concerns that animate the vagueness doctrine foster a sense of impartiality that enhances judges' ability to engage in a searching inquiry of systemic concerns such as inequality and discrimination. Incursions against the rule of law principle affect the entire community, not merely a suspect class or minority group. Vagueness obviates the necessity of speaking in the familiar idiom of modern equal protection—i.e., suspect class, discrete and insular minority, and tiers of scrutiny. Today's equal protection law recognizes at least three distinct tiers of scrutiny for different classifications.[185] It is well established that the Court will apply strict scrutiny to classifications involving race, for instance.[186] A vexing question hangs over equal protection analysis: which groups, in addition to racial minorities, can benefit from heightened review and what level of heightened review is warranted?[187] Equal protection in its current form requires courts

[184] 325 U.S. 91, 149 (1944) (Roberts, Frankfurter & Jackson, JJ., dissenting).

[185] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985) (describing the tiers of scrutiny and the classifications that warrant heightened scrutiny).

[186] *See* Grutter v. Bollinger, 593 U.S. 306, 326 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

[187] As Professor Klarman describes it, this is one of the questions that has "dominated the most recent phase of modern equal protection," and has been made all the more difficult to answer by the Court's unconvincing justification when it articulated and applied the racial classification rule. Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 256 (1991).

to wade into the politics of recognition and engage in the enterprise of deciding which among the numerous groups seeking heightened scrutiny is worthy of that distinction.

In contrast, a vagueness analysis does not require an overt engagement with identity politics even as it operates to prevent discrimination against certain minority groups. When the ultimate question of inequality can be framed in terms of liberty interests that affect the entire community, judges are not compelled to justify advantaging one group over another. The benefits of evenhanded administration of justice accrue to all groups, even if in actuality they help specific groups at a particular moment. In theory, everyone benefits when courts require legislative enactments to ensure equal treatment.

Papachristou, *Kolender*, and *Morales* exemplify cases in which the police power delegated in a law potentially threatened the liberty interests of the whole citizenry, not only a particular segment of the community (though in reality, the law was being enforced unequally against certain minorities). The Court in *Papachristou* viewed the vagrancy ordinance in question as criminalizing "activities which by modern standards are normally innocent"[188] and which have been "in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity."[189] In the Court's view, the expansive ordinance giving the police an overly large net to arrest and charge at will jeopardized the basic freedoms essential to our independent and free society.

Similarly, in *Kolender*, the Justices did not tolerate the open discretion granted the police to decide when a person detained had satisfactorily provided "credible and reliable" identification.[190] They viewed the law as undermining the right of every citizen to freely walk the public streets.[191] And, in *Morales*, the Justices were troubled by the anti-gang ordinance's capacity to criminalize innocent conduct through the untrammeled discretion of the police to decide when someone's use of the street may be considered "loitering."[192] The Justices understood the implication for the "freedom to loiter for innocent purposes"[193] when an ordinance subjected citizens to the will of the police.[194] Accordingly, in the framework of securing liberty interests, the Court achieved equality as well.

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[188] Papachristou v. City of Jacksonville, 405 U.S. 156, 163 (1972).

[189] *Id.* at 164.

[190] Kolender v. Lawson, 461 U.S. 352, 353–54 (1983).

[191] *Id.* at 359.

[192] City of Chicago v. Morales, 527 U.S. 41, 60 (1999). Dorothy Roberts has characterized the anti-gang ordinance as "incorporat[ing] racist notions of criminality and legitimat[ing] police harassment of Black citizens" because the law required police to distinguish between the lawless and the lawful without a clear set of criteria. Race-based policing of the kind exemplified by Chicago's ordinance "tells the community that Blacks are presumed to be lawless and are entitled to fewer liberties." Roberts, *supra* note 146, at 790, 803–04, 810. **R**

[193] *Morales*, 527 U.S. at 53.

[194] *Id.* However, only a plurality of the Court agreed that there was a substantive due process right to loiter freely.

The Court's opinion in the classic equal protection case *Yick Wo v. Hopkins*[195] provides an intriguing study, illustrating the power of the vagueness concept for framing an equality rationale. *Yick Wo* has conventionally stood for the proposition that a neutral law applied unequally against a protected class may violate equal protection. It is the only successful racial selective enforcement case in the Court's history.[196] Despite its vintage, *Yick Wo* continues to hold sway in the Court's jurisprudence on equality, making dutiful appearances in the Court's decisions on discriminatory prosecution.[197]

Yick Wo involved a pair of San Francisco ordinances that required laundry businesses operating out of wooden buildings to obtain the approval of the city's board of supervisors.[198] The supervisors withheld consent from more than 200 operators, all of whom were Chinese, while eighty non-Chinese applicants were given approval to carry on their business. As the Court noted, the supervisors' consent could and was withheld at their "mere will and pleasure."[199] The Court's analysis exhibited a close preoccupation with the effects of a law conferring discretionary power that was "purely arbitrary, and acknowledg[ed] neither guidance nor restraint."[200] A law of this nature, in the Court's view, was troubling because it jeopardized "the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions."[201] Laws that entrust power to the sheer will and caprice of an individual were the antithesis of a government based on laws not men:

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. . . . For, the very

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[195] 118 U.S. 356 (1886).

[196] DAVID COLE, NO EQUAL JUSTICE: RACE & CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 159 (1999) (stating that there are "no reported federal or state cases since 1886 that had dismissed a criminal prosecution on the ground that the prosecutor acted for racial reasons"); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1539-40 (1981) ("It says something about the wide berth the judiciary has given prosecutorial power that the leading case invalidating an exercise of prosecutorial discretion is the nearly century-old decision in *Yick Wo v. Hopkins*. . . . *Yick Wo* was the first and last time the United States Supreme Court struck down a prosecution for the invalid selection of a target.").

[197] In *Wayte v. United States*, when the majority refused to find selective enforcement in the indictment of a man who failed to register for the draft, the dissent invoked *Yick Wo* in arguing that under the majority's framework, no equal protection violation would have been found in *Yick Wo*. *Wayte*, 470 U.S. 598, 630 (1985). In *McCleskey v. Kemp*, the Court held up *Yick Wo* as a shining example of when statistical evidence alone warranted an inference of discrimination. *McCleskey*, 481 U.S. 279, 293 (1987). In setting an exacting standard for obtaining discovery about prosecutorial decisionmaking in *United States v. Armstrong*, the Court invoked *Yick Wo* to defend against the charge that its standard rendered a selective prosecution claim "impossible to prove." 517 U.S. 456, 466 (1996).

[198] 118 U.S. at 368.

[199] *Id.*

[200] *Id.* at 367.

[201] *Id.* at 370.

> idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.[202]

The Court's concern with a legal regime that granted police power to the unrestrained will of an individual echoes similar themes in the vagueness doctrine. Exercises of such power "may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed."[203]

The Court ultimately decided that the ordinances had been applied against a particular class "with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws."[204] The Court accepted evidence of disparate impact alone as sufficient proof of discriminatory intent where the terms of the law invited the arbitrary and discriminatory exercise of power. The Court characterized the ordinances in *Yick Wo* as posing a threat to the fundamental rights informing our democratic institutions, thus framing the deprivation of equal protection as a burden upon the freedoms guaranteed to the whole community. By making an appeal to liberty principles, the Court ensured that the more controversial equality rationale would be assured of broad support.

B. Facilitating Judicial Vindication of Equality

The vagueness doctrine maximizes the conditions conducive to judicial decisionmaking in controversial issues. Howard Gillman observed that, as with any institution, "those who are affiliated with the Court should be expected to deliberate about protecting their institution's legitimacy and (relatedly) adapting their institution's mission to changing contexts and the actions of other institutions."[205] Legitimacy is a commodity that judicial authorities, including the Supreme Court, attend to particularly because unlike other political institutions, the judiciary has limited coercive power to enforce its opinions. Gregory Caldeira and James Gibson have noted that the Court

> is an uncommonly vulnerable institution. The Court lacks an electoral connection to provide legitimacy, is sometimes obliged to stand against the winds of public opinion, operates in an environ-

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[202] *Id.* at 369–70.
[203] *Id.* at 373.
[204] *Id.*
[205] Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65, 81 (Cornell W. Clayton & Howard Gillman eds., 1999).

> ment often intolerant of those in need of defense, and has none of the standard political levers over people and institutions.[206]

Those observations hold true in varying degrees for lower courts as well though they may not be in the glare of the national spotlight the same way as the Supreme Court.

In the civil rights era, the Court resorted to a set of strategies to preserve its authority and blunt the institutional consequences of its decisions concerning race. The vagueness doctrine offered the Court a means to reject exercises of prosecutorial or law enforcement authority without the necessity of attributing racism to the conduct of southern officials. Although the Court no longer operates in the same political and social climate of the civil rights era, the Justices' sense of institutional identity and attention to legitimacy remains. Justices will surely feel institutional vulnerability more keenly during certain periods than others, finding the need to adopt more aggressive strategies to accommodate those concerns. However, as institutional actors, the Justices' concerns with cultivating institutional authority are always present to varying extents and will exert an influence on their decisionmaking.

The vagueness doctrine does not compel judges to ascribe ill will or bad faith to specific actors, unlike equal protection.[207] In a vagueness analysis, courts need not make highly public, moral judgments about specific individuals as a prerequisite to finding unequal treatment. Accordingly, the doctrine mediates the normative expectations of equality and fairness without engaging in an explicit evaluation of the role animus played in prompting the challenged legislation. The liberating effect of this cannot be overstated. It diffuses the tension of laying blame on specific individuals and relieves judges from the potential fallout of accusing government officials of prejudice. It is natural that judges will experience some reluctance in finding an equal protection violation, if it means having to accuse government officials of bias.[208] This is especially true if one cannot know with certitude that an official's actions were motivated by illicit intent in the absence of an

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[206] Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635 (1992).

[207] Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397, 441–42. Discussing the undesirable consequences of the intent rule in the equal protection doctrine, Binion observes that the level of intent that must be demonstrated means that "[p]laintiffs may succeed only by demonstrating the pervasiveness of a 'secret' agenda. . . . [P]laintiffs must prove [decisionmakers] to be liars. This necessarily involves the courts in an unseemly review of the behavior and attitudes of legislators and other official decisionmakers, a process necessarily characterized by innuendo, gossip, and suspicion." *Id.*

[208] Consider the well-publicized contretemps involving the arrest of Harvard scholar Henry Louis Gates and President Obama's role in stoking the controversy when he described the arresting officer as "acting 'stupidly'" and possibly with racist intent. Helene Cooper, *Obama Criticizes Arrest of a Harvard Professor*, N.Y. TIMES, July 23, 2009, at A20. President Obama's remarks engendered a spate of negative reactions leading him to apologize for his comments. The episode illustrates the political and institutional costs of criticizing government officials and especially accusing them of prejudice.

admission to that effect. If constitutional values are to be vindicated, judges must have effective tools at their disposal to engage with difficult and sensitive issues.

The vagueness doctrine treats the potential for abuse of power in the way authority is legislatively arranged and not in the way it is actually administered. It will invalidate a particular arrangement of law and preclude its use in the future if the terms of the regulation insufficiently constrain police power. Underlying this structural feature is the assumption that *every* decisionmaker is susceptible to exercising authority in an oppressive or biased fashion when a legal regime confers broad powers. Vagueness analysis actualizes a leveling effect in the manner that it conceptualizes the dispersal of power. This aspect of vagueness has strategic significance for judicial decisionmaking. It means judges can express doubt about an officer's judgment or question discriminatory prosecutorial decisions without undertaking a review of the actual conduct of specific police officers or prosecutors. Judges can speak in terms of the hypothetical officer or prosecutor who (having even the best intentions) cannot be vested with unconstrained authority.

The notion that every decisionmaker has the capacity to fall prey to the corrupting influence of unchecked power inverts the typical deference that the Court extends to law enforcement or prosecutors in other contexts. We have seen the Court's marked reluctance to examine the reasons and motivations behind prosecutorial decisionmaking even when confronted with highly compelling evidence of bias.[209] This deference extends to police conduct in the areas of search, seizure, and arrest. As one commentator pointed out, "[t]he Court has deferred to virtually every police and prosecutorial demand to limit Fourth Amendment rights and to eliminate or ease judicial oversight of searches, seizures, and arrests."[210] Current Fourth Amendment law is informed by the view that the courts should generally defer to the officers' training and experience, because the police must be afforded sufficient latitude to respond and adapt to dynamic situations.

Vagueness takes the larger, systemic view regarding the delegation of power to law enforcement. Rather than focusing on the facts of specific police-citizen interactions, vagueness enacts a broader perspective that emphasizes the critical importance of laying down lines of restraint to direct the discretion of the police in their decisionmaking. Such structural features of vagueness enable judges to retain some oversight of policing and

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

[210] David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 240 (1994) (also observing that the effect of the Court's Fourth Amendment cases "is to withdraw from Fourth Amendment coverage a broad range of police activity, to reduce the privacy protections of the Fourth Amendment, and to permit the police to use an assortment of pretextual encounters to validate otherwise unlawful intrusions").

prosecutorial decisionmaking without the typical deference shown to those decisionmakers.

C. Opening a Dialogue

The vagueness doctrine places the onus on the legislature to craft laws carefully and deliberately to avoid the likelihood of unequal administration, imposing an affirmative duty on the law-making body to safeguard the interests of equality by engaging in a deliberative process that is sensitive to promoting constitutional values. In this regard, the vagueness doctrine shares the First Amendment's broad prohibition. Under the First Amendment, not only must a legislature refrain from enacting laws that would use speech, assembly, association, or religion as grounds for burdening (or favoring) individuals, it must also secure First Amendment rights by pursuing policy goals with as little impact on those rights as possible. By contrast, rights under equal protection are traditionally understood as checks upon deliberate government harm towards blacks and other protected classes. Indeed, equal protection merely requires that the government refrain from the deliberate use of race or other prohibited criteria as a basis of selection. It does not oblige the legislature, in the course of enacting facially neutral laws, to affirmatively secure the interests of minorities.

Bickel has described the vagueness concept as a colloquy with the legislature. In his words, vagueness poses "more of a question and puts it to an institution in which getting answers is harder and takes more time and effort. The Court . . . tells the legislature that if there is to be regulation in the area touched by the vague statute, the legislature must itself make the regulation, deciding just what kind it wants and just where."[211] As a conversation opener, the vagueness doctrine initiates a line of communication between the judiciary and the political branches to reconsider or give a "second look"[212] to laws or policies that are ambiguously written and constitutionally infirm. The vagueness doctrine leaves room for the political branches to determine how best to provide sufficient constraints on enforcement authority to curb the risk of discriminatory decisionmaking. In Amsterdam's view, vagueness "leave[s] open a field for state experimentation in other modes of control," because "a vagueness decision does address itself to the *form* of regulation, without reference to the ultimate amenability to regulation of its subject."[213]

Kolender v. Lawson illustrates the nature of the communication that vagueness fosters between the branches. In the opinion, the Court expresses its dissatisfaction with the standard of "'credible and reliable' identification" for determining whether a suspect has satisfied the anti-loitering statute, be-

[211] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 179 (1962).

[212] GUIDO CALABRESI, COMMON LAW IN THE AGE OF STATUTES 16 (1982) (using this phrase in conjunction with doctrines that "allow courts to nullify some statutes and yet give the legislatures another chance, a second look").

[213] Amsterdam, *supra* note 1, at 113–14. R

cause the standard had no core meaning or content grounded in any "known community norms [or] established bureaucratic practices."[214] Refusing to sanction such a law despite the pressing needs of crime control, the Court advised the legislature to draft a more precise statute, because "this is not a case where further precision in the statutory language is either impossible or impractical."[215] Accordingly, the Court opens the dialogue by explaining to the legislature the constitutional infirmities in the law, suggesting possible ways to ameliorate the problem, but ultimately allowing the other branches to consider how best to conform to its regulation. Less directly, the Court also addressed the executive branch concerning the dangers of unequal administration. A court's vagueness decision that condemns discriminatory enforcement reminds the executive branch to refrain from the creative use of generally applicable laws to enact discriminatory policies or goals.

There is an independent value to this kind of conversation for enhancing democratic governance. The dynamic between the courts and political institutions fosters a form of collaborative constitutionalism that encourages each side to view commitments to substantive constitutional principles as a shared responsibility. The doctrine moves the courts to confront and examine instances of discriminatory exercises of power to determine whether a law is consonant with the interests of equality and fairness. Though the judiciary may make the first move in pointing out infirmities in the law that contravene substantive values, it does not have the last word on the matter. The lawmaking body and the executive have an opportunity to decide how to remedy the defects in the law and how they should implement safeguards against unequal enforcement. In this dynamic, all the branches have a significant role in ensuring the vindication of constitutional values. To be sure, there are social costs when courts void a law, prompting a legislature to pass new legislation. However, the costs are not insupportable when weighed against the important substantive values at stake. Moreover, this interaction incentivizes the other actors to consider alternative, innovative approaches to preventing the discriminatory exercise of authority.

IV. Towards an Invigorated Vagueness Doctrine

Admittedly, the vagueness doctrine does not offer a comprehensive remedy for the many inequities that plague our justice system and cannot be invoked indiscriminately to address the numerous forms of inequality in the system. There remain significant areas of discretion, such as charging decisions or plea-bargaining, that cannot be easily reached by the vagueness doctrine because they are not typically governed by specified legal rules and those decisions require a degree of flexibility for an efficient functioning of the criminal justice system. A claim of vagueness still depends on the pre-

[214] Post, *supra* note 36, at 495 (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983)). R
[215] *Kolender*, 461 U.S. at 361.

cept that a law possesses some degree of uncertainty that leads to less than fair warning of its prohibitions or erects fewer constraints upon the arbitrariness of governmental officials.[216] Nonetheless, the Court's current approach to vagueness overemphasizes textual precision to the exclusion of other considerations that matter in regulating arbitrary power. When the Court's opinion is confined to technical measurements of determinacy in the words of a statute, it risks writing an opinion disembodied from the historical and political context of the law under consideration. In doing so, the Court evades a meaningful confrontation of the issues of discrimination and inequality as experienced by the affected communities.

The vagueness doctrine can be applied more robustly than the Court's current approach suggests in *Morales* and *Kolender*. In this section, I delineate ways in which vagueness doctrine can be applied to maximize its underlying virtues. First, in evaluating whether the danger for unequal enforcement inheres in an imprecise law, the Court should move beyond a myopic parsing of text to a consideration of other forms of evidence that reveal how a law has been applied. Statistical evidence regarding the racial or ethnic impact of a law is relevant to the vagueness inquiry. It is artificial to look at the language of a statute, devoid of a contextual understanding that a law will likely impact particular minority or underrepresented groups.

While it is true that vagueness is concerned with the risk of unequal application, evidence regarding the actual application of the law is nonetheless probative of the core inquiry. Rather than detract from its analysis, integrating such evidence situates the vagueness analysis in an authentic understanding of how a specific law is actually enforced. For example, arrest statistics for the anti-gang loitering ordinance in *Morales* indicated that most of the 40,000 people arrested under the loitering ordinance were African American or Latino.[217] The Court neither referenced these statistics nor considered any other disparate impact evidence in the law's application. Had the *Morales* court explicitly acknowledged the statistics, a deeper discussion of the challenges of community policing and race would likely have ensued. At the least, the Court would have needed to discuss the effect of the law on minorities. Though the discussion might not have put to rest the complex issues surrounding the nature and role of policing in inner-city communities, the analysis would have mitigated the perception that the Court rendered a decision disconnected from an understanding of the competing interests at stake.

Additionally, consideration of such evidence might well foster more accountability in the entities that enforce our laws. Police and prosecutors may be more inclined to collect data on racial and ethnic impact to foreclose

[216] Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 661–62 (1981) (discerning three factors that account for the occasions when courts are apt to void a statute for vagueness: facts and values, core conduct, and nearby conduct).

[217] *See* Roberts, *supra* note 146, at 775.

a finding that a law creates the risk of arbitrary enforcement. More importantly, the existence of such data is an important step towards understanding and remedying inequities in the prosecutorial process, particularly the aspects of prosecutorial authority that cannot be readily challenged.[218] Such studies of course depend on the willingness of prosecutors to collect and maintain data about the defendants in the prosecutorial process.[219]

Second, the level of political salience surrounding a statute is particularly important to an inquiry about the risk of discrimination in the application of the law. The more highly charged the enforcement of a statute or policy, the greater the likelihood of unequal application. Acknowledging the undercurrents that inform a law's enforcement situates the court's vagueness analysis more firmly within the reality in which a law operates. A court should not blind itself to the sociopolitical milieu of a law's provenance or its operation. For instance, in *NAACP v. Button*, the Court attributed the enforcement of Virginia's law restricting attorney compensation in constitutional litigation to hostility against the "militant Negro civil rights movement."[220] Striking down the statute as vague, the Court emphasized the statute's threat to activity "looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority."[221]

Third, in evaluating the danger of discriminatory enforcement, the Court should also scrutinize alternate safeguards that have been implemented to prevent discrimination. This scrutiny would be especially pertinent when a law devolves authority to diffuse decisionmakers whose actions are not readily or immediately rendered accountable. Possible safeguards include administrative regulations, departmental guidelines, or internal policies that guide the parameters of law enforcement decisions. At least two discernible advantages emerge with this approach: (1) it allows for a more realistic assessment of the likelihood of unequal enforcement, and (2) it promotes accountability and self-regulation in the entities that enforce the laws. Consider the case of Chicago's loitering statute in which the police department had adopted internal rules limiting enforcement to certain designated areas. Although the Court acknowledged their existence and ultimately concluded that the rules did not sufficiently curb police discretion, its scant discussion left the impression that such rules were not particularly important to the inquiry. However, a vagueness jurisprudence that emphasizes the role of guidelines and regulations encourages self-monitoring by police and prosecutors, and fosters sensitivity to the need for accountability and transparency. In turn, carefully promulgated and well-observed guidelines can assist the courts in analyzing the risk of unequal enforcement. Ultimately,

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[218] ANGELA DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 186–89 (2007) (proposing the use of racial impact studies to curb the discriminatory effects of prosecutorial discretion).

[219] *Id.* at 189–91.

[220] 371 U.S. 415, 435 (1963).

[221] *Id.* at 434.

this facilitates the underlying goals of fostering accountability in entities that often operate without reasonable controls upon their discretion.

These proposed reforms are not radical departures from traditional vagueness review. They are consistent with the core principle underlying vagueness—that reasonable constraints on discretionary authority should exist. Yet they invigorate the vagueness review by moving the analysis beyond merely an abstract search for textual clarity towards an engagement with the social and political context behind a law and its enforcement. Although the vagueness doctrine represents an indirect means for achieving equality, the analysis need not evade a meaningful inquiry into the issue of inequality in the administration of our criminal laws.

Consider how the vagueness doctrine as elaborated would apply to the recently passed Arizona immigration law, S.B. 1070.[222] Among the set of new law enforcement procedures mandated under S.B. 1070 is a provision requiring that any police officer who has conducted a "lawful stop, detention or arrest . . . in the enforcement of any other law or ordinance of a county, city or town or [the State of Arizona]" must make a "reasonable attempt . . . to determine the immigration status of the person" who has been stopped, detained, or arrested whenever "reasonable suspicion exists that the person is an alien and is unlawfully present."[223] Furthermore, for any person arrested, the police must determine the person's immigration status and must detain the arrested person until such status is verified.[224]

Critics and proponents alike agree that S.B. 1070 represents the most draconian and sweeping immigration measure to be passed in generations.[225] The intent of S.B. 1070 is to help Arizona seal its borders to deter and punish the "unlawful entry and presence of aliens."[226] The law has provoked a storm of controversy as a racist law that will harm the fragile relationship between police and minority communities.[227] It has spawned lawsuits from civil rights organizations and most recently from the United States Depart-

[222] Arizona Governor Janice Brewer signed into law S.B. 1070 on April 23, 2010, a comprehensive system of state laws expressly intended to deter and punish "the unlawful entry and presence of aliens." 2010 Ariz. Legis. Serv. Ch. 113 (S.B. 1070) (West). On April 30, Governor Brewer signed H.B. 2162, which amends S.B. 1070 but retains the intent and core components of that law, and was intended to take effect on July 29, 2010. Ariz. H.B. 2162 (2010); *see* ARIZ. CONST. art. 4, part 1, §1(3).

[223] ARIZ. REV. STAT. ANN. § 11-1051(B) (2010).

[224] *Id.*

[225] Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, April 23, 2010, at A1.

[226] 2010 Ariz. Legis. Serv. Ch. 113 § 1 (S.B. 1070) (West).

[227] Spencer S. Hsu, *U.S. Police Chiefs Say Arizona Immigration Law Will Increase Crime*, WASH. POST, May 27, 2010, at A3 (Police chiefs from Los Angeles, Houston, and Philadelphia said: "Arizona's law will intimidate crime victims and witnesses who are illegal immigrants and divert resources from investigating more serious crimes . . . .").

ment of Justice.[228] That lawsuit has recently succeeded in temporarily enjoining key provisions of the law.[229]

The provisions requiring police officers to determine immigration status when reasonable suspicion exists that a person is unlawfully present grants police officers virtually unfettered discretion to determine when the requisite suspicion exists. No constraints are specified in S.B. 1070 to guide the officer's discretion, other than the fact that an officer cannot consider "race, color or national origin."[230] Notwithstanding that limitation, S.B. 1070 does not meaningfully specify the characteristics or scenarios that officers are permitted to utilize in forming reasonable suspicion. When asked what criteria other than the obvious one of race could be used to form reasonable suspicion, Arizona Governor Jan Brewer said, "[w]e have to trust our law enforcement."[231] That is precisely what our Constitution prohibits. Indeed, law enforcement leaders across the country have expressed doubt that any amount of training will prevent officers from resorting to racial and ethnic markers to form reasonable suspicion.[232] The high political salience of S.B. 1070 and the devolution of unconstrained discretion to diffuse decisionmakers—individual police officers on the beat—create a high risk of discriminatory enforcement.

As this Article has argued, a doctrine such as vagueness has proven efficacious in enforcing norms of equality in our criminal justice regime precisely because it does not compel courts to ferret out improper motivations nor to participate in the politics of recognition that is required by the equal protection doctrine. Vagueness has intimate connections with the substance of making and administering criminal laws. Within the domain it operates, vagueness remains a compelling doctrine in its structural capacity to regulate the bounds of governmental power and "oversee the kinds of judgments that can be made by officials within the domain"[233] regulated by the legal rule. Through this doctrine, courts retain an effective instrument for

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[228] Jeremy Markon & Michael D. Sher, *Justice Department Sues Arizona over Law; Unusual Clash with a State Immigration Measure Called Unconstitutional*, WASH. POST, July 7, 2010, at A1. Civil rights organizations such as the American Civil Liberties Union, Mexican American Legal Defense Fund, and Asian Pacific American Legal Center have filed a lawsuit to enjoin the Arizona law based on the grounds that S.B. 1070 violates the Supremacy Clause, the right to travel, and the First Amendment. Plaintiff's Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof at 2, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 10-1413). Neither of these lawsuits has raised a vagueness challenge to the controversial provisions of the law. Indeed, the federal government's lawsuit is distinguished by its failure to raise any claims based on the discriminatory impact of the law.

[229] Randal C. Archibold, *Judge Blocks Arizona's Law on Immigrants*, N.Y. TIMES, July 29, 2010, at A1 (On July 28, 2010, a district court judge enjoined key provisions of the law, including the sections requiring officers to check the immigration status of a suspected "alien.").

[230] 2010 Ariz. Legis. Serv. Ch. 113 § 2 (S.B. 1070) (West).

[231] *See* Archibold *supra* note 229, at A1. R

[232] Jonathan J. Cooper, *Arizona Immigration Law Divides Police Across US*, ASSOCIATED PRESS, May 17, 2010.

[233] Post, *supra* note 36, at 498. R

vindicating important substantive principles in the enforcement of criminal laws.

Conclusion

The development of the vagueness doctrine from "a procedure-oriented constitutional jurisprudence"[234] into one encompassing a substantive component that ensures equality in the administration of justice vitalizes a role for this doctrine in mediating the issues of race, discrimination, and inequality that criminal procedure and substantive criminal law have largely ignored. Realistically, courts do not have many tools at their disposal to redress inequities in the criminal justice system. Vagueness represents a distinct jurisprudential space that is assuredly concerned with fairness, prevention of discrimination, and freedom from arbitrary power. As such, it offers a doctrinal safety valve, delimiting a space in which courts can confront the difficult and potentially incendiary issues of racism, prejudice, and discrimination within a framework that eases the tensions otherwise heightened under equal protection.

As a vehicle for vindicating substantive equality, one discerns in the vagueness doctrine a methodology for addressing discrimination beyond the framework afforded by the equal protection doctrine. The doctrine's focus on the *risk* of discrimination suggests a systemic inquiry of inequality that treats the risk of discrimination as a harm in itself. This perspective runs counter to equal protection's narrow perspective of requiring injury particularized to an individual and perpetrated by specific decisionmakers. The vagueness approach offers possibilities for deeper inquiry into systemic discrimination that current equal protection doctrine cannot accommodate while conceptualizing a methodology for addressing broad-based inequality.

The expressive value of vagueness decisions imparts a social meaning about the desirable norms that should govern the enforcement of our criminal laws. When a court strikes down a law because of its discriminatory effects, it openly affirms a commitment to equality and fosters a set of expectations regarding the important constitutional values to perpetuate in a regime.[235] Beyond lip service about the importance of the justice system's commitment to equality, it is a demonstration of the courts' willingness to confront seriously the systemic problem of inequality and discrimination.

By voiding an overreaching statute, courts establish the limits of state power and the importance of regulating discretionary power to avoid arbitrary or discriminatory enforcement. In a legal regime that sanctions the accrual of vast discretion to prosecutors and law enforcement, the vagueness

[234] Kelman, *supra* note 216, at 661. R

[235] David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 Geo. L.J. 1059, 1089–92 (1999) (discussing the important role law enforcement plays in deterring crime and the deleterious effects of unconstrained discretion on legitimacy).

doctrine stands sentry against the seemingly relentless expansion of state power, bringing a corrective influence to a system that has few levers for regulating the coercive powers of the state and resettling the boundaries between order and liberty.