Public Law as a Whole: The Case of Selective Enforcement and Racial Profiling

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Introduction

Constitutional law and administrative law, often regarded as distinct disciplines, are both components of *public law*: the law of relationships between government and those whom it governs. Public law, in turn, comprises a set of rules and principles that establish, sustain, and restrict the activities of governing. By implementing these norms, *judicial review* serves to maintain the *rule of law*: a deeply-rooted, though not entirely uncontroversial, principle of Western legal thinking binding the government itself to the law.

Divergence of legal and political systems, shaped by local culture as well as history, has given rise to considerable differences among nations' perceptions of constitutional law, administrative law, judicial review and the manner in which these concepts are interrelated. In countries lacking unitary constitutional documents, such as England and Israel, the common law gradually established administrative grounds for judicial review and constitutional principles for the protection of human rights. The principle of rule of law, along with the doctrine of *ultra vires* – limiting government and its agents to act within their legitimate authority – formed the basis for judicial review of administrative power. Administrative law in these countries delineates the scope of government's executive, regulatory, and quasi-judicial activities. In Germany – where the principle of the rule of law and the principle of legality are embodied in the constitution – constitutionality is but one of several grounds for judicial review of administrative acts.

While other countries "harmoniously" subject *all* government activities to *each* rule of constitutional and administrative law, the United States' legal system often distinguishes between issues for constitutional review and those properly left to administrative review. Having the world's oldest extant written constitution, coupled with well-established precedents sustaining the courts' power to "say what the law is" in reviewing actions of the executive and legislature, administrative law plays second fiddle, and there is a tendency to review every issue involving human liberties through purported evaluation under solely constitutional principles ("over-constitutionalism"). Although the roots of the administrative law in the United States are in the common law, it is governed today by the federal Administrative Procedure Act (APA) and state enactments. While this body of law covers a huge public sector, it is still limited, and by and large we can say that administrative law in United States applies only to actions attributable to governmental entities serving regulatory functions.

The biggest problem with the limitations on the applicability of administrative law is the exclusion of the criminal enforcement authorities, which are reviewed according to the Constitutional Amendments relevant to the criminal process. The police and the prosecution are hardly ever seen as part of "administrative law," despite the fact that they are precisely the part

of government which most directly intervenes in people's lives, and despite the enormous discretion they are granted. This exclusiveness of constitutional review without any administrative perspective, combined with the traditional American reluctance to interfere with enforcement discretion, effectively grants the authorities excessive power in administering criminal proceedings and may lead to insufficient controls on abuse of power.

This article examines the phenomenon of the American emphasis on constitutional demands at the relative expense of the principles and insights of administrative law. As an alternative to this dichotomous approach, the article suggests a more holistic approach to public law. To this end, I will argue that discretionary actions of administrative authorities – including criminal law enforcement agencies – should be governed by principles of *Normative Duality*: constitutional norms as well as administrative rules. Thus, in judicial review of administrative authorities' exercise of discretion, courts should broadly combine constitutional analysis with consideration of administrative law principles. I do not contend that constitutional rules lack normative superiority, but rather that their interpretation and implementation regarding the actions of administrative authorities should be informed by administrative rules. Moreover, I do not propose changing the federal administrative rules of the APA or the relative status of state administrative rules. I do address the body of constitutional law for administrative authorities by suggesting borrowing, developing and implementing within it a layer of administrative insights, to be applied in both federal and state courts.

More specifically, I will focus on two substantive principles of administrative law: the principle of *legality*, which embodies the duty to act for a proper purpose and from relevant considerations, and the principle of *proportionality*, which requires due regard to the balance between the governmental ends pursued and the means to achieve those ends. These grounds of judicial review are mentioned explicitly in some constitutions, and can comport with American judicial review.

This approach is timely, considering the trend towards internationalization of the role played by law and the legal process in regulating the relations between citizens and government in modern democracies. Each country's public law has important strengths and weaknesses, many of which must be considered in the light of its unique history and culture, but it is clear that every country stands to learn from the others. As part of this process, I suggest that judicial review in the United States not hesitate to be influenced by substantive doctrines developed in other countries such as England, Israel and Germany.

Potential contributions of administrative law to contemporary constitutional judicial review are well demonstrated by the doctrines governing the problems of *selective enforcement*

and *racial profiling*. These two problems, both of which involve unfairly harsh application of the law to a particular person or class, are governed by different constitutional amendments. The doctrine of selective enforcement, namely uneven enforcement of neutral law, uses equal protection analysis under the Fourteenth and Fifth Amendments while the phenomenon of racial profiling, namely the use of race to decide the probability of criminality, is analyzed under the Fourth Amendment. This creates a complicated interplay between two constitutional doctrines which leads to some abnormalities and paradoxical results. Under equal protection analysis, a person alleging selective enforcement must prove that an authority made a subjectively intentional selection, based upon an unconstitutional standard such as race or religion. In contrast, courts emphasize that the proper inquiry for determining the constitutionality of a search or seizure under the Fourth Amendment is objective: made without regard to the officer's underlying motives or intent.

The above legal situation creates a problem in analyzing racial profiling in the context of traffic violations. Courts upheld pretext stops in which African-American male drivers were stopped because of the presumption that they were engaged in drug activities (so-called "driving while black"), as long as there was any minor objective cause. Indeed, the courts emphasized that the fact that there was no Fourth Amendment violation does not mean that one was not discriminatorily selected for enforcement of a law. However, it is almost impossible to address the above-mentioned requisite to support the selective enforcement claim, namely the demand to prove intentional discrimination based on illegitimate classification.

The approach which underlies these demands for proof presupposes a correlation between the state legislature's ability to make a "reasonable classification" which is "rationally related" to a legitimate state interest, and the ability of the executive to conduct reasonable classification in enforcement. Thus, as long as the classification made by the administrative authority is not unconstitutional, it is legitimate even if it does not meet the purpose of the respective legislation. In my view, this correlation contradicts the principle of *separation of powers* and the principle of *legality*. I will argue that a holistic view, based on constitutional and administrative rules, requires drawing the inference that when exercising discretion to enforce the law, not only are the authorities not allowed to make discriminatory classifications, but they are also prohibited from acting arbitrarily, unreasonably, upon irrelevant considerations, and with non-proportionality. The result is that the enforcement authorities are entitled to weigh only those considerations that are compatible with the purpose of the authorizing law.

This approach bears practical importance today. After the events of September 11th, an analogy has been drawn between the war on drugs, which led to the phenomenon of racial

profiling regarding traffic violations, and the war on terror, which has also led to some forms of racial profiling. Making the correct differentiations with the public law tools can help to explain why such analogies are misleading.

Part I addresses the main feature of the administrative powers in modern countries – the extensive *discretion* granted by the authorizing statutes. Recognizing the inevitability of authorities' discretion, this part deals with the right perception of the rule of law in that context. Following Professor Fallon's argument that any model of the rule of law falls short of grasping all its aspects, I focus on the rule of law as a *principle that limits the abuse of power and is enforced by judicial review*. In line with this aspect I argue that the main purposes of public law – constitutional and administrative – are to *keep the powers of government within their legal bounds and to limit the abuse of power*.

Part II describes the characteristics of administrative and constitutional judicial review in England, Israel, Germany and the United States in order to show how different cultural, historical, and political developments influenced the relationships between the two disciplines and the perception of the rule of law as defined in the previous part. I show that in England, Israel and Germany, despite the uniqueness of each, there is a relatively holistic approach to the rules of public law; there is, however, no "public law" in the United States, but rather "constitutional" and "administrative", which exist as separate disciplines rather than "as a whole."

Part III discusses the problems of the non-applicability of administrative rules to the criminal enforcement authorities and the traditional American reluctance to interfere with enforcement discretion in general and in particular with the discretion not to enforce the law. I argue that since this legal situation does not provide sufficient protection of the rule of law, solid reasons exist for judicial review to follow Israel, England and Germany by not refraining from scrutinizing enforcement discretion claims in general and selective enforcement claims in particular. A perception of the separation of powers doctrine as a system of checks and balances requires that all three powers be involved in enforcement work with continuous synchronization and mutual feedback. Courts, which are the "final link in the chain", have a supremely important role in guaranteeing constitutional rights, reducing the arbitrary exercise of discretion, and avoiding abuse of power. This approach will better serve modern functions underlining the separation of powers doctrine, namely *democracy*, *professionalism* and the *protection of fundamental rights*. Furthermore, the importance of the judicial power to "make law" as well as to scrutinize enforcement discretion is supported by public choice theories, based on the consensus principle, which accepts the historical idea of the Constitution as a social contract.

Part IV suggests that in line with the "internationalization" of public law, United States courts will not refuse to be influenced by the holistic approach in other countries, and hence will implement normative duality by combining constitutional review with the rationales of the administrative grounds for judicial review. This part addresses two connected counter-arguments that can be raised against this suggestion: the argument against *comparativism* and the argument against federal common law, both of which can be linked to the originalism approach to constitutional interpretation. After answering those counter-arguments, I demonstrate the potential contribution of two substantive grounds of administrative review to the constitutional review: legality and proportionality. The first one embodies the principles of proper purpose and relevant considerations. While those concepts are known in both administrative and constitutional review, there are realms in which they are ruled out. This is the case in traditional Fourth Amendment doctrine, which uses an objective test for stops, arrests and seizures, regardless of the motive of the officers. This may lead to absurd situations, in which courts validate abuse of power by officers not acting for the purpose of the authorizing law. Moreover, even when a wrong motive underlies the action it can still be perceived as "reasonable". The second ground demonstrated is proportionality, which is increasingly recognized as a key component of the rule of law in many countries around the world. Even though mentioned in the Constitution only in regard to punishments, its reasoning – which is not foreign to the United States Supreme Court – should be incorporated into judicial review of administrative authorities, in regard, for example, to selective enforcement claims.

Part V deals with the doctrine of selective enforcement, which was developed in the United States within the equal protection doctrine. The main requirement for establishing the claim of selective enforcement is proof of intention to discriminate on an unconstitutional basis such as race or religion. After describing the roots of this requirement and the sharp criticism which was raised against it, I show how the notion of the *normative duality* can contribute a different perspective of the issue. In this context, I argue that this requirement, which allows the authorities to make classifications as long as they are not unconstitutional, contradicts basic administrative principles. The principle of *legality of administration*, according to which the agent is constrained to adhere to the term of delegation made by the principal, requires that authorities draw only classifications faithful to the enabling law. Furthermore, beyond the requirement to act equally, the enforcement authority has the additional obligations of administrative law limiting the way in which it can exercise its discretion. The requirement to prove a discriminatory motive based on unjustifiable classification significantly reduces the reasoning behind prohibiting *irrelevant purposes* and *considerations*. This requirement may

allow *arbitrary* decisions so far as they do not produce unconstitutional classifications, and can lead to *non-proportional* decisions in which the enforcement injures the individual more than it benefits society. In light of this, the emphasis should be on the wrong result of selective enforcement rather than on the authority's motive.

Part VI addresses the problematic legal situation regarding the practice of "pretext stops," which is analyzed under the Fourth Amendment objective test. This practice involves the use of racial profiling by police officers who stop African-American male drivers because of the presumption that they are engaged in drugs or weapons activities. According to the Supreme Court decisions, the legality of stopping a car is not related to the police officer's subjective motive, and hence the stop is legal as long as the officer had an objective reason for the stop, even if this reason would not have caused her to stop someone else. I will argue that this constitutional interpretation runs counter to the Fourth Amendment's objective to prevent arbitrary search and seizure, grants the police unfettered discretion, and enables abuse. Here again the normative duality approach can help ameliorate the absurdity created by the strict constitutional rule. The perception of the police as an administrative authority would subject it to the principle of legality, which demands that the police use "class probability" only when it is consistent with its authorization and only when the statistics upon which the generalization is drawn are well established. Not only are these conditions not met in the case of pretext stops, but there are further defects in the exercise of discretion: this practice is extremely unreasonable, it involves improper purpose and irrelevant considerations, and it constitutes disproportionate infringement of the presumption of innocence.

Part VII deals with the "abnormality of the dichotomy" and aims to show how the interaction between subjective and objective constitutional rules and their respective treatment of the burden of proof creates a legal situation antithetical to the concept of public law as a whole, and fails to provide sufficient judicial protection against abuse of power. The "dichotomy" refers first, to the exclusiveness of constitutional review of selective enforcement and racial profile claims, ignoring principles of administrative law review; and, second, to the clear-cut distinction between the subjective equal protection tests and the objective probable cause tests. The final result of abnormality – stemming from the cumulative reasons of the exclusiveness of the constitutional review and the traditional reluctance to interfere with enforcement authorities' discretion – refers to the relative neglect of discriminatory racial enforcement compared to the judicial treatment of racial discrimination in other realms. Abnormality also refers to the extreme difficulty of proving either selective enforcement or racial profile claims, which robs the defendants of both alternatives.

Part VIII shows how the phenomenon of *over-constitutionalism* – defining the discussion on race as an unconstitutional classification, and the lack of administrative insights – have led to some misleading analogies between racial profiling in the form of pretext stops and racial profiling in the context of the war on terror. This part by no means aims to exhaust the discussion on racial profiling after September 11th. It does aim to point out that the approach of *normative duality* – and in line with it, the alternative propositions suggested with relation to selective enforcement and racial profiling doctrines – can shed light on the issue and explain why some frequently drawn analogies are ultimately misleading. I conclude that while the practice of racial profiling regarding pretext stops is generally illegitimate, it can be legitimate in some situations in the context of counter-terrorism activity, and hence, not necessarily perceived as selective enforcement. The solution for potential abuse of power lies in effective judicial review applying the public law rules and upholding the rule of law. This is part of the holistic approach, which perceives all the enforcement agencies as holding administrative powers subject to judicial review.

I. Public Law as a Whole and the Rule of Law

Public law is concerned with the activity of governing and the relations between the governors and the governed, namely the relationships between individuals and governmental authorities¹. While attempts to distinguish between public law and related fields² or to draw the exact limits of public law in regard to other areas of law³ may be controversial, there is no doubt that constitutional law and administrative law are both viewed as branches of it⁴. Constitutional law involves the study of society's principal organs of government and their interrelationships, and the study of basic democratic values, of which human rights are at the center. This is the

¹ Martin Loughlin, *The Idea of Public Law* (Oxford, 2003) 5, 153; Andrew Le Sueur, Javan Herberg & Rosalind English, *Principles of Public Law* (2nd ed., Cavendish Publishing, 1999) 4-5.

² For the affinity between public law and political science, see: Gavin Drewry, "Bridging the Chasm: Public Law and Political Science", in *The Law, Politics and the Constitutions – Essays in Honour of Geoffrey Marshall* (David Butler, Vernon Bogdanor, Robert Summers eds., Oxford, 1999) 203-221.

³ For the difficulty in distinguishing between public and private law, see: Loughlin (*supra* note 1), at 2, note 5. For discussion of the denial of any distinction between them, see: "The Peculiarities of the English': Resisting the Public/Private Law Distinction", in *Law and Administration in Europe – Essays in Honour of Carol Harlow* (Paul Craig & Richard Rawlings eds., Oxford, 2003) 107-121; John W.F. Allison, "Theoretical and Institutional Underpinning of a Separate Administrative Law", in *The Province of Administrative Law* (Michael Taggart ed., Hart Publishing, 1997) 71-89. For the tendency to prefer more specific categories, see: Le Sueur, Herberg & English (*supra* note 1), at 5. For the tripartite division of public law into the sub-disciplines of constitutional law, administrative law and international law, and the growing realization that all of them "are in the same boat," see: Michael Taggart, "The Tub of Public Law", in *The Unity of Public Law* (David Dyzenhaus ed., Hart Publishing, 2004) 455.

⁴ This convention is demonstrated by books addressing the subject of public law by combining the subjects of constitutional law, administrative law and human rights. See, for example: Ian Loveland, *Constitutional Law, Administrative Law and Human Rights* (3rd ed., Butterworth, 2003).

case today both in legal systems having a "material" but unwritten constitution⁵ (such as England⁶ and Israel⁷) and in legal systems with a formal constitution (such as the United States⁸, Canada⁹ and Germany¹⁰). Administrative law focuses on one of the branches of government – the executive branch – which plays the main role in supplying services to the public in the modern administrative state, and on the legal aspects of its actual operation¹¹. Thus, the basic tasks of public law – constitutional and administrative – deal with the core areas of governmental organizations and the maintenance, regulation and exercise of governmental powers. Public law, as a whole, can be defined, following Martin Loughlin, as the "assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition, sustain and regulate the activity of governing."

The basic idea underlying public law is the Rule of Law. Although this concept is shared in modern Western states, its content, as well as its historical and conceptual foundations, is

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⁵ For the distinction between written and unwritten constitutions, see: Stanley de Smith & Rodney Brazier, *Constitutional and Administrative Law* (6th ed., Penguin, 1989) 11-12. For criticism of the term "unwritten", see: A.P. Le Sueur & J.W. Herberg, *Constitutional & Administrative Law* (Cavendish Publishing, 1995) 9-10. The authors prefer to say that "there is no single constitutional document."

⁶ For the substance of the unwritten constitution of England, see: H.W.R. Wade, *Constitutional Fundamentals* (Stevens, 1980); Walter Bagehot, *The English Constitution* (Paul Smith ed., Cambridge University Press, 2001); Roger Cotterrell, "The Symbolism of Constitutions: Some Anglo-American Comparisons," in *A Special Relationship? – American Influences on Public Law in the UK* (Ian Loveland ed., Clarendon, 1995) 25-46. For a wide discussion of human rights in the British legal system, see: Glanville L. Williams, *Learning the Law* (11th ed., Stevens, 1982) 111. For the contemporary role of human rights in the English Constitution, see: Sir William Wade, Q.C., "The United Kingdom's Bill of Rights", in *Constitutional Reform in the United Kingdom: Practice and Principles* (The University of Cambridge, Center of Public Law, Hart Publishing, 1998) 61-68.

⁷ Israeli law does contain components of a written constitution, which are known as "Basic Laws." Most of the basic laws deal with institutional aspects. In 1992 the Knesset passed two basic laws regarding human rights (Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation). For further information, see: Michal Tamir, under the topic of "Israel", in *Legal Systems of the World* (Vol. II, Herbert M. Kritzer ed., ABC Celio, 1998) 755, 757.

⁸ That American constitutional law includes governmental institutions issues and human rights can be demonstrated clearly by the content of the books dealing with the subject. See, for example, Laurence Tribe's explanations in the preface of the third edition of his book *American Constitutional Law* (Vol. I, Foundation Press, 2000), at p. iii. See also the explanation for the "structural constitution" in Norman Redlich, John Attanasio & Joel K. Goldstein, *Understanding Constitutional Law* (3rd ed., Lexis Nexis, 2005) 4-6.

⁹ Bernard W. Funston & Eugene Meehan, *Canada's Constitutional Law* (2nd ed., Carswell, 1998); P. Macklem, K.E. Swinton, R.C.B. Risk, C.J. Rogerson, L.E. Weinrib & J.D. White, *Canadian Constitutional Law* (2nd ed., Emond Montgomery Publications, 1997).

¹⁰ Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of German* (2nd ed., Duke University Press, 1997).

¹¹ For the definition of "administrative law," see: William Wade & Christopher Forsyth, *Administrative Law* (7th ed., Clarendon, 1994) 4-5. For the modern administrative state, see: Lift H. Carter & Christine B. Harrington, *Administrative Law and Politics* (3rd ed., Longman, 2000) 4-17; Laurence M. Friedman, *Law in America* (Modern Library, 2004) 125; William Bishop, "A Theory of Administrative Law", in *Administrative Law* (Peter Cane ed., Dartmouth, 2002) 489.

¹² Loughlin (supra note 1), at 155.

essentially contestable¹³. However, the core idea, contributed by Western legal thought, that the government itself is bound by the law¹⁴, is no longer open to dispute.

Every discussion of the rule of law starts with the historical Diceyan conception, according to which one of the main meanings of the rule of law is that individuals ought not to be subjected to the power of officials wielding wide discretionary powers¹⁵. Although indications against delegations of discretion to the administration can be found even in the American Constitution¹⁶, it seems that Dicey underestimated the scope of administrative power which actually existed even at the time he wrote¹⁷. Anyhow, it is readily apparent that the traditional model of administrative law, which conceives of the agency as a mere "transmission belt" for implementing legislative directives in particular cases, cannot hold in the modern administrative world, because the legislature is not able to foresee all the eventualities and flexibilities that may be required to implement legislation¹⁸.

Thus, the main feature of the administrative authority nowadays is the existence of discretion as a necessary tool to perform the welfare and regulatory functions of modern government¹⁹. Discretion, according to its positive definition, is "a sphere of autonomy within which one's decisions are in some degree a matter of personal judgment and assessment."²⁰ In that sphere the public officer who has the authority is free to make the choice between possible courses of action or inaction²¹. This definition does not distinguish between situations in which the authorizing statute mentions standards for decision-making and situations in which there are none. In this context, Professor Ronald Dworkin distinguishes between "strong discretion,"

¹³ For the contest, see: Richard H. Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse", 97 *Col. L. Rev.* 1, 1-10 (1997); Jeremy Waldron, "The Rule of Law as a Theater of Debate", in *Dworkin and His Critics* (Justine Burley ed., Blackwell, 2004) 319.

⁽Justine Burley ed., Blackwell, 2004) 319.

14 In the judgment of many, the seminal document of the emergence of the Rule of Law as a fundamental Western legal concept is the Magna Carta – the Great Charter of English liberty granted by King John at Runnymede in 1215. Article 39 embodied the principle that government itself is bound by the law and may not do certain things to ordinary people without "lawful judgment of his equals or by the law of the land." See: Barry M. Hager, *The Rule of Law* (2nd ed., The Mansfield Center For Pacific Affairs, 2000) 4.

¹⁵ Albert Venn Dicey, *Introduction to the Study of Law and the Constitution* (9th ed., E.C.S Wade ed., Macmillan, 1956) 188: "In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint."

¹⁶ U.S. Const. art. I, § 1: "All legislative Powers herein granted shall be vested in a Congress of the United States,

¹⁶ U.S. Const. art. I, § 1: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." This was the basis for the "non-delegation" doctrine, according to which Congress cannot delegate legislative power to the President. In its entire history the Supreme Court has invalidated only two statutes on the ground of improper delegation of power. See: J. Skelly Wright, "Beyond Discretionary Justice", 81 *Yale L. J.* 575, 582 (1971-1972).

¹⁷ Paul P. Craig, *Administrative Law* (4th ed., Sweet & Maxwell, 1999) 5.

¹⁸ Richard B. Stewart, "The Reformation of American Administrative Law", 88 *Harv. L. Rev.* 1669, 1675 (1975). For the discretionary and continuous relationships between the citizens and the state in the modern welfare state, see: Joel F. Handler, "Discretion in Social Welfare: The Uneasy Position in the Rule of Law", 92 *Yale L. J.* 1270, 1276 (1983).

¹⁹ For a broad discussion, see: Kenneth C. Davis, *Discretionary Justice – A Preliminary Inquiry* (University of Illinois, 1971) 3-26.

²⁰ Denis J. Galligan, Discretionary Powers – A Legal Study of Official Discretion (Clarendon, 1990) 8.

²¹ Davis (*supra* note 19), at 4.

which exists when the official is not bound by standards, and "weak discretion," which exists when the standards an official must apply cannot be applied mechanically but demand the use of judgment²². This dichotomy was criticized, with reason²³. Indeed, usually, administrative power cannot be identified with pure "weak" or "strong" discretion, but rather "weak" or "strong" components of discretion, namely various extents of discretion according to the standards specified in the statute and their accuracy²⁴. Therefore, in my opinion, the preferable definition for discretion is the negative-residual one, which sees discretion as the restricted area left open for the official's decision among the various rules governing her actions²⁵.

If that is the case, modern administrative powers contradict the rule of law in its historical sense. However, this anachronistic and formal perception has been replaced by new models for the rule of law. For example, the duty of every individual and official to obey the law is commonly perceived as a formal or procedural dimension, to which we should add a substantive dimension, which asserts that the law itself contains inherent moral values²⁶. Thus, the rule of law, like such other terms as "democracy" and "rights," became one of a cluster of ideals that are used as "codes" to describe modern political morality, often without drawing sufficient distinction among them and with a tendency to use any one of them as surrogate for all the others²⁷. Professor Richard Fallon identified four ideal types of the rule of law that embody divergent aspects of the concept, and argued that all fall short of furnishing an adequate theory. In light of this he suggested that it is best to see the rule of law "as an ideal comprising multiple strands or elements, which the various ideal types help to illuminate."

Following this approach, I will try to emphasize the relevant "strands" of the rule of law for the current discussion. For the purpose of this article it is highly important to understand the

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²² Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) 31-39.

²³ Galligan (*supra* note 20), at 16-20. In his opinion Dworkin's theory is based on two problematic premises: *first*, that a significant distinction can be made between having authoritative standards to apply and having to create one's own; *second*, that there is a right answer to any question of interpretation of given legal standards.

²⁴ Cf. Frederick F. Schauer, *Playing by the Rules – a philosophical examination of rule-based decision making in law and in life* (Clarendon Press, 1991) 222. For the relations between discretion and rules, see: Diane Longley & Rhoda James, *Administrative Justice* (Cavendish Publishing, 1999) 166. The authors suggest that discretion and rules should be regarded as "different points on a continuum."

²⁵ See: Robert E. Goodin, "Welfare, Rights and Discretion", 6 *Oxford J. Legal Stud.* 232, 233 (1986). Dworkin described the rule of law in the negative sense as the "hole in doughnut." See: Dworkin (*supra* note 22), at 31. ²⁶ For the procedural vs. the substantive meaning, see: Jeffrey Jowell, "The Rule of Law Today", in *The Changing*

²⁶ For the procedural vs. the substantive meaning, see: Jeffrey Jowell, "The Rule of Law Today", in *The Changing Constitution* (5th ed., Jeffrey Jowell & Dawn Oliver eds., Oxford, 2004) 5-25. For one of the substantive meanings given to the rule of law, see: Ronald Dworkin, "Political Judges and the Rule of Law", *A Matter of Principle* (Harvard University Press, 1985) 9, 12: "It [the rule of law] does not distinguish, as the rule-book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule-book capture and enforce moral rights." For a positivist perception of the rule of law, which claims that the ideal of government under a rule of law is not a moral virtue but an instrumental virtue that makes the law more effective, see: Joseph Raz, "The Rule of Law and Its Virtue", in *The Authority of Law: Essays on Law and Morality* (Clarendon, 1979) 210; Joseph Raz, "Incorporation by Law" 10 *Legal Theory* 1 (2004).

²⁷ Compare: Waldron (*supra* note 13), at 17.

²⁸ Fallon (*supra* note 13), at 56.

rule of law as a principle that limits the abuse of power and is enforced by judicial review²⁹. In line with this approach, the primary purpose of public law is to keep the powers of government within their legal bounds, so as to protect the citizens from abuse. "Abuse" in this sense is not necessarily linked with malice or bad faith, but can be a misunderstanding of the legal position, which can occur even in the most well-intentioned and compassionate of governments³⁰. The example which will be demonstrated later in this article, the issue of selective enforcement, refers not to the content of the law but to its enforcement and application. The "formal equality," by which no person is exempt from the enforcement of the law, is captured even by the Diceyan conception³¹. However, I will emphasize the role of judicial review in limiting selective enforcement by implementing the rules of public law as a whole, from a holistic point of view.

II. <u>Constitutional Law, Administrative Law and Judicial</u> Review

We have seen that public law – administrative and constitutional – contains a collection of rules and principles that command the activity of governing and are applied by judicial review in order to protect the rule of law, namely to protect against abuse of power in light of the discretion granted to the administrative authorities. Although in this sense the task of public law is shared by Western countries³², the perception of "administrative law", "constitutional law", the relation between these disciplines and the nature of judicial review, are dependent on culture, history, and political system³³. This will be demonstrated by a comparative view of the nature of public law and judicial review in England, Israel, Germany and the United States.

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²⁹ This perception can be partially equated with what Prof. Fallon calls "The Legal Process Ideal Types", because it focuses on the reasoned connection between the sources of legal authority and the determination of rights and responsibilities in a particular case, and on judicial review as a generator of procedural fairness and rational deliberation by the executive and administrative decision makers. See: Fallon (*supra* note 13), at 18.

³⁰ Wade & Forsyth (*supra* note 11), at 5; Jowell (*supra* note 26), at 25.

³¹ The "formal equality" does not prohibit unequal law, and it is a different question, to what extent the substantive meaning of the rule of law contains the principle of equality. See: Jowell (*supra* note 26), at 23-24.

³² See Bernard Schwartz and H.W.R. Wade, *Legal Control of Government – Administrative Law in Britain and the United States* (Clarendon, 1972) 205, explaining that American and British judges are basically engaged in the same task: "It is a situation of challenge and response in a society increasingly dominated by government power, and therefore heavily loaded with administrative machinery. The one sphere within which it is agreed that all this power should be confined is that of law. In both countries therefore the courts see themselves as the citizen's appointed protectors against abuse of power."

³³ For the symbiotic relationship between public law and political values, see: Peter Cane, "Theory and Values in Public Law", in *Law and Administration in Europe – Essays in Honour of Carol Harlow* (Paul Craig & Richard Rawlings eds., Oxford, 2003) 3-21. See also: Paul Craig, "Theory and Values in Public Law: A Response", in *Law and Administration in Europe – Essays in Honour of Carol Harlow* (Paul Craig & Richard Rawlings eds., Oxford, 2003) 23-46.

A. England

The nature of public law in England harks back to the feudal system, in which the king held title to the land and granted particular estates to nobles in exchange for services. Despite the political revolution that curbed the power of the monarchy, governmental structures were changed as little as possible, so that the ruling classes could rely on a claim of governing by tradition. Part of that tradition was the legacy of common law – one unified law which regulated the activities of both private citizens and the government in the same court³⁴. The idea of a *unified* common law – as a fundamental element – prevented the development of a separate system of administrative law, which accordingly, says Dicey, contradicted the rule of law that demands subjection of all classes equally to one law administered by ordinary courts³⁵. This situation continues, to a large extent, even today, notwithstanding the wide-ranging constitutional reform in the wake of the Human Rights Act 1998, which subjected all official powers to the rights set out in the European Convention on Human Rights³⁶. Indeed, the institutional reform established an Administrative Court as part of the High Court, but this means only that some of the administrative judges spend part of their time on judicial review³⁷, and it is by no means equivalent to exclusive jurisdiction, as is the situation in France, for instance³⁸.

Another fundamental element of the 17th century settlement was the legislative *supremacy of Parliament* and the establishment of an independent judiciary. The idea was that Parliament made the law and the role of the judges was to interpret it and to make authoritative decisions as to the meaning and effect of legislation, but they could not review legislation to decide on its validity ³⁹. This concept was accepted later by Dicey who argued that the sovereignty of parliament is the dominant characteristic of the political institution and a

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³⁴ For a survey of the historical background, see: Longley & James (*supra* note 24), at 12-16.

³⁵ Dicey (*supra* note 44), at 189; See also: Jowell (*supra* note 26), at 7; de Smith & Brazier (*supra* note 5), at 534; Le Sueur & Herberg (*supra* note 5), at 40-41.

³⁶ The European Convention on Human Rights provides for an individual right of petition to the European Court of Human Rights. The United Kingdom ratified the convention in 1951 and accepted the individual right of petition in 1966. With the passage the Human Rights Act 1998, which came into force for the United Kingdom as a whole in October 2000, the Convention can be relied upon directly in domestic courts. See: Lord Lester of Herne Hill, Q.C. & Lydia Clapinska, "Human Rights and the British Constitution", in *The Changing Constitution* (5th ed., Jeffrey Jowell & Dawn Oliver eds., Oxford, 2004) 62.

³⁷ Dawn Oliver, "English Law and Convention Concepts", in *Law and Administration in Europe – Essays in Honour of Carol Harlow* (Paul Craig & Richard Rawlings eds., Oxford, 2003) 83.
³⁸ By way of contrast to the reluctance to change governmental structures in England, in France the ruling groups

³⁸ By way of contrast to the reluctance to change governmental structures in England, in France the ruling groups developed new forms of political theory based on natural rights and saw the functions of the state as separate from those of individuals. As a result, ordinary courts were forbidden to review administrative actions. This led to the development of the Conseil d'Etat as a separate body of administrative law, with its own exclusive jurisdiction, procedures and substantive law. See: Longley & James (*supra* note 24), at 13; Oliver (*supra* note 37) at 83; de Smith & Brazier (*supra* note 5), at 534.

³⁹ For the history of the legal sovereignty, see: Anthony Bradley, "The Sovereignty of Parliament – Form or Substance", in *The Changing Constitution* (5th ed., Jeffrey Jowell & Dawn Oliver eds., Oxford, 2004) 26, 28-32.

fundamental aspect of the British unwritten constitution ⁴⁰. The issue of parliamentary sovereignty under the Human Rights Act is beyond the scope of this article, which addresses the issue of judicial review of administrative authorities and not of the legislature ⁴¹. However, the doctrine of legislative supremacy of Parliament bears great importance for the current discussion as it affected the system of public law by placing the source of legal authority for the activities of public bodies in the hands of Parliament only. Thus, on the one hand, formally the doctrine restricts judicial review of administrative action to examination of *legality* in a narrow and technical manner ⁴², but, on the other hand, the doctrine supports judicial review in the sense that when the courts examine administrative actions they have to uphold the will of Parliament.

The major judicial review doctrine of *ultra vires* is the idea that bodies must keep within the power they have been given, namely within their jurisdiction. Acting outside those powers not only undermines the intention of Parliament, but also constitutes a breach of law ⁴³. Historically, every variety of excess and abuse of power had to be forced into the *ultra vires* ground for judicial review, but gradually courts began to make some artificial, although logical and consistent, expansions of the grounds for judicial review. They assumed that Parliament could not have intended otherwise and hence read the statutes as containing limitations that the administrative decisions should be *reasonable*, or that they should conform to certain implied *purposes*, or that particular *facts* should exist. Thus, administrative law was developed by courts by creating different categories of *ultra vires* through statutory interpretation ⁴⁴. More than that, constitutional law was developed by the same technique, since courts, whenever possible, interpreted legislation and the exercise of administrative discretion to be in conformity with fundamental rights ⁴⁵. The justifications for the *rights-based approach* were the traditional approach of the constraints imposed on public power and the protection of the rule of law ⁴⁶.

In light of the above we can say that even without written constitutional safeguards against the power of government, courts took a well-defined position as the protectors of citizens.

⁴⁰ Dicey (*supra* note 44), at chapter 1. See also: Jowell (*supra* note 26), at 6; Le Sueur & Herberg (*supra* note 5), at 39; Bradley (*supra* note 39), at 29-30.

⁴¹ For discussions of parliamentary sovereignty under the Act, see: Jeffery Jowell, "Judicial Deference and Human Rights: A Question of Competence", in *Law and Administration in Europe – Essays in Honour of Carol Harlow* (Paul Craig & Richard Rawlings eds., Oxford, 2003) 67, 69-70; Bradley (*supra* note 39), at 53-59; Lord Lester & Clapinska (*supra* note 36), at 63-65.

⁴² Longley & James (*supra* note 24), at 13.

⁴³ Brian Thompson, *Constitutional and Administrative Law* (Blackstone, 1993) 341.

⁴⁴ Schwartz & Wade (*supra* note 32), at 210. For the extensions of the doctrine, see also: Peter Cane, *An Introduction to Administrative Law* (3rd ed., Clarendon, 1996) 349-350.

⁴⁵ To demonstrate the connection between administrative and constitutional law, Professor S.A. de Smith said in one of his lectures in the London School of Economics and Political Science: "I regard constitutional law and administrative law as occupying distinct provinces, but also a substantial area of common ground." Cited in Michael Taggart, "The Province of Administrative Law (Michael Taggart ed., Hart, 1997) 1.

⁴⁶ Craig (*supra* note 17), at 21-28.

Furthermore, in spite of the traditional Diceyan view of their role, according to which they should protect the individual against the state rather than protect the public interest and thus should not deal with policy⁴⁷, courts decided between conflicting policies and so created new law. Though it was familiar to hear them saying that "judges do not make law, they only apply it," administrative law is a field in which they have been particularly creative and through which they developed constitutional law⁴⁸. It seems that this harmony between administrative and constitutional review continues today. According to one perception, *legality* is the appropriate ground of review under the Human Rights Act, as the question to be decided is whether the relevant decision strayed outside the scope of the Act⁴⁹. Thus, courts now develop public law and interpret legislation in line with the conventions of human rights⁵⁰.

Finally, it is important to note that as English law is uncomfortable with watertight distinctions, the public law rules are applicable in different degrees on bodies of various kinds. The standard public bodies of government and local authorities are regarded as not having any interest of their own and must act in the public interest⁵¹. In that context, the actors within the criminal justice system are not exceptional, and are broadly subject to the same controls as are other officers performing duties of a public nature⁵².

B. Israel

Professor Eli Salzberger says, "The Israeli political and legal system is an intriguing combination of a Westminster and a Continental-European type of parliamentary democracy, with an increasingly effective American flavoring." Indeed, to understand the central features and sources of public law in Israel, it is necessary to go back at least to the British civil administration, which was established in 1920, and is the source of the infusion of the common law into the State of Israel Nevertheless, with the foundation of the State of Israel in 1948, it was assumed, as stated in the Declaration of Independence, that the legal source of the rule of law and the dedication of the state to basic rights and freedoms would take the form of a written constitution, as the authority to enact a constitution was given to the first Knesset (the Israeli Parliament), in its capacity as "Constituent Assembly". However, for a host of reasons too

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⁴⁷ Longley & James (*supra* note 24), at 165.

⁴⁸ Schwartz & Wade (*supra* note 32), at 11 and 16-17.

⁴⁹ Jowell (*supra* note 41), at 76.

⁵⁰ Compare: Lord Lester & Clapinska (*supra* note 36), at 62.

⁵¹ Oliver (*supra* note 37), at 104.

⁵² Peter Osborne, "Judicial Review and the Criminal Process", in *Judicial Review A-Thematic Approach* (Brigid Hadfield ed., Gill & Macmillan, 1995) 128.

⁵³ Eli M. Salzberger, "A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?" 13 *Int'l Rev. L. & Econ.* 349, 357 (1993).

⁵⁴ The Mandate did not actually come into force until 1923. See: Allen Zysblat, "The System of Government", in *Public Law in Israel* (Itzhak Zamir & Allen Zysblat eds., Clarendon, 1996) 1.

lengthy to pursue here, a decision was taken to postpone the adoption of a constitution as one document and instead to prepare a series of basic laws. The first nine basic laws dealt mainly with institutional aspects of the state and not with human rights, and the task of balancing between public authority and individual freedoms – like in England – was left to the courts. Furthermore, carrying on the tradition of the British Mandate, the Supreme Court, sitting as the High Court of Justice, received the power to supervise governmental agencies, and served as the equivalent to the separate continental system of administrative courts ⁵⁵. This influenced the scope of review as the High Court perceived its function not only as settling disputes, but also as a guardian of the rule of law, which includes basic values and administrative fairness⁵⁶.

The absence of a formal written constitution influenced the development of administrative and constitutional law dramatically. Professor Itzhak Zamir wrote that:

In Israel, administrative law is, in a sense, more than just administrative law. It accounts for many of the norms and values which make Israel a free society governed by the rule of law. In many countries this may be attributed to constitutional law. In Israel, however, in the absence of a written constitution, basic principles such as the rule of law, equality before the law, and fair government originated in administrative law, mainly through judicial review of administrative action⁵⁷.

In other words, constitutional law was developed through principles of administrative law. The main principle governing administrative power is that of *administrative legality*, which prescribes that an administrative authority possesses only such power as has been vested in it by statute. This principle serves also to safeguard human rights, as the administrative authorities are not allowed to infringe upon freedoms if there is no statute curtailing those freedoms⁵⁸. Although the primary legislation could contain limitations on human rights, the Supreme Court employed the tool of creative statutory interpretation using the presumption that the Knesset intended to uphold such rights⁵⁹. Thus, the Supreme Court developed extensive case law dealing with tests of balancing basic rights with other rights and interests⁶⁰.

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⁵⁵ For survey of the history see: Asher Maoz, "Constitutional Law", in *The Law of Israel: General Surveys* (Itzhak Zamir & Sylviane Colombo eds., The Sacher Institute for Legislative Research and Comparative Law, The Hebrew University of Jerusalem, 1995) 5, 6-13 and 26; Zysblat (*supra*, note 54), at 1-5; Tamir (*supra* note 7).

⁵⁶ Itzhak Zamir, "Administrative Law", in *The Law of Israel: General Surveys* (Itzhak Zamir & Sylviane Colombo eds., The Sacher Institute for Legislative Research and Comparative Law, The Hebrew University of Jerusalem, 1995) 51, 77. See also the same article with slight variations: Itzhak Zamir, "Administrative Law", in *Public Law in Israel* (Itzhak Zamir & Allen Zysblat eds., Clarendon, 1996) 18, 40.

⁵⁷ Zamir (*supra* note 56, 1995), at 52.

⁵⁸ Maoz (*supra* note 55), at 6; Zamir (*supra* note 56, 1995), at 53-54.

⁵⁹ Allen Zysblat, "Protecting Fundamental Rights in Israel without a Written Constitution", in *Public Law in Israel* (Itzhak Zamir & Allen Zysblat eds., Clarendon, 1996) 47, 49-50.

⁶⁰ See: David Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?" in *Public Law in Israel* (Itzhak Zamir & Allen Zysblat eds., Clarendon, 1996) 141, 143.

In 1992 the Knesset passed two basic laws regarding human rights⁶¹ that constitute a partial Bill of Rights. This development was crowned as "a constitutional revolution." Given the central place basic rights have always played in judicial decisions in Israel, the revolution was not in the sense of defining protected rights, but in providing restrictions over legislation that would be inconsistent with those rights and, as a by product, supporting the Supreme Court's willingness to review such legislation⁶³. It is by no means a revolution in the judicial review of administrative authorities⁶⁴.

The rules of public law in Israel apply, in various degrees and in different ways, to a wide range of bodies and functions ⁶⁵. The enforcement authorities, including the police and the prosecution, are perceived as holding administrative powers and hence subject to all public law rules ⁶⁶.

Finally, it is important to note that a few years ago a system of courts for administrative issues was established as part of the district courts. These courts deal with issues specified in the authorizing law, and the rest of the public law issues still go directly to the High Court of Justice ⁶⁷. This system is not equivalent to the separate system of administrative courts in continental countries, which have their own exclusive jurisdiction, procedures and substantive law. In setting up these courts the perception of public law as a whole remained intact, since the administrative courts are authorized to decide according to the same grounds of judicial review as the High Court of Justice and to give the same remedies ⁶⁸.

⁶¹ Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. For an English translation, see: *Public Law in Israel* (Itzhak Zamir & Allen Zysblat eds., Clarendon, 1996) 154-159.

⁶² For the "constitutional revolution," see: Ariel L. Bendor, "Is It a Duck? – on the Israeli Written Constitution", 6 *Yale Israel Journal* (2005) 53; Ruth Gavison, in a Round Table: "Israeli Constitutionalism", 6 *Yale Israel Journal* 25, 27 (2005)

⁶³ David Kretzmer, "The Supreme Court and Parliamentary Supremacy", in *Public Law in Israel* (Itzhak Zamir & Allen Zysblat eds., Clarendon, 1996) 303, 306-308; Baruch Bracha, "Constitutional Upgrading of Human Rights in Israel: The Impact on Administrative Law", 3 *U. Pa. J. Const. L.* 581, 590-591 (2001).

⁶⁴ In my opinion, in Israel, to a large extent we face a problem opposite to the American phenomenon of "overconstitutionalism" that I am addressing in this article. Due to the well established administrative doctrine, as against the relatively new constitutional doctrine, courts usually apply an administrative scrutiny, mainly "reasonableness" as a ground for judicial review, while skipping mandatory constitutional conditions. For example, the constitutional demand that every infringement upon a right must be authorized by a law and can not be handled according to administrative directives is often substituted by examination of the reasonableness of those directives.

⁶⁵ Zamir (*supra* note 57, 1995), at 59-61.

⁶⁶ For the power of the attorney general in Israel to stay proceedings as an administrative power, see: Ruth Gavison, "Custom in the Enforcement of the Law: The Power of the Attorney-General to Stay Criminal Proceedings", 21 *Israel L. Rev.* 333, 345 (1986). For discussion of administrative and criminal enforcement agencies, see: Shimon Shetreet, "Custom in Public Law", 21 *Israel L. Rev.* 450, 485-489 (1986).

⁶⁷ Other issues can arrive at the Supreme Court by way of appeal. According to one of the opinions the High Court of Justice still has parallel jurisdiction, even in issues that are supposed to go directly to the administrative court. Compare: *Eisenberg v. Minister of Housing* [1993] IsrSC 45(3) 693, in *Israel Law Reports1992-1994* (Jonathan Davidson ed., Nevo, 2002) 19, 23-30.

⁶⁸ The Administrative Issues Act, 2000, § 8.

C. Germany

Germany is often described as a system of "legislative-executive" or "administrative federalism". The reason is that although it is a federal system, it is very different from the American one, in the sense that the bulk of legislative power in Germany is vested in the federal Parliament, and the administration of federal law is the main responsibility of the states⁶⁹.

Judicial review of administrative powers in Germany, unlike in common law systems, means review of the exercise of such power by administrative courts, which are established specially for the purpose of deciding administrative law disputes. Despite this basic difference there is a substantial convergence between the German system and the English one, and it is becoming more pronounced with the strengthening European Community. Both systems aim at achieving an optimal balance between an effective administration of social welfare on the one hand, and the safeguarding of individual interests on the other. The body of law so developed is also not very different, and it is becoming ever more similar with the Europeanizing of law⁷⁰.

As we have seen, the rule of law in combination with the doctrine of *ultra vires* forms the basis for judicial review of administrative powers in the common law. In German law the judicial review of administrative action stands on a much clearer basis. Not only does the Basic Law (the Constitution) guarantee certain judicially enforceable basic rights, but among such rights is also included the right to approach the court in case any right of a person, including rights other than the fundamental rights, is violated by any public authority⁷¹. In addition, anyone whose constitutional rights are invaded by *any* branch of public authority can file a constitutional complaint with the Constitutional Court⁷². Hence, not only are such substantive aspects of the rule of law as fundamental rights anchored in the constitution, but also aspects identified above as relevant to this article, namely the limitations on the executive that are enforced by judicial review, are embodied in the Basic Law⁷³.

The basic principle of judicial review of administrative authorities, as in the common law systems, is *legality*, but it has not been reached by the same route. First of all, the legality of an action covers its constitutionality, since the Basic Law makes the basic rights directly operative

⁶⁹ As a result executive-legislative conflicts often resolve themselves into disputes between federal lawmakers and state bureaucracies. See: Kommers (*supra* note 10), at 75 and 115.

⁷⁰ Mahenda P. Singh, German Administrative Law in Common Law Perspective (Springer, 2001) 119-122.

⁷¹ *Grundgesetz* [BVerfGE] art. 19(4): "Should any person's right be violated by public authority, recourse to the court shall be open to him." For analysis of judicial review according to this article, see: David P. Currie, *The Constitution of the Federal Republic of Germany* (The University of Chicago Press, 1994) 162-163.

⁷² The constitutional complaint lies only to vindicate fundamental rights that are contained in part I of the Basic Law. See: Currie (*supra* note 71), at 164-165. This remedy is anchored in BVerfGE art. 93(1), but it is important to note that all other jurisdictional instances must be exhausted. See: BVerfGE art. 90(2)

⁷³ It is interesting to note that in the German language there are two different words for "law." The term *Gesetz* is used to express the idea of laws enacted by an authoritative body, and the term *Recht* is used to express a high notion of law as binding because it is sound in principle. See: Hager (*supra* note 14), at 7.

upon the executive⁷⁴. Therefore any administrative action may be challenged on the ground of violation of the basic rights irrespective of the constitutionality of the legislation on which the action is based. In addition there is a principle of legality – laid upon the unity of state power and legal system and not on the sovereignty of Parliament – which consists of two aspects: primacy of the law over all other manifestations of state authority (*negative legality*); and the requirement of a statute for the exercise of any administrative power (*positive legality*). Both aspects find their immediate basis in the Basic Law and were developed by courts⁷⁵.

In pursuance with these constitutional provisions, the Code of Administrative Courts Procedure specifically empowers the administrative courts to invalidate illegal actions, discretionary as well as others, of the administrative authorities falling within the jurisdiction of such courts⁷⁶. In addition to the authority to examine the legality of administrative acts in general, the Code specifies grounds for judicial review of the discretion, such as *excess of power* or use of discretion not in accordance with the *purpose of authorization* ⁷⁷. Thus, the principle of constitutionality is only *one* of the aspects of legality and of the grounds for judicial review.

The scope of judicial review of administrative authorities is very wide. It stems, first of all, from the establishment of an independent judiciary crowned by a Constitutional Court with broad powers of judicial review. In line with this, the discretionary powers of the administrative courts do not stop at procedural or jurisdictional errors, but in effect extend to substantive justice⁷⁸. Furthermore, although the principle of *separation of powers* finds its expression in the Basic Law⁷⁹, it is not realized in a pure form, but rather as a "system of reciprocal controls" marked by numerous checks and balances⁸⁰. Consistent with the history of executive tyranny, German law is vigilant to enforce the principle that basic decisions as to the content of the law must be made by the Parliament, and the executive must act within the statutory authorization⁸¹.

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S1 Currie (supra note 71), at 172.

⁷⁴ BVerfGE art. 1(3): "The following basic rights shall bind the legislature, the executive, and the judiciary as directly enforceable law."

⁷⁵ Article 19(1) requires a law of general application for any restriction of any fundamental right, and article 20(3) binds the executive by law and justice. See: Singh (*supra* note 70), at. 124-133.

⁷⁶ The Code of Administrative Courts Procedure [VwGO] art. 113.

⁷⁷ VwGO art. 114: "To the extent that the administrative authority is authorized to act at its discretion, the court shall also examine whether the administrative act or its refusal or omission is unlawful for the reason that the statutory limits of its discretion have been exceeded or the discretion has not been used in accordance with the purpose of authorization..."

⁷⁸ Singh (*supra* note 70), at 135.

⁷⁹ BVerfGE art. 20(2): "All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive and judicial organs".

⁸⁰ Kommers (*supra* note 10), at 115. See also: Singh (*supra* note 70), at 18: "The separation of powers is ...'not purely a principle of separation but a concept of constituting, allocating and balancing of state power."

Criminal enforcement authorities are perceived in Germany as administrative authorities, and thus are subject to all the grounds for judicial review⁸², even though the jurisdiction to examine their actions lies within the ordinary courts⁸³.

In light of the above we can conclude that despite having a written constitution and a separate system of constitutional and administrative courts, Germany is a good example of exercising a holistic approach towards public law and thereby promoting the rule of law.

D. The United States

Two main features of the American system – which are also the most obvious differences between the United States and England – are crucial for the understanding of administrative and constitutional law in American legal system: the existence of a written constitution and its enforcement by courts and the federal system, which makes a rigid division of authority between the national and state governments.

In the American legal tradition, appeal to the rule of law is grounded in the doctrine of constitutionalism. Based on the ideas of Montesquieu, the Framers placed great faith in the power of a written constitution to order society, guarantee liberty and articulate the higher law which, by the consent of the governed, should rule the affairs of the nation⁸⁴. Even though the term "rule of law" is not mentioned in the United States Constitution, it is prominent in *Marbury v. Madison*⁸⁵, which became "an enduring symbol of judicial power" to review decisions of the legislature and the executive. The Supreme Court ruled that the Court, relying on the Constitution, has the power to review legislation and to set it aside as invalid. Furthermore, it announced that the Court could issue *mandamus* to a Cabinet official who was acting by direction of the President. This power was not obvious from a literal reading of the Constitution, as it is in the case of the German Basic Law⁸⁷. The power is an outcome of the essence of the judicial power "to say what the law is" which is strengthened by the perception that for every right, the law of the United States must furnish a remedy⁸⁹. Thus, the long-lasting heritage of a

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⁸² See, for examples: Klaus Sessar, "Prosecutorial Discretion in Germany", in *The Prosecutor* (William F. McDonald ed., Sage Publications, 1979) 255, 266, Joachim Herrmann; "The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany", 41 *U. of Chi. L. Rev.* 468, 505 (1974).

Article 1 of the Code of Criminal Procedure: "The competence of the courts as regards subject matter is defined by the Court Organization Law." For the pertinent provisions of this law, see: *The American Series of Foreign Penal Codes – The German Code of Criminal Procedure* (Horst Niebler trans., 1965) 209-216.

⁸⁴ Hager (*supra* note 14), at 8. See also: Bradley (*supra* note 39), at 31-33.

⁸⁵ 5 U.S. 137 (1803).

⁸⁶ Richard H. Fallon, *The Dynamic Constitution* (Cambridge, 2004) 12.

⁸⁷ As explained above, article 19(4) of the Basic Law provides for judicial review of the Executive. Article 93(1) provides a remedy against unconstitutional legislative and judicial, as well as administrative actions. Moreover, it authorizes the Constitutional Court to determine the validity of a challenged federal or state statute on its face. This "abstract judicial review," which is not based on a particular case. See: Currie (*supra* note 71), at 165-168.

⁸⁸ Marbury (supra note 85), at 177.

⁸⁹ *Id.* at 163.

written constitution enforced by courts and the extreme extent to which constitutional issues permeate American law and life are the roots of the phenomenon I call "over-constitutionalism," which is a major issue in this article. As Schwartz & Wade put it, "Americans have become a people of constitutionalists, who… see constitutional questions lurking in every case." ⁹⁰

In this situation, administrative law in the United States plays second fiddle⁹¹. Indeed, the administrative judicial review grew within a common law tradition, in which "federal equity law was judge-made." Furthermore, American judges have intruded far more widely than English courts on questions which the latter would regard as matters of policy, on account of the diffusion of powers among federal and state governments, which forced the courts step into gaps and enforce social changes ⁹³. However, in spite of the common law roots of American administrative law, its reach and substance are governed largely by legislative enactments, namely the federal Administrative Procedure Act (APA), and statutes that govern administrative decision-making by the agencies of the states or the local governments ⁹⁴. There are some disagreements about the role of common law judicial review after the enactment of the APA in 1946. While one view is that the APA governs the realm of administrative law "in a very positivist fashion" another concludes that its enactment "did little to displace the dominion of the common law in the field." Nevertheless, there seems to be agreement that the administrative common law of judicial review is being replaced by a doctrine grounded in the judicial review provisions of the APA and other statutes.

There is a huge public sector that is subject to administrative law under the APA, but there are two manners in which this body of law is restricted. *First*, the APA applies only to "agencies" which it defines⁹⁷ and many structures of government that should be within the scope of the administrative law are excluded from it⁹⁸. Since there is no set of federal common law principles that would impose APA-like requirements on entities not considered agencies under the statute, the APA does not govern the activities of "non-agencies"⁹⁹. *Second*, the APA focuses

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⁹⁰ Schwartz & Wade (supra note 32), at 6.

⁹¹ Taggart (*supra* note 45), at 18.

⁹² John F. Duffy, "Administrative Common Law in Judicial Review", 77 *Tex. L. Rev.* 113, 121 (1998).

⁹³ Schwartz & Wade (supra note 32), at 7 and 209.

⁹⁴ To a significant extent, the body of law that governs the agencies of the state and local governments is borrowed from and influenced by federal administrative law. This article will focus on the federal administrative law, whose features can identify the American administrative law in most respects relevant to this paper. Since I address the nature of the constitutional review, any suggestions are applicable in both federal and state courts.

⁹⁵ Jack M. Beermann, "The Reach of Administrative Law in the United States", in *The Province of Administrative Law* (Michael Taggart ed., Hart, 1997) 171, 172.

⁹⁶ Duffy (*supra* note 92), at 115.

⁹⁷ 5 U.S.C.A § 551(1).

⁹⁸ Alfred C. Aman & William T. Mayton, Administrative Law (2nd ed., West, 2001) 1.

⁹⁹ Beermann (*supra* note 95), at 173-175.

on rulemaking and adjudication and leaves out all other executive actions that do not fall under these categories ¹⁰⁰.

The APA empowers the courts to set aside agency action found to be "contrary to constitutional right," and thus the Constitution has also a role in the administrative review 102. Nevertheless, since the APA itself is a "quasi-constitutional statute" whose foundations are in the due process clauses of the Constitution 103, constitutional due process claims regarding its defined set of agencies are relatively rare 104.

To the partial applicability of the APA, we must add the understanding of the scope of administrative law, which is informed by a great deal more suspicion of governmental power than of private power, even when a private entity performs a function with close parallels to traditional governmental functions. This leads, for example, to non-applicability of public law rules to government corporations ¹⁰⁵. Finally, we must take into account the independent regulatory commissions, which perform powerful regulatory functions, yet exist outside the executive departments and beyond the jurisdiction of the president ¹⁰⁶.

In light of all of the above, we can say that by and large administrative law in the United States applies only to actions attributable to governmental entities serving regulatory functions under law. Thus, most cutting-edge administrative law scholarship is less concerned with *legal* issues than with the issue of how best to regulate ¹⁰⁷, and the legal profession of administrative law – as a result of the exclusive attention given to due process – is "controlled by lawyers who have emphasized courtroom procedural techniques as the virtual 'be all and end all' of good administration."

III. <u>Judicial Review of Enforcement Discretion</u>

One of the most serious problems caused by the limitations on the applicability of the administrative law in the United States is the exclusion of the criminal enforcement authorities (such as the police and the prosecution), which are reviewed according to the constitutional

¹⁰² Louis Fisher, *American Constitutional Law* (6th ed., Carolina Academic Press, 2005) 5.

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¹⁰⁰ Aman & Mayton (supra note 98), at 5.

¹⁰¹ 5 U.S.C.A § 706(2)(B).

¹⁰³ Peter H. Schuck, *Foundations of Administrative Law* (2nd ed., Foundation Press, 2004) 53; Schwartz & Wade (*supra* note 32), at 8.

Williams F. Fox, *Understanding Administrative Law* (4th ed., Lexis Publishing, 2000) 117.

¹⁰⁵ Beermann (*supra* note 95), at 191.

¹⁰⁶ Kenneth F. Warren, *Administrative Law in the Political System* (3rd ed., Prentice Hall, 1996) 28-29; Fox (*supra* note 104), at 56. These agencies are beyond the scope of this article.

¹⁰⁷ Richard A. Posner, "The Rise and Fall of Administrative Law", 72 Chi.-Kent L. Rev. 953, 958 (1996-7).

¹⁰⁸ Schwartz & Wade (supra note 32), at 7.

amendments regarding the criminal process¹⁰⁹. The police and the prosecution are hardly ever seen as part of "administrative law," despite the fact that they are the branch of government which most directly intervenes in people's lives, and despite the enormous discretion they are granted in the American legal system¹¹¹. Scholars have pointed to the importance of looking at the agencies responsible for criminal justice policies from an administrative point of view, in regard, for example, to regulation of sentencing¹¹² or police rulemaking processes¹¹³. Here I will focus on the problems created by the exclusiveness of constitutional review without any administrative perspective and will demonstrate these problems in selective enforcement and racial profiling claims.

"Over-constitutionalism" is accompanied by another characteristic identifying this legal system that must be taken into account, namely the traditional American reluctance to interfere with enforcement discretion in general and particularly with the discretion not to enforce the law¹¹⁴. Even though this kind of discretion contains the troubling capacity to discriminate, it is hardly ever reviewed by the courts, since they traditionally recognize that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." ¹¹⁵

As my interest lies in the criminal enforcement authorities, it is important to stress that the result of all this is to grant the authorities excessive power in administering criminal proceedings¹¹⁶ and this may lead to insufficient control on abuse of power. There are of course constitutional limitations on the discretion given to enforcement authorities, but they are insufficient to protect the rule of law. For example, the equal protection doctrine which prohibits

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¹⁰⁹ For the problem of the government not facing the same structural and institutional checks in criminal proceedings as in civil regulatory actions, see: Rachel Barkow, "Separation of Power and the Criminal Law", *Stanford Law Review* (forthcoming, 2006).

¹¹⁰ To demonstrate, according to Judge Friendly's definition, "Administrative law includes the entire range of action by government with respect to the citizen or by the citizen with respect to the government, except for those matters dealt with by the criminal law and those left to private civil litigation...." Cited in: Richard J. Pierce, *Administrative Law Treatise* (Vol. I, 4th ed., Aspen Law & Business, 2002) 1.

¹¹¹ For the wide discretion of the enforcement authorities, see: Jay A. Sigler, "The Prosecutor: A Comparative Functional Analysis", *The Prosecutor* (William F. McDonald ed., Sage Publications, 1979) 53, 71; Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes – Cases and Materials* (7th ed., Aspen Law & Business, 2001) 172; Jerold H. Israel, Yale Kamisar & Wayne R. LaFave, *Criminal Procedure and the Constitution* (2000) 501; Davis (*supra* note 19), at 162.

¹¹² Rachel E. Barkow, "Administering Crime", 52 U.C.L.A. L. Rev. 715 (2005).

¹¹³ Hudson Janisch & Ron Levi, "Criminal Justice from the Bottom-up: Some Thoughts on Police Rulemaking Processes", in *The Province of Administrative Law* (Michael Taggart ed., Hart, 1997) 243-278 (referring to the situation in Canada).

¹¹⁴ Kenneth Culp Davis, *Administrative Law* (West Publishing, 1973) 477-478.

¹¹⁵ Heckler v. Chaney, 470 U.S. 821, 831 (1985).

¹¹⁶ Mark L. Amsterdam, "The One-Sided Sword: Selective Prosecution in Federal Courts", 6 *Rutgers Camden L.J.* 1, 7 (1974).

discriminative enforcement on an unconstitutional basis such as race or religion 117 does not impose on the enforcement authorities the duty to exercise their discretion with "administrative equality," and thus does not provide a sufficient safeguard against arbitrariness. This will be elaborated below 118.

The extent of courts' willingness to interfere with enforcement discretion is also a measure by which the legal situation in the United States today is different from that of England, Israel and Germany. It is true that a traditional reluctance of the judiciary to intervene in the enforcement authorities' decisions is common to Israel, England and the United States, but its roots are somewhat different: in England non-intervention has derived from the perception of the enforcement process as a prerogative of the Crown¹¹⁹; in the United States the primary ground upon which this traditional aversion has been based is the separation of powers doctrine 120, as the federal Attorney General is one of the highest political officers appointed by the president¹²¹; and in Israel the restraint stems from the tradition of the "independence of the attorney general" 122. Conversely, the basic perception in Germany is of tight supervision by the judiciary over the executive, which finds its expression in a need for certain judicial consents to prosecutorial decisions and in the wide competence of the judiciary to review the decisions of enforcement authorities 123.

The last decades have seen a considerable withdrawal from the traditional reluctance to intervene in decisions of enforcement authorities. The most significant process has taken place in Israel, where the courts do not distinguish between judicial review over enforcement authorities and judicial review over other administrative authorities, and do not limit the grounds for judicial review over enforcement authorities. In a leading case ("The Bankers") the Supreme Court held that the Attorney-General's decision that there was no "public interest" in instituting the prosecutions demanded by the petitioners was inherently unreasonable, even though the

¹¹⁷ For the prohobition on unconstitutional discrimnative enforcement, see, for example: Wade v. United States, 504 U.S. 181, 185-186 (1992): "Because we see no reason why courts should treat a prosecutor's refusal to file a substantial-assistance motion differently from a prosecutor's other decisions...we hold that federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive. Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant's race or religion."

¹¹⁸ See especially *infra* notes 322-330 and the related text.

For a leading case, see: *Gouriet v. Union of Police Office Workers* [1977] 3 All. E. R. 70, 78.

¹²⁰ See, for example, *Inmates of Attica Correctional Facility v. Rockefeller* 477 F.2d 375, 379 (2d Cir. 1973).

¹²¹ Local prosecutors in the United States are either elected or appointed (according to the local charter) on political basis. See: Sigler (supra note 111), at 55. For the vast amount of discretion of the prosecuting attorney in the United States and the political pressures, see: Note, "Prosecutor Discretion", 103 *U. of Pa. L. Rev.* 1057, 1080 (1955).

122 For the assumption that the Attorney General's duty is to the law and not to the Government that appoints him,

see: Abraham S. Goldstein, "The Public Prosecutor, The Court and the Public Interest: Some Reflections on the Role of the Attorney General in Israel and the United States", 3 Plilim 1, 6 (1992).

¹²³ Julia Fionda, *Public Prosecutors and Discretion – A Comparative Study* (Oxford, 1995) 159-162. It is important to note that the prosecutor in Germany has also become a central player in the criminal justice system, as the rule of compulsory prosecution has been curtailed. See: id. at 169.

Attorney General weighed only relevant considerations and there was not sufficient evidence relating to similar situations to establish the claim of unjust discrimination. 124

In England for some years the courts have expressed a willingness to review certain prosecution decisions, and recent years have seen striking developments¹²⁵. The primary basis for judicial review is unreasonableness¹²⁶, failure to follow a declared policy¹²⁷, or failure to take relevant considerations into account 128. In addition to those grounds, the abuse of process doctrine recognizes the inherent power of courts to stay prosecution ¹²⁹. Not only has this doctrine been invoked against prosecutors in some cases¹³⁰, but the House of Lords took a step further and applied it in the name of the rule of law even when the accused had had a fair trial but the abuse referred to the behavior of the enforcement authorities before trial¹³¹. As explained by Lord Griffiths:

If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law... I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it 132.

These common law developments have been reinforced by the Human Rights Act 1998¹³³, but it is important to note that the decision was justified not merely by the protection of human rights,

¹²⁴ Ganor v. Attorney-general, in Asher F. Landau, The Jerusalem Post Law Reports (The Magnes Press, The Hebrew University of Jerusalem, 1993) 143-146. For a discussion of "the Bankers" Case, see: Goldstein (supra note 122), at 4-8.

¹²⁵ Andrew Ashworth, *The Criminal Process – an evaluative study* (2nd ed., Oxford University Press, 1998) 203. See also: Fionda (supra note 123), at 60-62.

For the willingness to review enforcement decisions on this basis, see: R. v. Metropolitan Police Commissioner, ex parte Blackburn [1968] 2 QB 118, 135-136; R. v. Metropolitan Police Commissioner, ex parte Blackburn (No. 3) [1973] 1 All. E. R. 324, 236; R. v. General Council of the Bar, ex parte Percival [1990] 3 All. E. R. 136, 152.

127 R. v. Chief Constable of Kent and Another, ex parte L. (1991) 93 Cr. App. R. 416, 428 (criminal proceedings)

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

¹²⁸ Mead (supra note 127), at 784. For discussion, see: Christopher Hilson, "Discretion to Prosecute and Judicial Review", The Crim. L. Rev. 739, 741-742 (1993).

⁹ For the doctrine, see: Andrew L.-T. Choo, Abuse of Process and Judicial Stays of Criminal Proceedings (Clarendon, 1993) 1-15.

⁰ See, for example, R. v. Croydon Justices, ex parte Dean [1993] 3 All. E. R. 129, 135; Mark Andrew Bloomfield [1997] 1 Cr. App. 135, 143.

¹³¹ Bennett v. Horseferry Road Magistrates' Court [1993] 3 All E. R. 138.

¹³² *Id.* at 150 (emph. supp.)

¹³³ R. v. Loosly [2001] 4 All. E. R. 897, paragraphs 15-16 of Lord Nicholls of Birkenhead's decision.

but also by the importance of judicial review for the protection of the rule of law - a principle with possibly wider applications than the European Convention¹³⁴.

There are good reasons for judicial review in the United States to move in the same direction and not refrain from scrutinizing enforcement discretion claims in general, or selective enforcement claims in particular. As we have seen, discretionary justice is indispensable to modern government, so the cure for discretionary injustice, as Professor Kenneth Davis has argued, is not by elimination of such power, but by controlling it through mechanisms to *confine*, *structure* and *check* the discretion ¹³⁵. Judicial review is an obvious way of checking the discretion in order to reduce arbitrariness and avoid abuse of power ¹³⁶. Perhaps even more important than judicial review of rule-making, is the judicial review of the enforcement of the regulations enacted, and the enforcement of the criminal law by the police and the prosecutors, which perform as administrative authorities.

Nevertheless, the American courts fear that judicial inquiry into enforcement discretion will violate the separation of powers¹³⁷, since it would demand that judges enter deeply into the policies, practices and procedures of the enforcement authorities¹³⁸, and courts cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbiter of the cases presented to them¹³⁹. This fear is especially strong in regard to a selective enforcement claim, because it "asks a court to exercise judicial power over a 'special province' of the Executive" ¹⁴⁰.

¹³⁴ Compare: Ashworth (*supra* note 125), at 53-54.

¹³⁵ Kenneth C. Davis, *Discretionary Justice in Europe and America* (University of Illinois Press, 1976) 9-10. Confining discretion involves setting the limits of discretion by the use of rules which define the area in which the decision-maker's choice is to operate. Structuring discretion involves controlling the way in which the choice is made by the administrator between alternative courses of action which lie within the limits of the discretion. In that context Professor Davis suggested learning from the relative success of Western European countries in limiting such discretion. See: Davis (*supra* note 19), at 217. For the mechanisms of confining and structuring, see also: Cane (*supra* note 44), at 134-135.

Compare: Longley & James (*supra* note 24), at 169.

¹³⁷ See for example: *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965): "It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." See also: *Newman v. United States*, 382 F.2d 479, 482 (D.C. Cir. 1967): "It is assumed that the United States Attorney will perform his duties and exercise his powers consistent with his oaths; and while this discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors... it is not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers."

¹³⁸ See, for example: *Reno, Attorney General v. American-Arab Anti-Discrimination Committee* (A.A.D.C.), 525 U.S. 471, 489-490 (1999): "This broad discretion [afforded the Executive] rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." See also: *United States v. Redondo-Lemos*, 955 F.2d 1296, 1300 (9th Cir. 1992).

¹³⁹ For the "separation of power claim", see: Steven D. Clymer, "Equal Justice: The Federalization of Criminal Law", 70 *S. Cal. L. Rev.* 643, 719-720 (1997).

¹⁴⁰ United States v. Armstrong, 517 U.S. 456, 464 (1996).

In my opinion, the protection of the rule of law demands a different interpretation of the separation of powers doctrine. Furthermore, the warm appreciation that professional authority deserves within the realm of its discretion should not act as a factor restraining judicial review. On the contrary, courts should use all the rules of public law, including administrative law grounds for judicial review, in order to protect the rule of law in the aspects defined above. This attitude will better serve modern functions underlining the separation of powers doctrine, namely democracy, professionalism and the protection of fundamental rights¹⁴¹.

First, a perception of the separation of powers doctrine as a system of checks and balances ¹⁴² – as the Framers interpreted it ¹⁴³ – requires that all three powers be involved in enforcement work with continuous synchronization and mutual feedback 144. In this context, courts, the final link in the chain, have a burden of responsibility in guaranteeing human rights, reducing arbitrariness and preventing abuse of power. Courts have already realized that their task is to review the vast discretion of administrative authorities:

The judges are coming to realize that abdication of the field to the administrator is not a valid way of performing the task. "It will not do to say that it must all be left to the skill of experts". The judiciary too, has a vital part to perform. "Courts no less than administrative bodies", the Supreme Court has stated significantly, "are agencies of government. Both are instruments for realizing public purposes" ¹⁴⁵.

On the basis of what courts know today about leaving administration to administrators but at the same time providing an effective check to protect against abuses, as Professor Davis noted, the courts should take a fresh look at the tradition that enforcement discretion is non-reviewable, since the reasons for a judicial check of a prosecutor's discretion are stronger than for such a check of other administrative discretion that is reviewable ¹⁴⁶.

Second, the professionalism claim against review cannot hold in every context. Enforcement powers have a semi-judicial aspect and hence lie within the expertise of the judges and should be subject to the norms laid out by the Supreme Court¹⁴⁷. Thus, for example, the courts do not necessarily have to interfere in allocating enforcement resources in order to protect

¹⁴¹ Bruce Ackerman, "The New Separation of Powers", 113 Harv. L. Rev. 633, 634 (2000).

¹⁴² For the "checks and balances" as a critical genius of the American Constitutional System, see: John N. Moore, Treaty Interpretation, The Constitution and The Rule of Law (Oceana Publications, 2001) 34.

¹⁴³ See James Madison's analysis of the Separation of Power Doctrine, in *The Federalist*, no. 47: "he [Montesquieu] did not mean that these departments ought to have ... no control over, the acts of each other." (emphasis in original) ¹⁴⁴ For the distict but dependent tasks of each of the three powers in the criminal process, see: Kadish & Schulhofer (supra note 111), at 1.

¹⁴⁵ Bernard Schwartz, "American Administrative Law – A Synoptic Survey", 14 *Is. L. Rev.* 413, 426 (1979).

¹⁴⁶ Davis (*supra* note 19), at 211-212.

¹⁴⁷ Compare: Abraham S. Goldstein, *The Passive Judiciary* (Louisiana State University Press, 1981) 55-58.

against harm deriving from selective prosecution¹⁴⁸. In regard to such arguments, the role of the court is to guarantee that the selection made by the enforcement authorities is done in accordance with the purpose of the statute being enforced. Not only does this role of the courts not trespass into the professional realm of the executive, it lies entirely within the competence of the judiciary, which is used to interpret and apply the law¹⁴⁹.

Third, the principles of criminal law support the legitimacy of judicial review over enforcement authorities, since the public interest lies not only in indicting the offender and exonerating the guiltless, but also in the *moral integrity* of the entire criminal justice process¹⁵⁰.

Fourth, the argument that enforcement discretion is "a special province of the Executive" should lead to no more than restrained judicial oversight, rather than non-reviewability¹⁵¹. The mere knowledge of the enforcement authorities that their discretion is reviewable is important, since even when it will not provide a remedy, legal process can influence governmental behavior¹⁵². Even if the change in the doctrine would, in the short run, burden the courts with more litigation, such a burden is inevitable when current doctrine does not protect the rule of law. In the long run, the court system itself will benefit, because the need of the enforcement authorities to justify their decisions will lead them to consider and explain their actions more carefully. For example, granting courts the power to review selective enforcement claims will result in the establishment of open criteria, subject to discussion and evaluation and applied on the basis of equality¹⁵³. Thus, in the long term, the result will be a decrease in the number of selective enforcement events and related litigation.

Fifth, judicial review of enforcement authorities, especially on the grounds of selective enforcement, will strengthen the rule of law and will enhance public faith in the legal system. Conversely, when justice is not perceived as even-handed, the integrity of the justice system is undermined and law enforcement credibility declines¹⁵⁴.

Sixth, a review on selective enforcement grounds is also supported by a democratic argument. If a given law is rarely enforced, so that it affects only a few people or a politically powerless group, it is not being applied as the legislature intended. Moreover, its wisdom will

¹⁴⁸ Anne B. Poulin, "Prosecutorial Discretion and Selective Prosecution: Enforcing Prosecution after *U.S. v. Armstrong*", 34 Am. Crim. L. Rev. 1071, 1086 (1997).

Compare: Daniel J. Givelber, "The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law", (1973) *U. Ill. L. F.* 88, 104.

¹⁵⁰ For the moral integrity of the criminal process, see: Choo (*supra* note 129), at 17-18; 74-76 and 99-100.

¹⁵¹ For a possible restrained judicial oversight, compare: Clymer (*supra* note 139), at 721. It is important to mention that this is the attitude of the Israeli Supreme Court, which on the one hand reviews the enforcement discretion on the usual administrative grounds, and on the other hand usually exercises judicial restraint in dealing with claims against enforcement authorities.

¹⁵² For the importance of the legal process, see: Poulin (*supra* note 148), at 1088.

¹⁵³ Clymer (*supra* note 139), at 734-735; Givelber (*supra* note 149), at 105.

¹⁵⁴ Poulin (*supra* note 148), at 1088.

not be tested through the democratic political process because most of the people will not be inconvenienced by the law 155.

Finally, the importance of judicial power to "make law" (by developing, for instance, administrative grounds for review) as well as to scrutinize enforcement discretion is supported by public choice theories for separation of powers. These theories are based on the consensus principle 156, which accepts the historical idea of the constitution as a social contract 157 – an idea which found its expression in the American Declaration of Independence 158. The theories distinguish between the constitutional and the post-constitutional stages of social contract and thus view the state as having two separate roles. At the *constitutional* stage, the state emerges as that institution of society which enforces the law (the protective state); and at the postconstitutional stage the state facilitates exchanges of public goods (the productive state) 159. The task of the protective state is to ensure that the terms of the conceptual contractual agreement are honored and that rights are protected. In this role the state is, ideally, external to the individuals or groups whose rights are involved 160. The task of the productive state is to produce public goods¹⁶¹, to facilitate complex exchanges among separate citizens and to increase the overall levels of economic well-being. In this role government is internal to the community, and meaningful political decisions can only be derived from individual values as expressed at the time of decision or choice 162. There is an inherent tension between the two roles, since the protective state should ensure that the productive state, which is engaged in reallocation of resources, does not overstep the constitutionally delegated bounds.

From this analysis the theory draws several inferences regarding separation of powers. There must be separation between the productive and the protective functions of the state, as well as between the governmental agencies which perform these functions and the personnel in

¹⁵⁵ Givelber (*supra* note 149), at 96-97.

¹⁵⁶ This is the leading normative principle of the economic approach, called also "Pareto optimality." This is also a leading principle of the social contract theories of the state. See: Eli M. Salzberger, "The Independence of the Judiciary: An Economic Analysis of Law Perspective", in *Judicial Integrity* (Andràs Sajó ed., Martinus Nijhoff Publishers, 2004) 69, 73.

¹⁵⁷ The idea of a transformation, by consensus, from a state of anarchy to a centrally governed society was first put forward by Hobbes (*Leviathan*, 1651). See: Salzberger (*supra* note 157), at 75. For the social theory of Locke (*Second Treatise of Civil Government*, 1690) and Rousseau (*The Social Contract*, 1762), see: Hager (*supra* note 14), at 4-5.

¹⁵⁸ Declaration of Independence, 1776: "We hold these truths to be self-evident, that all men are endowed by their Creator with certain unalienable rights... to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

¹⁵⁹ James M. Buchanan, *The Limits of Liberty – Between Anarchy and Leviathan* (The University of Chicago, 1975) 68-70.

¹⁶⁰ *Id*. at 95-97.

¹⁶¹ For definition of public goods and the reasons they are not likely to be produced by the market and thus government intervention is necessary to guarantee the optimal supply, see: Niva Elkin-Koren & Eli M. Salzberger, *Law, Economics and Cyberspace* (Edward Elgar, 2003) 49-55. See also: Buchanan (*supra* note 161), at 36-38.

¹⁶² Buchanan (*supra* note 161), at 97-98.

those organs ¹⁶³. Thus, the *judiciary* is part of the enforcement structure, and it must be independent of the *legislative* body, which performs the productive task. Nevertheless, the theory rejects the pure doctrine of separation of powers in favor of some degree of power sharing and functional dependency as a means of reducing a monopoly of power. Sharp separation strengthens the monopolistic powers of government and the exploitation of the public, decreases the public's welfare and increases the potential for abuse of power¹⁶⁴. The concept of checks and balances leads to a view of the judiciary as equal to the other two branches in the task of controlling one another, which means that it should take part in performing small portions of the legislative and administrative functions, just as it should not exclude the other branches from taking up some adjudication functions as well¹⁶⁵. Given all of the above, to a certain extent, "making law" by judges is justified as part of a review of the other organs involved.

IV. Normative Duality – The Potential Contribution of Administrative Law to Judicial Review

"Over-constitutionalism" may lead to some paradoxical consequences. For example, as I will demonstrate later, precisely the *prima facie* strong protection that constitutional review gives "suspect classes" such as race¹⁶⁶ can result in no remedy if the burden of proof is not met. Such a result, in which no protection against abuse of power is supplied by judicial review – undermines the rule of law. Consistent with the role of public law to keep the powers of government within their legal bounds and to limit the abuse of power, this article proposes a *holistic approach for judicial review*, that is, seeing public law as a whole. For this purpose, I suggest using the concept of *Normative Duality*¹⁶⁷. The main thesis of normative duality is that when exercising discretion, the administrative authorities, including the criminal law enforcement authorities,

¹⁶³ Salzberger (*supra* note 156), at 78-84; Niva Elkin-Koren & Eli M. Salzberger, "The Effects of Cyberspace on the Economic Theory of the State", in *Law and the State* (Alain Marciano & Jean-Michel Josselin eds., Edward Elgar, 2005) 58, 79-87.

¹⁶⁴ Salzberger (supra note 157), at 87; Elkin-Koren & Salzberger (supra note 164), at 87-90.

¹⁶⁵ Salzberger (*supra* note 157), at 88.

¹⁶⁶ Under Equal Protection analysis, when a suspect classification is implicated, courts apply "strict scrutiny." Under this scrutiny a racially discriminatory governmental action should be upheld only if it can be supported by reference to a compelling justification and only if the government's distinction is narrowly tailored to advance the project at hand. See: Randel Kennedy, *Race, Crime and the Law* (Pantheon Books, 1998) 147.

¹⁶⁷ This term is used by the Israeli Supreme Court when two systems of law – private law and public law – are applicable to a situation. As far as I know, the term has never been used to describe the applicability of administrative law and constitutional law simultaneously. For the "normative duality" regarding procurement contracts and tender law, see: Gabriela Shalev, "Public Procurement Contracts in Israel", 5 *P.P.L.R.* 185, 191 (1997). For the rule of "normative duality" regarding private corporations that are under the control of governmental authorities and regarding public authorities acting within the sphere of public law, see: Bracha (*supra* note 63), at 590. For a totally different use of the term, see: Christopher F. Edley, "The Governance Crisis, Legal Theory, and Political Ideology", 1991 *Duke L. J.* 561, 570 (1991). Edley argues that there is a trichotomy of paradigmatic decision-making methods: adjudicatory fairness, science, and politics; each of which is associated with a collection of positive and negative attributes, namely "normative duality."

must comply with constitutional norms and administrative law. In line with this, when reviewing the discretion of the administrative authorities, the courts should combine constitutional review with rationales of administrative grounds for judicial review. The consequence will be the development of a layer of administrative insights within the constitutional review of administrative authorities. Since my suggestion refers to the nature of the constitutional review and has nothing to do with the implementation of administrative rules under the federal and state statutes, it can be applied in both federal and state courts.

A. The "Internationalization" of Public Law

The approach of *normative duality* can be considered as part of the movement towards "internationalization" ¹⁶⁸ of public law. There have long been indications that India, Canada, Australia and even England make extensive resort to United States Supreme Court case law as a guide for the exercise of judicial discretion in public law matters¹⁶⁹. There are additional legal and constitutional implications of accommodating principles of European public law within the legal framework of the United Kingdom¹⁷⁰. This is an inevitable process, notwithstanding the differences between the countries. As Taggart put it, "while it must constantly be borne in mind that the constitutional and administrative laws of a particular country are uniquely products of that society's history and culture, inevitably as judges and jurists learn about the public laws of other countries 'borrowings' take place." First, as part of this process, I suggest that judicial review in the United States should not hesitate to be influenced by the substantive grounds for review developed in other countries such as England, Israel and Germany. Indeed, "...the mechanisms by which states allow foreign influences to affect their systems of public law reflect their constitutional traditions and patterns of social interaction, and their legitimacy depends at least in part on their compatibility with those traditions and patterns." Nevertheless, as I will demonstrate by two substantive principles of administrative law – the principle of *legality* (which includes proper purpose and relevant considerations), and the principle of proportionality – there are grounds of judicial review of administrative acts that can fit the American constitutional judicial review.

¹⁶⁸ "Internationalization" in this sense is a term invoked as a label to explain developments in domestic legal theory which have no readily discernible roots. See: Ian Loveland, "Should We Take Lessons from America?" in *A Special Relationship? – American Influences on Public Law in the UK* (Ian Loveland ed., Clarendon, 1995) 5.

¹⁶⁹ For a survey of the developments, see *id.* at 1-23.

Lord Irvine of Lairg, "The Influence of Europe on Public Law in the United Kingdom", in *Human Rights, Constitutional Law and the Development of the English Legal System* (Hart Publishing, 2003) 181.

171 Taggart (*supra* note 45), at 18.

¹⁷² David Feldman, "The Internationalization of Public Law and Its Impact on the United Kingdom", in *The Changing Constitution* (Jeffrey Jowell & Dawn Oliver eds., 5th ed., Oxford, 2004) 117, 118.

Before demonstrating this, we must address two connected counter-arguments that can be raised against my suggestion. One is the argument against "*comparativism*," which is the use of foreign law in American constitutional interpretation¹⁷³; and the other is the argument against "*federal common law*," namely rules created by the court when the substance of those rules is not clearly suggested by federal enactments, constitutional or congressional¹⁷⁴. These arguments are linked to the perception of "*originalism*," which refers to theories maintaining that constitutional meaning should be fixed either by the "original understanding" of the constitutional language or by the "intent" of the Framers and ratifiers¹⁷⁵. While I find persuasive many arguments against originalism, this is beyond my scope here¹⁷⁶. For my present purposes it is enough to explain why the arguments against federal common law and against comparative law should not deter the Supreme Court from applying administrative insights to constitutional review.

First, even for the originalists, the only relevant foreign law is the pre-1789 law of England, because the framers of the American Constitution, as former English colonists, frequently used terms taken from the English law with which they were familiar¹⁷⁷. Indeed, judicial review of administrative acts in the United States derives from judicial review in Britain, since the American courts succeeded to the historical position of the Court of the King's Bench, exercising its supervisory control over inferior tribunals and officers¹⁷⁸. If so, it is not surprising that the conceptual tools and values of the common law became entrenched in the American legal system¹⁷⁹. Moreover, not only does the common origin affect administrative law, but it also refers to American Constitutionalism, whose ideas originate in the relatively libertarian traditions of English constitutional history, such as the Magna Carta¹⁸⁰, the 1628 Petition of Rights and the Bill of Rights of 1628¹⁸¹. In light of this, the objections to referring to English law cannot derive from anti-comparativism and may lie only on the arguments against "federal common law." In regard to this argument, a distinction must be made between using common law in interpreting

¹⁷³ For the term "comparativism," see: Emily Bazelon, "What Would Zimbabwe Do?" 296(4) *The Atlantic Monthly* (November, 2005) 48-52.

¹⁷⁴ Martha A. Field, "Sources of Law: The Scope of Federal Common Law", 99 Harv. L. Rev. 883, 890 (1986).

¹⁷⁵ For the definition of originalism, see: Fallon (*supra* note 13), at 12.

¹⁷⁶ For an extended discussion about the dangers of "originalism" (fundamentalism), see: Cass R. Sunstein, *Radicals in Robes* (Basic Books, 2005); a definition of "fundamentalism" is at p. xiii. The dangers of the theory are discussed throughout the book, which aims to explain "Why Extreme Right-Wing Courts Are Wrong for America".

¹⁷⁷ Michael C. Dorf, "The Use of Foreign Law in American Constitutional Interpretation" (A Revealing Colloquy between Justices Scalia and Breyer), *FindLaw* (January 19, 2005), http://writnews.findlaw.com/dorf/20050119.html. It is important to note that even the bills ("Constitution Restoration Act"), that were introduced in the House and Senate to ban American courts from employing foreign judgments when interpreting the constitution, referred to other than centuries-old English common law. See: Field (*supra* note 174), at 48.

¹⁷⁸ Schwartz & Wade (*supra* note 32), at 206.

¹⁷⁹ Lord Irvine of Lairg, "The Common Origin of English and American Law", in *Human Rights, Constitutional Law and the Development of the English Legal System* (Hart Publishing, 2003) 209, 211.

¹⁸⁰ For the origins of the rule of law in the Magna Carta, see *supra* note 14.

¹⁸¹ Lord Irvine (*supra* note 179), at 215.

the administrative rules in the APA, and using common law in an attempt to promote a more holistic view of judicial review under the Constitution. Even if the APA may be said to constitute a "comprehensive statement of the right, mechanics and scope of judicial review," 182 the same cannot be said of the Constitution, which is inherently more general and principal in nature, and hence needs concretization and interpretation 183. The role of the judiciary in this context was dealt with in the previous section.

Second, in regard to foreign law in general, as Justice Breyer stated in his discussion with Justice Scalia¹⁸⁴, foreign opinions can be helpful in at least two ways: they can be the source of good ideas in much the same way that a well-crafted legal brief or scholarly article can be; and the experience of a foreign nation can provide object lessons. Indeed, the reference to other countries does not necessarily mean adoption of their arrangement. Even if the examination of a foreign law leads to the conclusion that it is not relevant to the American system 185, the importance of the lesson provided is firm and abiding. As will be demonstrated below, there are some grounds for judicial review that can fit and enrich American judicial review.

Third, given globalization, foreign law will influence many realms, and the Constitution will not be immune to such influences. While for years the exchange of law among nations consisted almost entirely of other nations' following the United States Bill of Rights, over time many countries' highest courts have upheld rights that even American courts have not recognized 186. Furthermore, the human rights discourse in the United States is limited to essentially "negative" rights against state action, compared to the international conception of rights which includes "positive" rights to some kinds of state services 187. It has been suggested to open the door "to American participation in at least the discourse, if not yet the creation, expansion or enforcement, of the generous conception of rights at the heart of public international law" ¹⁸⁸. The United States can learn from the development of public law in other places, especially in the context of a problem shared by many Western countries, namely the wide discretion of the administrative authorities and the ways judicial review can control it.

¹⁸² Duffy (*supra* note 92), at 212.

¹⁸³ For the legitimacy of "constitutional common law," see: Henry P. Monaghan, "The Supreme Court 1974 Term – Foreword: Constitutional Common Law", 89 Harv. L. Rev. (1975) 1. For a later suggestion of "taxonomic understanding of constitutional doctrine," see: Mitchell N. Berman, "Constitutional Decision Rules", 90 Va. L. Rev.

¹⁸⁴ Dorf (*supra* note 177).

¹⁸⁵ See, for example, Susan Rose-Ackerman, "American Administrative Law under Siege: Is Germany a Model?" in Administrative Law (Peter Cane ed., Ashgate, 2002) 123-146. Analysis of the review of German judicial review of agency police-making processes led to the inference that American bureaucracy should be more constrained by procedural limits. ¹⁸⁶ Bazelon (*supra* note 173), at 48.

¹⁸⁷ Robin West, "Human Rights, the Rule of Law, and American Constitutionalism", in *Protecting Human Rights* (Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone eds., Oxford, 2003) 93. ¹⁸⁸ *Id.* at 114.

Finally, beyond all the theoretical questions, we must remember that the aim of judicial review is to protect the rule of law. In this context justices, like "all the institutions of legal order", are "to be understood as involved in a common project, one that seeks to justify exercise of public power by explicit references to the values that make it an authority." As the role of judicial review is to protect against abuse of power, it must avoid absurd constitutional results, which, due to strict rules, may leave such abuse without a remedy. Faced with the fact that administrative authorities, and especially enforcement authorities, are conferred with discretionary powers with little regard to the dangers of abuse, the courts must attempt to strike a balance between the need for efficient administration and the need to protect the citizens against arbitrary government "190". If administrative insights can contribute to this result, and thus help in narrowing the gap between "law" and "justice," their use is worthwhile "191".

B. <u>Demonstration of the Administrative Perspective</u>

The various grounds of judicial review of administrative acts fall essentially into two spheres: *substantive* grounds, which are concerned with the content or outcome of the decision made; and *procedural* grounds, which address the question of the way in which the decision was made¹⁹². As the American constitutional rights to fair procedure are well developed and refer to criminal, civil and administrative proceedings, my focus will be on the substantive grounds¹⁹³.

1. The Principle of Legality (Relevant Considerations and Proper Purpose)

As will be recalled, the starting point for administrative action in England and Israel is that public authorities are restrained from *exceeding their powers* (acting *ultra vires*). Gradually, the courts in both countries have extended the meaning of the excess of power by reading the authorizing statutes as containing implied limitations such as that the administrative decision shall be *reasonable* and that it conform to certain *purposes*.¹⁹⁴ Another starting point is that the

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¹⁸⁹ David Dyzenhaus, "Aspiring to the Rule of Law", in *Protecting Human Rights* (Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone eds., Oxford, 2003) 195, 209. I tend to agree with Dyzenhaus analysis, according to which the disagreement between Dworkin and the positivists is premised on a large measure of agreement. At the end of the day, values play a role in interpretation.

¹⁹⁰ Wade & Forsyth (supra note 11), at 25.

¹⁹¹ An analogy can be drawn from the doctrine of *stare decisis*, according to which deviation from a precedent is justifiable, when there are substantial reasons for it, despite the need for stability and continuity. See: Michael J. Gerhardt, "The Role of Precedent in Constitutional Decisionmaking and Theory", 60 *Geo. Wash. L. Rev.* 68 (1991). ¹⁹² Loveland (*supra* note 4), at 426.

¹⁹³ The procedural rights are embodied in the due process clauses of the Fifth and Fourteenth Amendments, which forbid governmental action that deprives any person "of life, liberty, or property, without due process of law." These clauses by and large confer constitutional guarantees in criminal, civil and administrative proceedings. See: Fallon (*supra* note 86), at pp. 91-105.

⁽supra note 86), at pp. 91-105.

194 See supra note 44 and the related text. See also Lord Green's famous words in the leading case Associated Provincial Picture Houses v. Wednesbury Corporation [1947] 2 All. E. R. 680, 685: "...the court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local

legislature intends the competent authority to exercise its own discretion; hence, the principle is that the court should not substitute its own discretion for that of the authority. However, this principle applies only to discretion lawfully exercised, that is, in accordance with those rules (such as reasonableness and proper purpose) laid down by the court¹⁹⁵. Thus, there are various grounds for judicial review which often merge or overlap¹⁹⁶. The doctrines of proper purpose and relevance are sub-doctrines of legality 197, but are so deeply entrenched that they are perceived as the two main methods for controlling the discretion ¹⁹⁸.

It is unlawful to use a discretionary power to achieve a purpose other than that for which the power was conferred. Working out whether a decision-maker acted with improper purpose demands examination of the statutory context. The courts can refer to the empowering legislation to ascertain the purpose to be pursued through its exercise. Complex problems can arise where one of the purposes is lawful and one is regarded as unlawful ("mixed motives") ¹⁹⁹. In this regard, the main questions that courts ask are whether the lawful purpose is "the true and dominant one," and whether the unauthorized purpose "has materially influenced the author's conduct."²⁰⁰ However, we can say that as long as the dominant motive is the one which is the specified purpose of the power, it will not matter that an ancillary purpose is also achieved²⁰¹.

Relevance deals with the factors which may or may not be considered in making decisions. The legislative purpose also determines, to a great extent, which considerations are relevant. Whether other considerations are relevant may depend on the circumstances of the case. The courts ensure that the official decisions do not stray beyond the "four corners" of a statute by making sure they do not fail to take into account relevant considerations (considerations that the law requires), and, conversely, that they did not take into account irrelevant considerations (considerations outside the object and purpose of the statute)²⁰². In Israel the Supreme Court has gone further by holding that the authorities should take into account two main kinds of relevant considerations: specific considerations that are relevant to the case at hand; and general considerations, which apply to administrative powers generally and derive from the basic values

authority it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

¹⁹⁵ Zamir (supra note 56, 1995), at 69. See also: Longley & James (supra note 34), at 184; Craig (supra note 17), at

¹⁹⁶ Loveland (*supra* note 4), at 426, Le Sueur & Herberg (*supra* note 5), at 211.

¹⁹⁷ For elaboration of the different grounds covered by "illegality," though frequently treated separately, see: Michael Allen, Brian Thompson & Bernadette Walsh, Cases and Materials on Constitutional and Administrative Law (Blackstone, 1990) 367.

¹⁹⁸ Craig (*supra* note 17), at 543.

¹⁹⁹ For elaboration of six different tests that the courts used at one time or another, see: *Id.* at 543.

²⁰⁰ Longley & James (*supra* note 24), at 187; Zamir (*supra* note 56, 1995), at 70.

²⁰¹ Thompson (*supra* note 43), at 352-353.

²⁰² Jowell (*supra* note 26), at 20.

and principles of the legal system, prominent among which are individual freedoms and equality 203 .

It is important to note that in practice it may not be easy to discover whether or not a consideration has been taken into account, unless the decision itself reveals that it has been influenced by that factor²⁰⁴. In practice, in such cases, *unreasonableness* can serve as a useful ground of review, since a decision can be unreasonable because it is tainted by an improper purpose or by an irrelevant consideration. The unreasonableness of a decision, in such cases, serves as an indication of a defect in the exercise of discretion and may be sufficient to shift the burden of proof to the deciding authority²⁰⁵.

In German law *excess of discretion* is distinguishable from *abuse of discretion*. While excess of discretion is equivalent to *ultra vires*, abuse of discretion is an illegality within the granted power. Abuse of discretion may be either *objective* (i.e. a result of a non-observance or violation of constitutional or other legal principles, such as equality and reasonableness) or *subjective* (i.e. a result of an exercise of discretion for a wrong purpose or when its exercise is not justified by the considerations on which it is based). The forms of abuse of discretion overlap as much as they do in the common law. Thus, the same case may be characterized as an abuse either because the discretion has been used for an unlawful purpose, or because its exercise is based on improper motives, or because irrelevant considerations have been taken into account²⁰⁶.

Are the principles of proper purpose and relevant considerations, so well developed in other countries, foreign to the American legal system? Not at all. As I will show, similar principles can be found both in administrative and in constitutional law. However, these principles are found in very specific situations, while there are other realms of constitutional review where they could provide useful insights but where they are not used at all.

The APA authorizes judicial review of whether an agency action is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." If an agency acts outside its jurisdictional limits, it is said to be functioning *ultra vires*. Most of the time the enabling acts are clear as to the substantive boundaries of an agency's jurisdiction, but some cases demand statutory interpretation and require a close look at the legislative history and at the language of

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²⁰³ Zamir (*supra* note 56, 1995), at 70.

Le Sueur & Herberg (*supra* note 5), at 209.

 $^{^{205}}$ Zamir (*supra* note 56, 1995), at 71.

²⁰⁶ Singh (*supra* note 70), at 155 and 159.

²⁰⁷ 5 U.S.C.A. § 706(2)(C).

the statute (particularly the provisions that tell the agency what to regulate)²⁰⁸. In the seminal case Chevron²⁰⁹, the Supreme Court set forth a revised, two-step approach to the review:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the $statute^{210}$.

Discussion of this case, which was perceived as narrowing the range of legal issues in which courts are expected to have the final word ("the deference principle"), ²¹¹ is beyond the scope of this article. What is important to emphasize is the assertion of the primacy of congressional intent where that can be identified. Indeed, there are many instances in which courts have deemed Congress to have spoken to the issue and applied the interpretation of the statutory words²¹², referring also, among other things, to the purpose of the statue and to substantive background considerations²¹³. Given this background, it is clear that the principle of limiting the authority to proper purposes and relevant considerations is indeed recognized in American administrative law.

The reference to the purpose of the statute is even more transparent in the judicial review of statutes on constitutional grounds. Courts examine the connection between the ends and the means of the relevant statute in a "two tiered" approach 214. Under the regular test, which is the "rational basis test," laws are sustained if they bear a reasonable relationship to a legitimate state end. This test is used to examine ordinary or non-suspect classifications under the equal protection clause, and it closely parallels the rational basis test used in the post-Lochner era to assess economic regulatory legislation under the due process clause 215. The "strict" or "heightened" scrutiny test is applied regarding "fundamental interests" or "suspect classes."

²⁰⁸ Fox (*supra* note 106), at 76-77.

²⁰⁹ Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

²¹⁰ *Id.* at 842-843 (emph. supp.; footnotes omitted).

²¹¹ Aman & Mayton (*supra* note 98), at 478; Warren (*supra* note 106), at 447.

²¹² For a survey of this kind of cases, see: Paul Craig, "Jurisdiction, Judicial Control, and Agency Autonomy", in A Special Relationship? - American Influences on Public Law in the UK (Ian Loveland ed., Clarendon, 1995) 173, 187-188. ²¹³ Aman & Mayton (*supra* note 98), at 478.

²¹⁴ Brown v. Board of Education, 347 U.S. 483 (1954); Loving v. Virginia, 388 U.S. 1 (1967). For cases naming the Justice Warren test a "two tiered approach", see: Harris v. McRae, 448 U.S. 297 (1980); Craig v. Boren, 429 U.S.

²¹⁵ Fallon (*supra* note 13), at 111-114.

Laws affecting these rights are upheld only by reference to the promotion of a *compelling state interest* and only if the government distinction is *narrowly tailored* to advance the project at hand²¹⁶. There is also a middle-tiered scrutiny, used, for example, for discrimination based on gender, which is a "quasi-suspect class." In this case the classification set by the law must be *substantial* to serve *important governmental objectives*²¹⁷. Thus, the examination of purposes and objectives of statutes serve an important role in American constitutional review.

There are other areas of constitutional review, in which courts do not refer to the properness of purpose and the relevance of considerations regarding a given statute, although such insights may have contributed to the coherence and justice of the judicial review. This is the case regarding traditional Fourth Amendment analysis. The Fourth Amendment protects the right of people to be secured against *unreasonable* searches and seizures and provides that no warrants shall issue, but upon *probable cause* ²¹⁸. The Supreme Court has held that whenever "a reasonably prudent police officer" believes that his safety or that of others is endangered, he has a right to "stop and frisk" a person who is behaving suspiciously, even though there is no probable cause to make an arrest²¹⁹. In deciding whether a police officer has met these requisite minimum standards (i.e. reasonable suspicion in the case of a stop and frisk or probable cause in the case of an arrest or a search), the courts rely on what is known as the objective (as opposed to subjective) test of reasonableness. ²²⁰ Within this context, the courts have emphasized that proper inquiry for determining the constitutionality of a search and seizure should be made without regard to the officer's underlying motive or intent²²¹.

This legal situation is very problematic with regard to "pretext stops," as will be discussed below. Paradoxically, the objective test, which aims to avoid subjective discrimination²²², may leave abuse of power without remedy. The reason is that the test does not take into account the potential problem of officers using their authorization not for the proper purposes of the enabling law. In my view the objective test cannot rule out the basic public law demand of *legality*, namely that police officers must act only to fulfill the ends of the authorizing

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²¹⁶ Kennedy (*supra* note 166), at 147; Redlich, Attanasio & Goldstein, (*supra* note 8), at 378-379.

²¹⁷ See: The Editors of the Harvard Law Review, *Sexual Orientation and the Law* (Harvard University Press, 1990) 55; Robert Wintemute, *Sexual Orientation and Human Rights* (Clarendon, 1995) 61-64.

²¹⁸ U.S. Const. amen. IV. This amendment applies only to action of the federal government but it is enforceable against states through the due process clause of the Fourteenth Amendment, by the same sanctions as are used against the federal government. See: *Mapp v. Ohio*, 367 U.S. 643 (1961).

²¹⁹ Terry v. Ohio 392 U.S. 1, 20-27 (1968).

²²⁰ Paul H. Zoubek & Ronald Susswein, "Symposium: On the Toll Road to Reform: One State's Effort to Put the Brakes on Racial Profiling", 3 *Rutgers Race & L. Rev.* 223, 251 (2001). ²²¹ See, for example, *Whren v. United States*, 517 U.S. 806, 814 (1996).

²²² Compare: Justice Doherty's words, regarding the concept of reasonable cause in Canada: "The requirement that the facts must meet an objectively discernible standard is recognized in connection with the arrest power, and serves to avoid indiscriminate and discriminatory exercises of the police power." Cited in: Hudson & Levi (*supra* note 113), at 276.

law and must weigh relevant considerations. Furthermore, recall that the objective ground of *unreasonableness* can be a sign of irrelevant consideration or improper purpose. If so, how can an act be reasonable if it is motivated by a wrong aim?

2. The Principle of Proportionality

The principle of proportionality is at the heart of the European legal order ²²³ and is increasingly recognized as a key component of the rule of law in many countries around the world ²²⁴. By providing a systematic approach to the judicial review of measures taken by public authorities, it affirms that individuals affected by decisions should not bear a burden that is unnecessary to the end being pursued ²²⁵. The principle perceived in most of the democracies combines three subsidiary tests ²²⁶: 1. *Suitability* – the means used must be appropriate to serve the legal aim; 2. *Necessity* – the means adopted is the least restrictive way to achieve the aim; 3. *Proportionality in the strict sense* – viewed overall, the burden on the right must not be excessive relative to the benefits secured by the state objective.

So popular and useful has the doctrine of proportionality become in many legal systems over the world that David Betty, in his recent book, *The Ultimate Rule of Law*²²⁷, says:

Making proportionality the critical test of whether a law or some other act of state is constitutional or not separates the power of the judiciary and the elected branches of government in a way that provides a solution to the paradox that has confounded constitutional democracies for so long. Building a theory of judicial review around a principle of proportionality... satisfies all the major criteria that must be met for it to establish its integrity²²⁸.

After a critical survey of three dominant theories for judicial review: the *contract theory*²²⁹, the *process theory* ²³⁰ and the *moral theory* ²³¹, Betty examines the judicial practice in many democracies and draws the inference that "proportionality transforms... questions of value into

²²⁹ The Contract Theory preserves the original meaning of the constitution. It is represented, for example, by Robert Bork, *The Tempting of America* (Free Press, 1990).

²²³ Michael Fordham & Thomas de la Mare, "Identifying the Principle of Proportionality", in *Understanding Human Rights Principles* (Jeffrey Jowell & Jonathan Coopered eds., 2001) 28.

David Betty, *The Ultimate Rule of Law* (Oxford, 2004), mainly ch. 2-4.

²²⁵ Jeffrey Jowell & Anthony Lester Q.C., "Proportionality: Neither Novel nor Dangerous", in *New Directions in Judicial Review* (J.L. Jowell & D. Oliver ed., Stevens & Sons, 1988) 51, 68-69.

²²⁶ For the division to three subsidiary tests and for their content, see: Kommers (*supra* note 10), at 46; Singh (*supra* note 70), at 160; Lord Lester & Clapinska, (*supra* note 36), at 77-78; Bracha (*supra* note 63), at 638. Some scholars analyze proportionality as comprising more tests. See, for example, Craig (*supra* note 17), at 591; Fordham & de la Mare (*supra* note 223), at 28.

²²⁷ Betty (*supra* note 224).

²²⁸ *Id.* at 160.

²³⁰ The Process-Based Theory sees the main role of judges as guaranteeing that the ordinary institutions of politics work fairly, remain open to change and do not disadvantage a particular group. This theory is represented mainly by John H. Ely, *Democracy and Distrust – A Theory of Judicial Review* (Harvard Univ. Press, 1980).

²³¹ According to this theory moral reasoning is a necessary component of all constitutional adjudication. This is Dworkin's theory. See: Ronald M. Dworkin, *Freedom's Law – The Moral Reading of the American Constitution* (Harvard Univ. Press, 1996).

questions of fact."²³² Thus proportionality accords with separation of powers, and, as against the other theories surveyed, "has the capacity to ensure constitutions are the best they can possibly be."²³³ There are some methodological problems in Betty's argument, in which he derives normative justifications for judicial review from a descriptive analysis of the actual work of judges²³⁴. Not only that, as I will show, it is not accurate to say that proportionality is concerned only with judicial fact finding, since it requires estimations of the balance between the advantage of the means to fulfill governmental objectives and the extent to which those means infringe upon constitutional right. Nevertheless, proportionality is doubtless one of the most important public law grounds – administrative and constitutional – for judicial review²³⁵.

Indeed, unlike some other democratic constitutions²³⁶, the United States Constitution does not mention the principle of proportionality, except in regard to bail, fines and punishments²³⁷. Moreover, and again unlike other systems, the United States Constitution merely defines the protected rights in an absolute manner, ignoring the issue of balancing principles, which is left to the courts²³⁸. Nevertheless, I will argue that proportionality, which embodies the basic principle of fairness, can serve as an important tool in the constitutional review on administrative authorities, including enforcement authorities ²³⁹. I agree with Betty that proportionality transforms judicial review from an interpretive exercise of the text into a pragmatic conception

²³² Betty (*supra* note 224), at 170.

²³³ *Id.* at 176.

²³⁴ Moshe Cohen-Elia, "Separation of Powers and Proportionality", *Mishpat Umimshal* (forthcoming; in Hebrew).

²³⁵ Compare: Craig (*supra* note 17), at 601. Addressing the argument that the balancing exercise of the court allows an intrusion to the merits of a decision, Craig clarifies that this ground does not support substitution of the authorities' discretion by that of the court.

²³⁶ For the principle in the Israeli Basic Laws, see *infra* note 252. For the principle in the European Convention on Human Rights, see: *infra* note 244.

²³⁷ U.S. Const. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This prohibition is directed against all punishments' which by their excessive length or severity are greatly disproportioned to the offenses charged, and by virtue of the Fourteenth Amendment it is applied to any actions taken in state courts. See: Richard H. Andrus, "Which Crime Is It? The Role of Proportionality in Recidivist Sentencing after Ewing v. California", 19 BYU J. Pub. L. 279, 280-281 (2004). For proportionality regarding the Eighth Amendment, see also: Richard S. Frase, "Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: 'Proportionality' Relative to What?' 89 Minn. L. Rev. 571 (2005). For proportionality of punishments as deriving from substantive due process, see: James Headley, "Proportionality between Crimes, Offenses, and Punishments", 17 St. Thomas L. Rev. 247 (2004).

²³⁸ The European Convention on Human Rights lays down specific balancing tests for different rights. See *infra* note 244. The Israeli and the Canadian model lay down one general balancing test that must be employed in all cases in which restrictions have been placed on one of the protected rights. For the Israeli limitation clause, see *infra* note 252. For the Canadian model, see: the Canadian Charter of Rights and Freedoms, art. 1: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." For a discussion of the United States model compared to other countries, see: Kretzmer (*supra* note 60), at 150-151.

²³⁹ Compare: Jowell & Lester (*supra* note 225), at 51 (arguing that far from being dangerous, proportionality embodies a basic principle of fairness, the explicit recognition of which would greatly strengthen the coherence of the English system of administrative law).

of law²⁴⁰. Thus, in much of its work, the Constitutional Court in Germany is less concerned with interpreting the constitution than in applying an end-means test to determine whether a particular right has been violated in light of a given set of facts²⁴¹. Furthermore, the experience of proportionality shows that the concept can be applied to varying degrees so as to accommodate the range of types of decision which are subject to judicial review²⁴². However, since the main interest of this article is judicial review of administrative authorities, I want to focus on the holistic approach of proportionality in other countries. In line with this harmony, I will argue that while the issue of using this principle in reviewing legislation in the United States is not unanimously accepted, there is no reason not to use it as a ground of review of administrative authorities.

Proportionality serves in English common law as a judicially fashioned standard which requires all discretionary powers to be exercised with due regard to the balance between the ends pursued and the means to achieve those ends. Although it has been applied under other names, mainly reasonableness, it gradually emerged as a separate ground of review²⁴³. Proportionality also serves an important role in the jurisprudence of the European Convention on Human Rights²⁴⁴. Thus, in light of the Human Rights Act, which brings this Convention into domestic law, courts need to apply the principle of proportionality and to ask if the governmental objective is sufficiently important to limit a Convention right; if the means used to achieve the objective are rationally connected to it; and if the means used to impair the Convention right are no more than necessary to accomplish the objective²⁴⁵. While it seems to be an advantage for the same test to be applied both as a general standard of review and in relation to the Convention rights²⁴⁶, there are those who hold a less holistic approach, which identifies a contrast: according to this opinion, while proportionality in general seeks to ensure substantive fairness in the exercise of any discretionary power, proportionality under the Human Rights Act is an instrument tailored for testing the scope of Convention rights and ensuring that they are overridden only for

²⁴⁰ Betty (*supra* note 224), at 182-183.

²⁴¹ Kommers (*supra* note 10), at 46.

²⁴² Craig (*supra* note 17), at 601; Lord Irvine (*supra* note 170), at 196-198.

²⁴³ For the relation between reasonableness and proportionality and the recognition of proportionality as independent, see: Craig (*supra* note 17), at 598-600; Jowell (*supra* note 41), at 78.

²⁴⁴ Feldman (*supra* note 172), at 140; Lord Irvine (*supra* note 170), at 192; Fordham & de la Mare (*supra* note 223), at 49-60. As a demonstration of the principle that infringement upon rights will be only to the necessary extent, see: The European Convention on Human Rights, art. 9(2): "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are *necessary* in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others...." (emph. supp.). There is a similar formula in the limitation clauses regarding other rights. This is reinforced by article 18, which provides that permitted restrictions may be applied only for the prescribed purposes.

²⁴⁵ Lord Lester & Clapinska, (*supra* note 36), at 77-78. For a longer discussion of proportionality under the Human Rights Act, 1998, see: Fordham & de la Mare (*supra* note 221), at 77-89.

²⁴⁶Craig (supra note 17), at 600; Lord Lester & Clapinska (supra note 36), at 78.

compelling reasons²⁴⁷. I tend to agree with those who think that the Human Rights Act conferred a constitutional legitimacy on proportionality-based review and thus made it a general principle of English public law²⁴⁸. Nevertheless, for now, I do not think I need to be definite in this matter, since what is important is that the proportionality serves as constitutional and administrative grounds for judicial review.

In Israel, the harmonious way in which proportionality serves in public law is not contestable²⁴⁹. Being an effective means to reduce abuse of power, it is perceived today as one of the main instruments for judicial review of discretionary power²⁵⁰. Proportionality emerged about fifteen years ago as a new ground of administrative review, although it had been implicit since long before that. The Supreme Court held that even where the balance of interests allows the authority to restrict a human right, the power should be exercised proportionally, that is, in proportion to need or danger. To this end, the authority should take into account the legislative purpose and the particular circumstances of the case. For example, in case of a pornographic movie subject to censorship, it may be an excessive use of power to ban the movie if the legislative purpose may be adequately served by less dramatic measures, such as cutting out certain scenes or excluding minors²⁵¹. The requirement of proportionality was upgraded to a constitutional level by making it part of the limitation clause in the two Basic Laws regarding human rights. Those clauses demand, inter alia, that any violation of a protected right would be "to an extent no greater than required." Since administrative authorities are subject to the provisions of the basic laws²⁵³, they also have to meet the test of proportionality²⁵⁴. Inspired by comparative law²⁵⁵, the courts in Israel developed this ground of review through the three

²⁴⁷ Jowell (*supra* note 41), at 78.

²⁴⁸ Lord Irvine (*supra* note 170), at 196.

²⁴⁹ For a discussion of proportionality as an administrative as well as constitutional ground for the review of administrative discretion, see: Bracha (*supra* note 63), at 637-639.

²⁵⁰ Itzhak Zamir, "Unreasonableness, Balance of Interests and Proportionality", in *Public Law in Israel* (Itzhak Zamir & Allen Zysblat eds., Clarendon, 1996) 327, 333.

²⁵¹ Zamir (*supra* note 56, 1995), at 72-73 and the cases cited therein.

Basic Law: Human Dignity and Liberty, art. 8: "There shall be no violation of rights under this Basic Law except by a law fitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required, or by regulation enacted by virtue of express authorization in such law." Basic Law: Freedom of Occupation, art. 4, contains the same formula regarding freedom of occupation.

²⁵³ Basic Law: Human Dignity and Liberty, art. 11: "All governmental authorities are bound to respect the rights under this Basic Law." Basic Law: Freedom of Occupation, art. 5: "All governmental authorities are bound to respect the freedom of occupation of all Israel national or residents". For the applicability of these provisions to criminal enforcement authorities, see: Eliyahu Harnon, "The Impact of the Basic Law: Human Dignity and Liberty on the Law of Criminal Procedure and Evidence", 33 *Isr. L. Rev.* 678, 683-684 (1999).

²⁵⁴ Bracha (*supra* note 63), at 639.

²⁵⁵ For the reference to Canadian case law, see: Kretzmer (*supra* note 60), at 151. For other examples, see: Bracha (*supra* note 63), at 638 and the references cited therein.

subsidiary tests focusing on the relation between the means and the purpose, and apply it in both administrative and constitutional review²⁵⁶.

In Germany, unlike the common law countries, the principle of proportionality is not based on any implied legislative prohibition against unreasonable exercise of power, but on the fundamental principle of means appropriate to the end or in the cause and effect relationship²⁵⁷. Thus the principle consists of the three sub-principles elaborated above and requires that the measures be suitable and necessary for achieving the desired end and that there is a reasonable proportion between the means and the ends. Though the Basic Law contains no explicit reference to proportionality, the principle has acquired a constitutional status, according to a 1965 decision of the Federal Constitutional Court, since it is regarded as an indispensable element of a state based on the rule of law. Thus, proportionality is perceived as an overriding rule for the guidance of all state activities and applies to legislative measures just as it applies to administrative measures²⁵⁸.

As we can see, proportionality serves as a public law principle and is used as a general ground for review. Thus, its reasoning can also play an important role in the constitutional review of administrative and enforcement actions. American courts already possess the tools for doing this. The first step is the *suitability* test, a positive component which checks whether the means are appropriate to achieve the goals. This is very similar to the rational basis test, which checks whether the means bear a reasonable relationship to a legitimate state end. Indeed, the rational basis test is a paradigm for judicial restraint because usually the Supreme Court hesitates to say either that the government's ends or purposes are not legitimate or that there is no rational connection between ends and means²⁵⁹. But this is actually the case with the proportionality test, since in most cases the administrative act passes the first sub-test, as administrative authorities rarely use means that bear no connection to the end. In regard to the suitability test, Donald Kommers notes that the rights in the German Basic Law are often limited by objectives and values and thus gives the court considerable guidance in applying the test, as against the sparse language of the American Constitution²⁶⁰. In my opinion, this argument holds only for judicial review of the legislature. In regard to administrative power, courts should check the objectives of the authorizing statute.

²⁵⁶ Bracha (*supra* note 63), at 638.

²⁵⁷ Singh (*supra* note 70), at 160.

²⁵⁸ *Id.* at 161; Kommers (*supra* note 10), at 46.

²⁵⁹ For the rational basis review as a paradigm for judicial restraint, see: *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313-314 (1993).

²⁶⁰ Kommers (*supra* note 10), at 46.

The second step is the *necessity* test, a negative component which demands proof that appropriate, less restrictive means are not available. The United States Supreme Court applies a similar principle in regard to remedial legislation enacted under Section 5 of the Fourteenth Amendment. Discussing the various limits that Congress imposed in its voting rights measures, the Court noted that where a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5.²⁶¹ In addition, Betty compares the necessity test to the framework of analysis within the *strict scrutiny* test²⁶². In my opinion it is more similar to the *middle-tiered* scrutiny²⁶³, since this sub-test is applied variously in different countries, and some jurisdictions grant the authority "a margin of proportional", in which it can choose between some means that cause minimal injury²⁶⁴. Yet, it is clear that the reasoning behind the necessity test exist in the American constitutional review and there is no reason why a similar test could not be applied to administrative authorities.

The third step, *proportionality in the strict sense*, demands that the means used must be proportionate to the end, namely that the burden on the right must not be excessive relative to the benefits secured by the state objective. This is exactly the administrative insight which should be incorporated into the judicial review of public authorities, since it adds a component of *reasonableness*. Thus, as will be demonstrated in the next section, selective enforcement should be deemed illegal, not only when it is motivated by discrimination on an unconstitutional basis, but also when it is disproportionate. The criminal law itself is intended to protect the most vital social interests against particularly severe violations when there is no less intrusive means for defending them²⁶⁵. Selective enforcement is an undesirable phenomenon which causes many problems, so, *a fortiori*, it should be weighed carefully against the benefits of enforcement. Furthermore, pretext stops, i.e. using the means of traffic stops in order to find drugs, is not only illegal because of the irrelevant considerations underlying it, but also because the disproportionality of the means in the lack of crucial evidence connecting black drivers with drugs.

²⁶¹ City of Boerne v. Flores 521 U.S. 507, 533 (1997); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank 527 U.S. 627, 647 (1999).

²⁶² Betty (*supra* note 224), at 182.

²⁶³ Compare: Kommers (*supra* note 10), at 46 (arguing that the necessity test is more than rational basis and less than strict scrutiny).

For the concept of "margin" or "latitude" that presents the public authority with the freedom of choice, see: Fordham & de la Mare (*supra* note 223), at 28-29. In Israel the courts grant the authority "a margin of proportionality". Conversly, in Germany the authority must show that out of several effective means the one employed is of the *least* disadvantage to the individual (Singh *supra* note 70, at 160).

²⁶⁵ Mordechai Kremnitzer, "Constitutionalization of Substantive Criminal Law: A Realistic View", 33 *Isr. L. Rev.* 720, 726 (1999).

V. Selective Enforcement and the Fifth and Fourteenth Amendments

The term "selective enforcement" applies to a situation in which even though the law seems fair and impartial, it is applied, administered and enforced by the public authority²⁶⁶ in a discriminating way, in that the law is enforced only against certain individuals or groups, or in that there are different enforcement policies depending upon the identity or affiliation of the person or entity involved²⁶⁷. Selective enforcement is not the opposite of complete enforcement, since complete enforcement is neither feasible 268 nor desirable 269, given the scarcity of resources²⁷⁰. Nor is it, necessarily, identical with the term "partial enforcement", though the latter can be selective and hence wrong and illegitimate²⁷¹. Selective enforcement is, thus, a specific kind of partial enforcement, the selectivity feature of which makes it illegitimate. The question of what exactly constitutes illegitimate selective enforcement is a normative question that can have different answers in various legal systems.

Selective enforcement violates the *legitimate expectations of the public*, who generally understand the law, its content and application by viewing the administrative behavior and not by reading the statutes themselves²⁷². Moreover, selectivity in law enforcement severely contradicts the fundamental principle of equality before the law in its basic meaning, since similar cases are not dealt with comparably. If a number of citizens violate the law with no interference by those in charge of its enforcement, it is not just to treat another citizen differently – at least when the breach of the law has no materially different attributes²⁷³. Beyond the injustice, deep resentment and danger to the legal system, which are the potential results of any severe infringement upon equality, there can be economic implications of selective enforcement, such as damaging or

²⁶⁶ This can be a criminal enforcement authority or regulatory enforcement authority. For nonenforcement and other defects in regulatory enforcement authorities, see: Note, "Judicial Control of Systematic Inadequacies in Federal Administrative Enforcement", 88 *Yale L. J.* 407, 408 (1978). ²⁶⁷ Compare: Gavison (*supra* note 66), at 333.

²⁶⁸ Frank W. Miller, *Prosecution: The Discretion to Charge a Suspect with a Crime* (Little, Brown and Company, 1969) 151: "Full enforcement of the criminal law in a sense that every violator of every statue should be apprehended, charged, convicted and sentenced to the maximum extent permitted by law has probably never been seriously considered a tenable ideal."

²⁶⁹ According to the economic analysis of criminal law, the optimal rate of enforcement lies at the point where the social cost from extra enforcement equals the social utility from diminishing criminal activity. See: I. Ehrlich, "The Economic Approach to Crime - A Preliminary Assessment", Readings in the Economics of Law and Regulation (A.I. Ogus & C.G. Veljanovskieds eds., Clarendon, 1984) 297; A. Mitchell Polinski & Steven Shavell, "The Economic Theory of Public Enforcement of Law", 38 Journal of Economic Literature 45 (2000).

²⁷⁰ This is the main feature of every enforcement system. See: George F. Cole, "United States of America", *Major* Criminal Justice Systems (George F. Cole., Stanislaw J. Frankowski & Marc G. Gertz eds., 2nd ed., Sage Publications, 1987) 29, 43.

²⁷¹ Compare: Albert F. Wilcox, *The Decision to Prosecute* (Butterworths, 1972) 1.

²⁷² Mortimer R. Kadish & Sanford H. Kadish, Discretion to Disobey: A Study of Lawful Departures from Legal Rules (Stanford, 1973) 129-130. See also: Poe v. Ullman, State Attorney, 367 U.S. 497, 502 (1961): "Deeply embedded traditional ways of carrying out state policy . . . ' - or not carrying it out - 'are often tougher and truer law than the dead words of the written text.""

²⁷³ Choo (*supra* note 129), at 125; Kadish & Kadish (*supra* note 269), at 130; Davis (*supra* note 19), at 167-169.

inhibiting free competition and causing damage to the reputation and income of those against whom the law is enforced²⁷⁴. Furthermore, the results of selective enforcement are destructive not only to individuals but to society as a whole, since it jeopardizes the rule of law, obedience to the law and *public faith* in the legal system²⁷⁵.

A. The Current Legal Situation

The roots of the customary practice in the United States go back to 1886, the year Yick Wo^{276} was decided. The American Supreme Court recognized in this decision that there could be a situation in which the law is on its face fair and equal, but is applied by an administrative agency illegally and unjustly as between people in similar circumstances, and in practice injures the right to equal protection anchored in the Fourteenth Amendment. As Justice Matthews wrote:

Though the law itself be fair on its face and impartial in appearance yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution²⁷⁷.

The principle of *Yick Wo* was formulated very generally and left much room for different interpretations by later courts, so that it did not give absolute legal protection against discriminatory enforcement, and all it meant was that this defense could be raised in particular circumstances. Thus, for example, the case dealt with selection in the grant of licenses, and it was not clear whether it covered selective enforcement in criminal cases; also it dealt with discrimination on a group basis, in contrast to an individual basis²⁷⁸. However, in the long period since the decision was handed down, the law dealing with selective enforcement has crystallized, but the basic requirement established by the case, that there must be proof of "evil eye and unequal hand," has not changed²⁷⁹. In order to succeed in such a claim, one must prove not only that the law is enforced unequally, but also that there was discriminatory intent. This is a heavy

²⁷⁴ See, for example, *Federal Trade Commission v. Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967): "... the Federal Trade Commission does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry." See also the examples brought in: Comment, "The Right to Nondiscriminatory Enforcement of State Penal Laws", 61 *Col. L. Rev.* 1103, 1137 (1961).

²⁷⁵ Poulin (*supra* note 148), at 1087. For the connection between effectiveness and the public faith, compare: Tomer Einat, "How Effective is Criminal Fine Enforcement in the Israeli Justice System?" 33 *Isr. L. Rev.* 322, 326-327 (1999).

²⁷⁶ Yick Wo v. Hopkins, 118 U.S. 356 (1886).

²⁷⁷ *Id.* at 373-374.

²⁷⁸ Karl S. Coplan, Note, "Rethinking Selective Enforcement in the First Amendment Context", 84 *Col. L. Rev.* 144, 152 (1984).

²⁷⁹ For the fact that this standard remained the crux of the claim, see: Karen L. Folster, "Just Cheap Butts, or an Equal Protection Violation? New York's Failure to Tax Reservation Sales to Non-Indians", 62 *Alb. L. Rev.* 697, 717 (1998).

burden, in light of the broad discretion given the prosecution, and in effect as a result of this the number of decisions which accepted the claim is very small²⁸⁰.

According to the current legal situation, to claim selective enforcement it is not enough to show proof of discrimination alone, it must also be proved that the complainant is a "victim" of *intentional* discrimination and that the decision to indict her is based on race, gender, national origin or other *improper classification*²⁸¹. Also, speaking of passive enforcement that results in the indictment only of one who exercises her right of free speech²⁸², the American Supreme Court was not satisfied with proof of the government's awareness of the consequences of the policy regarding a particular group, but required proof of discriminatory intent, which meant proving that the choice of a particular course of action was made, at least in part, "because of," not merely "in spite of," its adverse effect upon an identifiable group²⁸³.

In a relatively recent case in which selective enforcement against blacks was claimed²⁸⁴, the Supreme Court returned to the rule that it is not enough to show that the prosecution's policy has a discriminatory effect, but there is a need to prove that it was driven by discriminatory intent, and hence required related proof – according to which the defendant has to show that people of another race who committed exactly the same offense were not indicted²⁸⁵. The result is that in the legal situation today, in order to establish the claim of selective enforcement, one must meet a triple demand of proof²⁸⁶: 1. that other violators *similarly situated* are generally not prosecuted; 2. that the selection of the claimant was "*intentional or purposeful*"; 3. that the selection was pursuant to an *unjustifiable standard*, such as race, religion or another arbitrary classification.

The requirement to prove a motive is embedded in the character of the judicial review of prosecuting authorities described above, and in the special character of judicial review according to the equal protection concept derived from the Fifth and Fourteenth Amendments²⁸⁷. The traditional equal protection test proceeds from the premise that the legislator must necessarily

²⁸⁰ Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, *Criminal Procedure* (Vol. IV, 2nd ed., West, 1999) 44.

²⁸¹ For the main decision establishing the requirement, see: *Oyler v. Boles*, 368 U.S. 448, 453 (1962). For other examples, see: *Edelman v. California*, 344 U.S. 357, 359 (1953); *Snowden v. Hughes*, 321 U.S. 1, 6 (1944); *United States v. Berrios*, 501 F2d 1207, 1211 (2d Cir. 1974).

²⁸² Under a passive enforcement policy, an enforcement agency makes no effort to discover violators, but indicts

²⁸² Under a passive enforcement policy, an enforcement agency makes no effort to discover violators, but indicts only those violators who turn themselves in by writing a letter of protest to the government, or who are turned in by third parties. See: Coplan (*supra* note 278), at 144.

²⁸³ Wayte v. United States, 470 U.S. 598, 610 (1985).

²⁸⁴ Armstrong (supra note 140).

²⁸⁵ *Id.* at 465.

²⁸⁶ LaFave, Israel, & King (*supra* note 280), at 44-45.

²⁸⁷ U.S. Const. amen. XIV, § 1: "...No state shall...deny to any person within its jurisdiction the equal protection of the laws." The Fifth Amendment does not contain an Equal Protection clause as does the Fourteenth Amendment, which applies only to the states. The Supreme Court held that the concepts of equal protection and due process are not mutually exclusive and that discrimination by the federal government may be so unjustifiable as to be a violation of due process. See: *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

classify citizens in order to achieve different goals and to advance general welfare 288. However, a given classification is subordinated to a reasonableness test, in which the rational connection between the classification and the aim is examined²⁸⁹. As mentioned, when it is a matter of a "suspect" grouping, a higher standard is required 290. But a claim of discrimination relates not only to situations in which the government distinguishes between people who should be treated as equal (de jure discrimination); it can also take the form of de facto discrimination which stems, for example, from laws which are on their face neutral, but have a disproportionate discriminatory impact on suspect groups²⁹¹. In such situations – in which it is claimed that a law has a disparate impact involving discrimination against a protected group – American precedents raise the requirement of motive²⁹². Specifically: a statute having a disparate impact on a distinct class does not trigger heightened scrutiny, absent a showing of a purposeful discrimination²⁹³. This doctrine spawned a considerable body of literature, mainly criticizing it and suggesting alternatives ²⁹⁴. From this doctrine apparently comes also the conclusion that systematic classifications made by administrative authorities in the framework of enforcing and implementing laws are valid insofar as they are "reasonable." And here is the source of the requirement to prove an intentional discrimination according to an unjustifiable standard, which was developed in the framework of the doctrine of selective enforcement.

This requirement was attacked from several directions: *First*, it was argued that it is not proper to limit the equal protection clause only to discrimination against classes of people, since the Constitution condemns discrimination against "any person." The traditional emphasis on discrimination against classes of people stems from the recognition that often there will be no other way to prove that a governmental action toward an individual is motivated by an intention to discriminate against her in relation to others. Proving this is particularly difficult in light of the

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²⁸⁸ Givelber (*supra* note 149), at 90.

²⁸⁹ Supra note 215 and the related text.

²⁹⁰ Supra note 216 and the related text.

²⁹¹ For the different discrimination claims, see Tribe (*supra* note 8), at 1438.

²⁹² The doctrine was established in *Washington v. Davis*, 426 U.S. 229 (1976).

²⁹³ William G. Bernhardt, "Constitutional Law: The Conflict of First Amendment Rights and the Motive Requirement in Selective Enforcement Cases", 39 *Okla. L. Rev.* 498, 508 (1986). See also: Redlich, Attanasio & Goldstein (*supra* note 8), at 376.

²⁹⁴ See, for example, Charles L. Lawrence, "The Id, the Ego, and equal protection: Reckoning with Unconscious Racism", 39 Stan. L. Rev. 317 (1987) (suggesting to recognize unconscious racism of governmental actors in situations of neutral policies with disparate racial impact); R.H. Lenhardt, "Understanding the Mark: Race, Stigma and Equality in Context", 79 NYU L. Rev. 803 (2004) (arguing that racial stigma, not intentional discrimination, constitutes the main source of racial harm and that court must take this social science insight into account in the constitutional analysis).

²⁹⁵ Comment, "The Right to Nondiscriminatory Enforcement of State Penal Laws" (*supra* note 274), at 1117. See also: Coplan (*supra* note 278), at 156.

enormous discretion given the criminal prosecution in the United States. But this does not demand the conclusion that only intentional singling out of a defined class is forbidden²⁹⁶.

Second, an argument was asserted that in the framework of judicial review of enforcement authorities, different levels of scrutiny can be applied; similar to what is customary in judicial review of the legislature²⁹⁷. This opinion completely ignores the question of the intention to discriminate and places at the center the question, "How convincing must the reason of the state be to justify selective enforcement?" Or, in other words, "What is the level of the review which is to be applied?" The general rule is a rational basis, and regarding a suspect grouping – strict scrutiny. This requirement does not forbid an intentional selectivity in indictment, but does require the prosecution to present relevant reasons for distinguishing between those against whom the law is enforced and others, and a rational or closer connection between the reason for a different treatment and a legitimate government purpose²⁹⁸.

Third, criticism was passed on the small number of instances in which a selective enforcement claim was recognized. Thus, in one of the Court of Appeals cases²⁹⁹, some of the judges expressed their dissatisfaction with the ease with which claims of selective enforcement are dismissed, by virtue of the rule which endorses selectivity in enforcement so long as there is no intention to discriminate on the basis of an improper classification. This principle, according to their line of reasoning, often does not give a correct answer to the question whether there is a violation of the equal protection clause³⁰⁰.

Fourth, the American Supreme Court issued a number of decisions according to which motive is not a proper standard for a constitutional review of the legislature³⁰¹. There are those who contend that though legislative motive is not the precise equivalent of prosecutorial motive³⁰², any implicit discretionary grant to the Executive by Congress must be subject to the same constitutional limitations as those that apply to Congress³⁰³. Hence, if a positive motive is not relevant when Congress infringes a constitutional right, there is no reason for it to be relevant when speaking of an enforcement authority.

The *fifth* criticism, which is related to the fourth, holds the view that since the requirement of motive does not exist in the context of First Amendment cases, judicial review

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²⁹⁶ R.G. McCloskey, "The Supreme Court 1961 Term", 76 Harv. L. Rev. 54, 121 (1962).

²⁹⁷ See, for example, Folster (*supra* note 276), at 718; Givelber (*supra* note 149), at 117.

²⁹⁸ Clymer (*supra* note 139), at 692-693.

²⁹⁹ United States v. Falk, 479 F2d 616 (7th Cir. 1973)

³⁰⁰ In the words of Justice Sprecher: "In conclusion, we wish to note our disapproval of the apparently frequent, and often too easy, practice of simply dismissing all allegation of illegal discrimination in the enforcement of criminal laws with a reference to *Oyler v. Boles* and its statement that the conscious exercise of some selectivity in the enforcement of laws does not violate the Constitution." *Id.* at 624.

³⁰¹ See, for example, *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968).

³⁰² Bernhardt (*supra* note 293), at 505.

³⁰³ Coplan (*supra* note 278), at 160.

regarding selective enforcement that infringes upon the freedom of speech should be under the First Amendment and not under the Fourteenth. Regular analysis under the First Amendment does not require proof of the government's intent to violate the freedom of speech, and the claim is satisfied merely by proving the violation of the right. Refusal of the Court to trace the intention stems from reluctance to deal with "psychoanalysis," as well as from the basic perception that good motives are irrelevant when freedom of speech is affected³⁰⁴. In the opinion of the critics, this vulnerability of First Amendment rights should not depend on whether the claim is analyzed under the equal protection concept or the First Amendment³⁰⁵. Moreover, the need to prove intention to discriminate when dealing with a neutral law which has disparate negative results on a suspect class – which underlies the origin of the requirement of motive – is irrelevant when a fundamental right such as freedom of speech is involved³⁰⁶.

And *finally*, enforcement authorities benefit from a *presumption of neutrality* and from a *presumption of regularity*, which are based on the authority's performing the same acts every day, and therefore there is no room to assume that treatment of a specific person was touched by considerations which deviate from regular practice in the same subject³⁰⁷. Indeed, the recognition of the ability of enforcement authorities to establish a particular measure of selectivity in enforcement comes, to a large extent, from the practical problem of scarcity of resources, which does not enable general enforcement and requires making particular choices. But the trouble is that this rationalization does not explain why only intention to discriminate refutes the said presumptions³⁰⁸.

B. The Normative Duality Proposition

I wish to offer a different approach, by which the result of selective enforcement is permissible only if it stems from a classification made by the legislature which is within constitutional limits. The motive of the enforcement authorities is relevant, therefore, only for the need to examine the question whether it fulfills the goals of the law. To begin with, this approach flows from placing emphasis on the constitutional infringement, namely the unequal treatment, and not on the intention to discriminate. Needless to say, unequal treatment injures also when there is no discriminatory motive underlying it. And indeed in England and Israel the emphasis in questions of equality is on the result and the motives of the authority are perceived

³⁰⁴ *Id.* at 149.

 $^{^{305}}$ *Id.* at 155.

³⁰⁶ Bernhardt (*supra* note 293), at 518.

³⁰⁷ See, for example, *Armstrong* (*supra* note 140), at 15-17.

³⁰⁸ Givelber (*supra* note 149), at 101-102. For the argument that there is no place for the presumption of regularity in the law of selective prosecution, see: Amsterdam (*supra* note 116), at 15-17.

as irrelevant³⁰⁹. Even in Germany, where early jurisprudence required a proof of "intention", more recent judgments recognize that discrimination is not necesserarily a result of intention³¹⁰.

That said, in this article I wish to emphasize principally the administrative insights which can help to achieve different perspective, and hence a different perception, of the issue. As mentioned, the perception which stands at the base of the need to prove an unjustifiable classification assumes correlation between the ability of the legislature to draw a "reasonable classification" having a "rational connection" to the goal of the legislation, and the ability of the enforcement authority to draw reasonable classifications for the needs of enforcement. With that, since a statute having a disparate impact on a distinct class does not trigger heightened scrutiny, absent a showing of a purposeful discrimination, so systematic classifications made by administrative authorities in the framework of enforcing laws are valid as far as they are "reasonable." This correlation is, in my eyes, misleading.

First, separation of powers and the distinctions between the legislative and administrative functions require distinguishing the scope of the permitted classification for each one of the powers to make³¹¹. Once the legislature has chosen the purpose of the law, and this was not found unconstitutional, the executive agency must act to fulfill this purpose and it is not authorized to create a classification which is not consistent with the goal set by the legislature. This approach stems directly from the basic principle of *legality of administration*, according to which the agent is constrained to adhere to the term of delegation made by the principal. Thus, it is not enough that the source of the administrative agency's authority must be in the statute, but also that exercising the authority falls within the limits defined by the legislature³¹². Indeed, the pure principle of legality does not exist in the modern state, because of the broad discretion delegated by the legislature to the executive ³¹³, including even legislative ³¹⁴ and judicial powers ³¹⁵. Nevertheless, at least the obligation to act within the authorization set by the

³⁰⁹ For England, see: *James v. Eastleigh Borough Council* [1990] 2 All. E. R. 607, 112: "...the purity of the discriminator's subjective motive, intention or reason for discriminating cannot save the criterion applied from the objective taint of discrimination...." For Israel, see: *Nevo v. National Labor Court and Others*, in Landau (*supra* note 124) 164, 166.

³¹⁰ Gubelt, in: von Münch/Kunig, Bd.1, 5. Aufl. 2000, Art. 3 Rn. 104 (in German).

³¹¹ Compare: Comment, "The Right to Nondiscriminatory Enforcement of State Penal Laws" (*supra* note 274), at 1117-1118.

³¹² Zamir (*supra* note 56, 1995), at 52-53.

³¹³ For the delegation issue, see: Ernest Gellhorn & Ronald M. Levin, *Administrative Law and Process* (West Publishing, 1997), at 8-11. See also: Craig (*supra* note 17), at 12-13; Stewart (*supra* note 18), at 1676-1677.

³¹⁴ For the principle of non-delegation as an element of the traditional model, see: Stewart (*supra* note 18), at 1672-1676. For the inability to revive the doctrine against delegation, see: Stewart (*supra* note 18), at 1693-1697; Gellhorn & Levin (*supra* note 313), at 18-28. See also *supra* note 16.

³¹⁵ For delegation of judicial power, see: Gellhorn & Levin (*supra* note 313), at 28-32.

legislature remains as a requirement to act according to the goals which it defined, and not according to new classifications appearing desirable in the eyes of the agency³¹⁶.

Second, creation of classifications requires a rational policy set forward whose goal is to advance the particular philosophy which is fundamental to the act of enforcement. But enforcing officials often operate reactively, on the basis of information brought by citizens' complaints or by the police, and they need to give an immediate answer to the questions raised and to take ad hoc decisions. The basis of making these decisions is not necessarily uniform and does not always rest on a policy set out beforehand³¹⁷. If so, the decision to indict on the basis of any sort of classification is not necessarily made upon a rational policy or on a basis of expertise, but might be the result, for example, of a prosecutor's giving confirmation to a prior act of a police officer³¹⁸. Therefore, even if we agree that enforcement agencies must have broad discretion, having expertise in areas such as evaluating evidence or chances of conviction, this discretion should not be extended to the ability to draw classifications not compatible with those of the enabling legislator³¹⁹.

Third, we recall that one of the central reasons for intervening in the discretion of an agency is an act based on improper purpose or irrelevant considerations. The discretion to enforce the law is among the most sensitive that exist. The argument that enforcement agencies are authorized to draw classifications only provided that there is no basis in gender, race, religion or similar criteria amounts to legitimating acts taken for political, personal or other purposes foreign to the statute. The requirement to prove a discriminatory motive based on unjustifiable classification means a very significant reduction in the reasoning behind the doctrine of *proper purpose* and *relevant considerations*, which prohibit acting upon foreign purpose and considerations even if they are constitutional. Certainly, enforcement authorities weigh a variety of considerations and sometimes the goals of their actions are mixed. In this context the general law concerning "mixed motives," valid and invalid, of the agency is applicable. As detailed

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³¹⁶ Indications of this approach can be found in some decisions at the state level, from which one can understand that enforcement according to a classification which was not set by the legislature constitutes prohibited selectivity. However, it is important to note that the requirement of motive is imposed today at both the federal and state levels. See: *Bargain City U.S.A., Inc. v. Dilworth*, 407 Pa. 129, 134 (1962): "...the constitutionality of the statute cannot be governed by its enforcement unless the discrimination in enforcement flows directly from the discrimination intended by the statute, a conclusion we cannot here draw." See also *People v. Kail*, 501 N.E.2d 979, 981 (Ill. App. 1986): "The State 'may not rely on classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."

³¹⁷ Givelber (*supra* note 149), at 103.

³¹⁸ For the different factors influencing prosecutors in their decision, see Miller's research (*supra* note 268), mainly chapter VI. For a survey of the research, see also Sigler (*supra* note 111), at 63-64.

³¹⁹ Compare: Singh (*supra* note 70), at 172 (noting that in the German law, unlike common law systems, equality in treatment in the exercise of discretionary powers is as important as, if not more important than, the individualization of justice through discretion).

above³²⁰, in England and in Israel courts use the tests of the "material effect" and "dominant purpose," which ask whether the lawful purpose is "the true and *dominant* one," and whether the unauthorized purpose "has *materially* influenced the authority's conduct."

Fourth, beyond the requirement to act equally, the enforcement authority has the additional obligations of administrative law, which limit the way in which it can exercise its discretion. Thus, for example, it must act *reasonably* and *proportionately*. The principle of proportionality is crucial regarding enforcement discretion, for it is not enough that the norm is proportional³²¹; its implementation must also pass this test. There are circumstances in which the injury to the person against whom the law is enforced exceeds the public benefit of an investigation or an indictment. Hence, the enforcement action is disproportional.

Fifth, authorities are not supposed to act arbitrarily³²², but while this prohibition applies in the United States to "agencies" defined in the APA³²³, it is not applied in regard to enforcement authorities, which are, on the face of it, entitled to make arbitrary selections as long as the selections are not based on unconstitutional classifications³²⁴. In other words, the enforcement authorities are obliged by "constitutional equality", namely the prohibition to discriminate against certain classes, but are not obliged by "administrative equality", namely the duty to treat similar cases in a similar way³²⁵. This situation is unjustifiable. Indeed, there is an argument in favor of manipulating the uncertainty regarding the probability of detection as a mean of enhancing deterrence³²⁶. But this argument, which is controversial in itself, by no means

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³²⁰ See *supra* note 200 and the related text.

³²¹ For the requirement of proportionality in substantive criminal law, see: Kremnitzer (*supra* note 265), at 726.

For arbitrariness, see: Choo (*supra* note 129), at 123-126.

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

³²⁴ See *Oyler* (*supra* note 281), at 73: "...the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." For an indication of a different approach, see: *Falls v. Town of Dyer, Indiana*, 875 F2d 146, 149 (7th Cir. 1989): "Dyer does not say that Falls' shop is distinctive or that his portable signs are more of a problem than anyone else's.... It rests on the proposition that so long as Falls actually broke the law, no pattern of selectivity other than on account of race or a proscribed characteristic can be unconstitutional. Not so. If Falls can prove that the law of Dyer is that 'Phillip H. Falls may not use portable signs, and everyone else may,' then he has stated a claim of irrational state action, of a bill of attainder by another name."

³²⁵ This can be demonstrated by a citation from a decision given by the Court of Appeals for the District of Columbia circuit, in a case in which an appellant claimed that the district attorney refused to consent to a guilty plea, while consenting to a plea tendered by his co-defendant. See: *Newman (supra* note 137), at 481: "Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to the charge."

³²⁶ See, for example, Tom Baker, Alon Harel & Tamar Kugler, "The Virtues of Uncertainty in Law: An Experimental Approach", 89 *Iowa L. Rev.* 443 (2003-2004) (using insights from behavioral economics, the authors conclude that predictability in punishment may be inefficient). See also: Alon Harel & Usi Segal, "Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime" 1 *Am. L. & Econ. Rev* 276. (1999) (invoking psychological insights to illustrate that the choice to increase certainty with respect to the size of the sentence and to decrease certainty with respect to the probability of detection and

justifies arbitrariness³²⁷. As Prof. Davis noted, decisions can be based on broad discretion and still be reasonable and just; there is no reason to exercise power capriciously, inconsistently or despotically³²⁸.

The discussion of what constitutes arbitrariness exceeds the scope of this article³²⁹, but I do want to note that the preferable definition in my eyes is that of Prof. Gilligan, which opposes arbitrariness and rationality, seeing them as antithetical. An act is rational if the person performing it believes that it serves a particular goal; the act is arbitrary if she does not have this belief. In the exercise of public power, there is an additional limitation, because belief that the action serves the purpose under discussion is not enough, but there must be objective or empirical reasons that the means will lead to the required ends³³⁰. This definition strengthens my position in the matter of the obligation of enforcement authorities to draw only classifications which are faithful to the purposes of the law. Classification which is not related rationally to the purpose of the law is, at least, an arbitrary classification. In any event the issue of arbitrary enforcement depends on the circumstances and context, namely on the data and rationales which should stand at the basis of the particular enforcement decision. These data and rationales are supposed to serve a proper and relevant purpose, which is in itself context-dependant, since it derives from a specific statute.

In light of all this, I suggest that a holistic view, based on the normative duality of constitutional and administrative rules, requires drawing the inference that when exercising discretion to enforce the law, not only are the authorities not allowed to make discriminatory classifications, but they are also prohibited from acting arbitrarily, unreasonably, upon irrelevant considerations, and with non-proportionality. The result is that the enforcement authorities are entitled to weigh only considerations compatible with the purpose of the authorizing law. There is no doubt that enforcement authorities are authorized and even required

conviction can be justified on the grounds that such a scheme is disfavored by criminals and consequently has better deterrent effects).

³²⁷ See: Baker, Harel & Kugler (*supra* note 326), at 448-449; the authors emphasize that they are not even saying that increasing uncertainty is necessarily desirable, but aim to expand the traditional paradigm beyond the focus on the size of the sanction and the probability of detection as means by which law can deter wrongful behavior. For a more extreme opinion, according to which there is no place to equality claims within criminal law, see: Frank H. Easterbrook, "Criminal Procedure as a Market System", 12 J. Legal Stud. 289, 302 (1983).

³²⁸ Davis (*supra* note 19), at 29.

There are many ancillary questions regarding arbitrariness in enforcement. For example, there is the question whether and when "sample enforcement" and "random enforcement" constitute arbitrariness. For sample enforcement, see: Falls (supra note 324), at 148. For random enforcement, see: Note, "Constitutional Law - Equal Protection of the Laws - Defendant Permitted to Prove Discriminatory Enforcement of Statute that is Generally Enforced", 78 Harv. L. Rev. 884, 885-886 (1965); Clymer (supra note 139), at 712-714.

³³⁰ Galligan (supra note 20), at 143. For the duty to rely on scientific methodology, see: Ecology Center, Inc., Austin, Forest Supervisor of LNF (9th Cir. December 8, 2005) 2005 U.S. App. LEXIS 26852: "An agency's choice of methodology is entitled to deference... However, there are circumstances under which an agency's choice of methodology, are arbitrary and capricious. For example, we have held that in order to comply with NFMA, the forest service must demonstrate the reliability of its scientific methodology".

always to weigh general considerations such as respect for individual rights, but there is nothing in these general considerations to permit the creation of classes which do not match the statutory purpose. It is possible that a classification would be proper if it were made by the legislature, but the enforcement agency is not authorized to draw it because the agency is not authorized to act according to goals which are not set by the legislature.

The practical result of the approach which forbids also arbitrariness is that an individual who does not belong to a suspect class can claim that enforcement of the law against her constitutes prohibited discrimination. This is also the reason why it seems preferable to call the ground of review "selective enforcement" and not "discriminatory enforcement", as it is sometimes called.

VI. Racial Profiling and the Fourth Amendment

As one of the most complex and emotional issues facing law enforcement today³³¹, "racial profiling" was given many definitions and has become an amorphous concept³³². One of the problems is that some of the definitions embody moral assessment ³³³ or use legal and constitutional terms³³⁴ within the frame of the definition. Another problem lies in the very use of the term "profiling," which has moved in public perception from a description of professional law-enforcement practice³³⁵ to a characterization of one of the worst forms of police abuse³³⁶. These problems stem from the original development of the term as a synonym of the police practice of stopping a disproportionate number of male African-American drivers on the assumption that they have a heightened likelihood of being involved in criminal activity³³⁷. I therefore prefer a definition which is relatively neutral, though preserving the negative meaning of the use of race. This is the definition of a report which was submitted to the United States' Department of Justice: racial profiling is "any police-initiated action that relies on the race,

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³³¹ For the concern of law enforcement agencies, see: Richard G. Schott, "The Role of Race in Law Enforcement", *Law Enforcement Bulletin* (FBI Publications; November 2001) 24, 31; Grady Carrick, "professional Police Traffic Stops", *Law Enforcement Bulletin* (FBI Publications; November 2001) 8-10.

³³² Milton Heumann & Lance Cassak, *Good Cop*, *Bad Cop – Racial Profiling and Competing Views of Justice* (Peter Lang Publishing, 2003) 3.

³³³ See, for example, Zoubek & Susswein (*supra* note 220), at 224: "Racial-profiling is a form of prejudice in the literal sense that it entails pre-judging the likelihood that a person is a criminal on the basis of skin color."

³³⁴ See, for example, Darin D. Fredrickson & Raymond P. Siljander, *Racial Profiling* (Charles C. Thomas Publisher, 2002), at p. ix: "...racial profiling occurs when law enforcement officials rely on race, skin, color and/or ethnicity as an indication of criminality, reasonable suspicion or probable cause, except when part of the description of a particular suspect."

particular suspect."

335 For the rationales of the legitimate criminal profiling, see: David A. Harris, *Profiles in Injustice* (The New Press, 2002) 16.

³³⁶ Fredrick Schauer, *Profiles*, *Probabilities*, *and Stereotypes* (The Belknap Press of Harvard University Press, 2003) 159.

³³⁷ See the definition of *Black's Law Dictionary* 1286 (8th ed. 2004). For the origin of racial profiling, see also: Heumann & Cassak (*supra* note 332), at 2; Fredrickson & Siljander (*supra* note 334), at 21-22.

ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity"³³⁸. With that, I will try later, when dealing with the contemporary problems, to discover whether racial profiling must be synonymous with abuse of power. For now, we shall turn to examine constitutional review in regard to racial profiling in the original sense of disproportional stops of African-American Drivers.

A. The Legal Situation Regarding Pretext Stop, Search and Seizure

Pretext stop, search and seizure are carried out by enforcement officers at least partially for reasons other than the justification submitted afterwards by the authorities ³³⁹. Thus, for example, a pretext investigatory stop occurs when a police officer uses a valid basis, such as a traffic violation, to stop a vehicle in order to search for evidence of an unrelated crime, for which she does not have the objective cause necessary to justify the stop³⁴⁰. This phenomenon is, as said, closely related to the phenomenon of racial profiling. The combination of the two created the problem facetiously called "driving while black" ³⁴¹, when African-American male drivers are stopped because of the presumption that they are engaged in drugs and weapons activities ³⁴².

As mentioned above ³⁴³, the Fourth Amendment protects people against unreasonable search or seizure by the federal government, and it is applicable to the states through the Fourteenth Amendment. While for search and seizure the relevant constitutional test is "probable cause," the test for a constitutional "stop and frisk" – established by the 1968 landmark case *Terry v. Ohio*³⁴⁴ – is "reasonable suspicion" In 1996 the Supreme Court held in the *Whren* case that the legality of stopping a vehicle is not related to the police officer's subjective motive, that is, so long as an objective cause exists, the action is legal. In this matter it was claimed that the initial stop for traffic violation had been a pretext to arrest the defendants on drug charges, and that the decision had been based on race. The Court agreed that the Constitution forbade selective enforcement on racial grounds, but held that in considering whether a stop was warranted, the only question was whether there was objectively enough

³³⁸ Deborah Ramirez, Jack McDevitt & Amy Farrell, *A Resource Guide on Racial Profiling Data Collection Systems* – *Promising Practices and Lessons Learned* (A Report Submitted to the U.S. Department of Justice, November 2001) 3 [hereinafter: The Report].

³³⁹ Craig M. Glantz, "Supreme Court Review: 'Could' This be the End of Fourth Amendment Protections for Motorists?" 87 *J. Crim. L. & Criminology* 864, 865 (1997).

³⁴⁰ Andrew J. Pulliam, Note, 47 Vand. L. Rev. 477, 479 (1994).

³⁴¹ For the term, see: Floyd D. Weatherspoon, "Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection", 38 *J. Marshall L. Rev.* 439, 440 (2004).

Heumann & Cassak (supra note 332), at 16; Fredrickson & Siljander (supra note 334), at 21-22.

³⁴³ Supra note 218 and the related text.

³⁴⁴ *Supra* note 219.

³⁴⁵ For the legal situation before and after the *Terry* decision, see: Heumann & Cassak (*supra* note 332), at 17-22.

³⁴⁶ *Supra* note 221.

evidence that the officer had witnessed a traffic violation in order to justify the stop, and the "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."³⁴⁷

There are those who argue that in this the Court deviated from the rule of *Terry*, according to which the questions which the court must ask are (1) whether the officer possessed a reasonable suspicion based on objective assessment of the facts available to her at the time of carrying out the stop (that is to say, an objective standard for testing the legality of the stop); and (2) whether the scope of the search was reasonably related to the facts and circumstances which initially justified the stop³⁴⁸. In *Whren*, on the contrary, the Court was satisfied with the "could test," holding that a police officer's traffic stop is justified by probable cause for believing that a traffic violation has occurred³⁴⁹.

However, even if we agree that *Whren* is faithful to the objective test of *Terry*, the widespread criticism leveled against it is justified. It was claimed that by removing the subjective motivation of the officer from the Fourth Amendment calculation, the Court validated one of the popular uses of racial profiling – the pretext stop – and thus significantly reduced the ability of defendants to contest it and to prove that the extrinsic consideration of race played a part in the decision to stop and arrest them³⁵⁰. The use of racial profiling as a pretext for a search not only harms the individual, but undermines the integrity of the state by making it a tool for discrimination against a group³⁵¹, fuels existing skepticism about the fairness of law enforcement and further undermines the rule of law³⁵². In an attempt to confront these problems, it was recommended that an alternative test be adopted – the "would test"³⁵³ – which takes the subjective intentions of the police officer into account as one the factors in a "totality of the circumstances" analysis³⁵⁴. It was also suggested that courts, at least, should give the defendant an opportunity to show that the facts surrounding the pretext stop raise an inference of a racebased seizure. This would then require the prosecution to provide a race-neutral explanation other than the fact that a traffic offense was observed³⁵⁵.

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³⁴⁷ Whren (supra note 221), at 813.

³⁴⁸ Pulliam (*supra* note 340), at 494-496.

³⁴⁹ Glantz (*supra* note 339), at 864.

³⁵⁰ Abraham Abramovsky & Jonathan I. Edelstein, "Pretext Stops and Racial Profiling after *Whren v. United States*: The New York and New Jersey Responses Compared", 63 *Alb. L. Rev.* 725, 732-733 (2000).

³⁵¹ Phyllis W. Beck & Patricia A. Daly, "State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns", 72 *Temple L. Rev.* 597, 618 (1999).

³⁵² Sean Hecker, "Race and Pretexual Traffic Stops: An Expanded Role for Civilian Review Board", 28 *Columbia Human Rights L. Rev.* 551, 604 (1997). The author suggests addressing the problem by the use of police civilian review boards (*id.* at 592-604)

³⁵³ This test adds a requirement, namely that a reasonable police officer would have made the stop in identical circumstances.

³⁵⁴ Glantz (*supra* note 339), at 894.

³⁵⁵ Tracey Maclin, "Race and the Fourth Amendment", 51 Vand. L. Rev. 333, 392-393 (1998).

In practice, it is important to note that while most of the courts that have confronted the issue have authorized police to use race in making decisions to question, stop, or detain persons so long as doing so is reasonably related to efficient law enforcement³⁵⁶, more and more anecdotal evidence regarding "driving while black" has accumulated³⁵⁷. The debate over the issue led to a governmental condemnation of the practice³⁵⁸ and to the prohibition of the racial profiling practice in some of the states³⁵⁹. This point is very important, since as part of the misleading analogy – which will be discussed later – between pretext stops and racial profiling after September 11th, one of the arguments is that due to the terror attack the calls for the elimination of such enforcement methods have been silenced³⁶⁰.

B. The Normative Duality Analysis

One of the harsh problems of the legal situation according to the *Whren* decision is that the police are granted unlimited discretion, in a way that facilitates arbitrary intrusions and thus runs counter to the Fourth Amendment's objective to prevent *arbitrary* search and seizure³⁶¹. This Fourth Amendment's purpose was expressly recognized by the Supreme Court in *Brown v*. *Texas* ³⁶², which stated that a central concern in balancing the competing considerations embodied in the Fourth Amendment is to ensure that an individual's reasonable expectations of privacy are not subject to arbitrary invasions solely at the unfettered discretion of officers in the field³⁶³. This problem of potential arbitrariness was raised by Justice O'Connor in her dissenting opinion in the *Atwater* case³⁶⁴, in which the Supreme Court held that the Fourth Amendment does

³⁵⁶ Kennedy (*supra* note 166), at 141.

³⁵⁷ See: Harris (*supra* note 335), at 1-15; Heumann & Cassak (*supra* note 332), at 3; The Report (*supra* note 338), at 5-6. For a sort of "play" with those anecdotes, trying to show that the practice of pretext stops is a kind of "on-the-job" informal training of policemen, see: "Racial Profiling: Prejudice or Protocol?", http://www.horizonmag.com/6/racial-profiling.asp.

³⁵⁸In June 1999 President Bill Clinton stated in a conference that "racial profiling is in fact the opposite of good police work, where actions are based on hard facts, not stereotypes. It is wrong, it is destructive, and it must stop". See: *Attorney General's Conference on Strengthening Police-Community Relationships, Report on the Proceedings* (Washington, DC: US Department of Justice, June 9-10, 1999) 22-23 (cited in The Report, *supra* note 338, at 1). By 2000, racial profiling was an issue in the presidential election. See: Heumann & Cassak (*supra* note 332), at 3-4.

³⁵⁹ Heumann & Cassak (*supra* note 332), at 4. In addition, police departments around the country began to collect data on all traffic stops. New Jersey was the first to initiate examination of the practice. In the interim report issued after the examination, the Attorney General of New Jersey adopted a bright-line rule that state police members are not permitted to consider a person's race, ethnicity, or national origin to any extent in making law enforcement decisions. Under this approach, racial profiling occurs if a motorist's race or ethnicity was taken into account and in any way contributed to the officer's decision to act or refrain from acting. See: Zoubek & Susswein (*supra* note 220), at 229.

³⁶⁰ See, for example, Sameer M. Ashar, "Symposium: Immigration Enforcement and Subordination: The Consequences of Racial Profiling after September 11", 34 *Conn. L. Rev.* 1185, 1193-1195 (2002).

³⁶¹ Glantz (*supra* note 339), at 864; Pulliam (*supra* note 340), at 517; Hecker (*supra* note 352), at 579. For arbitrary search and seizure, see: Anthony G. Amsterdam, "Perspectives of the Fourth Amendment", 58 *Minn. L. Rev.* 349, 411 (1974).

³⁶² 443 U.S. 47 (1979).

³⁶³ *Id.* at 51.

³⁶⁴ Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

not forbid arrest for a minor criminal offence. Relying on *Whren*, the Court observed that although the Fourth Amendment generally requires a balancing of individual and governmental interests, the result is rarely in doubt where an arrest is based on probable cause³⁶⁵. Justice O'Connor was concerned with the majority decision. In her words:

My concern lies not with the decision to enact or enforce these [fine-only misdemeanors] laws, but rather with the manner in which they may be enforced. Under today's holding, when a police officer has probable cause to believe that a fine-only misdemeanor offense has occurred, that officer may stop the suspect, issue a citation, and let the person continue on her way... Or, if a traffic violation, the officer may stop the car, arrest the driver... search the entire passenger compartment of the car including any purse or package inside, and impound the car and inventory all of its contents.... Although the Fourth Amendment expressly requires that the latter course be a reasonable and proportional response to the circumstances of the offense, the majority gives officers unfettered discretion to choose that course without articulating a single reason why such action is appropriate. Such unbounded discretion carries with it grave potential for abuse ³⁶⁶.

The *Whren* and *Atwater* decisions exemplify the complexity of the issue of arbitrariness: as discussed above ³⁶⁷, there is no doubt that complete enforcement is not feasible and even undesirable. In the nature of things, the police stop only some of the cars which commit a particular violation. But how are the police to choose against whom to enforce the law? And what, in this context, is behavior which reaches the level of arbitrary and improper?

This is the place for application of the *normative duality* approach, to use insights of administrative law and to apply administrative grounds for judicial review. First and foremost, we must consider the principle of *administrative legality* according to which the power exercised must fall within the limits prescribed for that power in the legislation³⁶⁸. Generally speaking, the police are given the task of maintaining law and order and investigating crimes. Indeed, in order to perform this task, the police must have the necessary powers³⁶⁹. In such cases the use of criminal profiling is a necessary and even inherent power³⁷⁰. But the use of class probability, by which an individual is assumed to possess features of the group she belongs to, is a different

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³⁶⁵ *Id.* at 325.

³⁶⁶ *Id.* at 371-372 (emph. supp.; footnotes omitted)

³⁶⁷ Supra notes 268-269 and the related text.

³⁶⁸ Zamir (supra note 56, 1995), at 53.

³⁶⁹ Thompson (*supra* note 43), at 272.

³⁷⁰ Criminal profiling is possible because criminals tend to establish *modus operandi*, namely distinctive features of criminal behavior. See: Fredrickson & Siljander (*supra* note 334), at 17-19. Even the biggest opponents of racial profiling agree that other form of "profiling" must remain a legitimate and important part of modern police work. See, for example, Zoubek & Susswein (*supra* note 220), at 237: "In short, legitimate 'profiles' focus on the conduct and methods of operation of criminals, rather than on personal characteristics that individuals cannot change, such as their racial or ethnic heritage."

story³⁷¹. While this practice can be used by insurance companies as private entities³⁷², its use by public authorities must, in my opinion, be limited in two ways. *First*, it must be compatible with the authorization of the law. As argued above, the legality principle requires that enforcement authorities draw only classifications compatible with the main purpose of the norm being enforced. In light of this, enforcement of traffic violations should be generally for the aim of advancing the safety in the roads and arranging traffic. Class probability regarding drug or weapons offences is definitely not within the authorization. *Second*, the statistics upon which the generalization about the group is drawn must be well established, as any findings of public authority must be based on satisfactory evidence³⁷³. Regarding pretext stops, not only do research and empirical evidence discredit the argument that more minority drivers are found with contraband³⁷⁴, but even the statistics the police claim to rely on were found to be a self-fulfilling prophecy whereby law enforcement agencies rely on arrest data that they themselves generated as a result of the discriminatory allocation of resources³⁷⁵.

Moreover, administrative grounds of judicial review can help ameliorate the absurdity created by the strict constitutional rule according to which the motive of the police officer is irrelevant so long as she had an objective reason for the stop, even if this reason would not have caused her to stop someone else. The practice of pretext stops is *unreasonable* on its face. The unreasonableness finds its expression in disproportionate stops of African-Americans at a rate far in excess of what would have been expected on the basis of their percentage in the population, and in excess of what would have been expected on the basis of the percentage of African-Americans committing drug or weapons crimes ³⁷⁶. This can even be construed as extremely unreasonable, if we consider that these stops are carried out on the pretext of minor traffic violations for which others are not stopped at all. But the unreasonableness in this case is also a symptom of other defects in the exercise of administrative discretion. *First*, pretext stops involve the use of a police officer's discretion for an *improper purpose*, since a search for drugs and weapons is justified by statutes intended to manage traffic on the roads. *Second*, pretext stops involve racial considerations which are completely *irrelevant* to the enabling law and taking them into account certainly cannot bring a reasonable result. Indeed, the practice of random

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³⁷⁶ Compare: Schauer (*supra* note 336), at 159.

³⁷¹ Class probability refers to situations in which we know enough about a *class* of events to describe it using statistics, but nothing about a particular event other than the fact that it belongs to the class in question.

³⁷² For the use by insurance companies, see: Gene Callahan & William Anderson, "The Roots of Racial Profiling", *Reasononline* (Aug-Sep 2001), http://reason.com/0108/fe.gc.th.shtml.

³⁷³ The evidence must be reasonable to support the findings. See: Wade & Forsyth (*supra* note 11), at 312.

³⁷⁴ The Report (*supra* note 338), at 7.

³⁷⁵ See: Zoubek & Susswein (*supra* note 220), at 243, referring to the findings of the Interim Report, issued by the New Jersey's Attorney General on April 20, 1999 regarding allegations of racial profiling.

enforcement³⁷⁷ in the context of traffic violations can be in some circumstances legitimate; but the "randomness" can by no means be based on racial classification or on other irrelevant considerations, in which case it turns into "arbitrariness", "discrimination" or such other defects in the exercise of discretion. And *third*, validating the practice of pretext stops causes *disproportional* harm to the presumption of innocence. In the absence of crucial evidence that African-Americans are more inclined to carry drugs, the infringement upon the presumption of their innocence definitely exceeds the social benefit of the stops³⁷⁸.

VII. The Abnormality of the Dichotomy

The purpose of this part is to show how the "play" between subjective and objective strict constitutional rules and their related burden of proof rules express a legal situation antithetical to the concept of public law as a whole, which, at the end of the day, aims to address, by means of judicial review, problems of abuse of discretional power.

The "dichotomy" refers first, to the exclusiveness of constitutional review versus the disuse of principles of administrative review within the framework of judicial review of selective enforcement and racial profile claims; and, second, to the clear-cut distinction between the subjective equal protection test and the objective probable cause test, which results, in Zoubek & Susswein's words, in "a delicate and easily misunderstood interplay between the Fourth Amendment, which prohibits unreasonable searches and seizures, and the Fourteenth Amendment, which guarantees (among other things) that all citizens are entitled to equal protection of the laws."

The final result of "abnormality" – stemming from the cumulative reasons of the exclusiveness of the constitutional review and courts' traditional reluctance to interfere with enforcement authorities – refers also to a double paradox. *First*, although racial discrimination in enforcement decisions is no less serious than racial discrimination in other fields, threats of direct discrimination in employment and other fields are well treated by judicial review, while the crucial problem of disparate racial effects of police or prosecutorial conduct is neglected ³⁸⁰. *Second*, abnormality finds its expression in the inability to prove both selective enforcement and

For random enforcement, see *supra* note 329.

³⁷⁸ See Callahan & Anderson (supra note 372): "It should be obvious that there's something nutty about a legal system that assumes suspects in murder, robbery and rape cases are innocent until a trial proves otherwise, but assumes that a landscaper carrying some cash is guilty of trafficking."

³⁷⁹ Zoubek & Susswein (*supra* note 220), at 245-246.

³⁸⁰ Richard H. McAdams, "Symposium on Race and Criminal Law: Race and Selective Prosecution - Discovering the Pitfalls of Armstrong", 73 *Chicago-Kent L. Rev.* 605, 644-645 (1998); Andrew D. Leipold, Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law", 73 *Chicago-Kent L. Rev.* 559 (1998).

racial profile claims. Indeed, the courts have emphasized that "[t]he fact that there was no Fourth Amendment violation does not mean that one was not discriminatorily selected for enforcement of a law." However, as we shall see, it is almost impossible to meet the requisite threshold showing to get discovery to support the selective enforcement claim.

Enforcement authorities, like other public authorities, enjoy the presumption of legality, which assumes that the agency is acting legally and in good faith, and requires whoever claims differently to bear the burden of proof³⁸³. This presumption includes the assumption that the enforcement authority acts from relevant and proper motives 384. In line with the motive requirement discussed above in Part V, in order to claim that enforcement is selective the claimant must present clear evidence of an intention to discriminate, thus removing the basis of the presumption that the motives are proper³⁸⁵. This is a difficult, even nearly impossible task³⁸⁶, particularly since in order to be entitled to discovery or an evidentiary hearing in a selective prosecution case, the defendant asserting infringement of her equal protection right must make a prima facie case for the existence of the essential components of the claim³⁸⁷. In spite of the great potential hidden in statistical evidence and its ability to aid the defendant in sustaining this burden of proof, the rule is that evidence pointing to failure to prosecute other violators merely establishes selectivity and cannot by itself establish a prima facie showing of intentional discrimination. Such statistical evidence is relevant to the issue of intentional discrimination only when offered with other evidence³⁸⁸. This is another paradox deriving from the dichotomy: under Fourth Amendment analysis, reviewing courts focus entirely on the conduct of the law enforcement officer who was directly involved in the specific seizure or search that is at issue; under Equal Protection analysis, in contrast, persons claiming to be victims of unconstitutional

³⁸¹ See, for example: *Gibson v. Superintendent of New Jersey Department of Law*, 411 F.3d 427, 440 (3rd Cir. 2005); *Carrasca v. Pomeroy*, 313 F.3d 828, 836 (3rd Cir. 2002); *Bradeley v. United States*, 299 F.3d 197, 205 (3rd Cir. 2002).

³⁸² Marc Michael, "United States v. Armstrong: Selective Prosecution – A Futile Defense and Its Arduous Standard of Discovery", 47 Catholic U. L. Rev. 675, 681 (1998).

³⁸³ Stephan H. Krieger, "Defense Access to Evidence of Discriminatory Prosecution", 1974 *U. Ill. L. F.* 648, 653; Givelber (*supra* note 149), at 91-92.

³⁸⁴ See, for example, *United States v. Hastings*, 126 F.3d 310, 313 (4th Cir. 1997): "...absent a substantial showing to the contrary, governmental actions such as the decision to prosecute are presumed to be motivated solely by proper considerations."

³⁸⁵ For rare cases in which defendants succeeded to meet this initial burden of proof, see: *Falk* (*supra* note 299), at 623; *United States v. Berrios*, 501 F2d 1207, 1212-1213 (2d Cir. 1974). Its important to note that these decisions were given before the *Amstrong* decision, discussed in *infra* notes 390-393 and in the related text.

³⁸⁶ Israel, Kamisar & LaFave (*supra* note 111), at 501; LaFave, Israel, & King (*supra* note 280), at 46-50; Goldstein (*supra* note 147), at 10.

³⁸⁷See, for example: *Wade* (*supra* note 117), at 186; *United States v. Blackley*, 986 F. Supp. 616, 618 (D.D.C. 1997). Sometimes a distinction is made between the burden of proof required to get an evidentiary hearing (colorable basis of discrimination) and the burden of proof required to get discovery (sufficient evidence to raise reasonable doubt that the government acted properly in seeking the indictment). See: *United States v. Cyprian*, 23 F.3d 1189, 1195 (7th Cir. 1994).

³⁸⁸ Krieger (supra note 383), at 654-656.

behavior are permitted or in some cases are even required to present evidence concerning patterns of the enforcement authority's conduct³⁸⁹. The catch is that the relevant statistical evidence usually would not suffice to support a selective enforcement claim.

In the 1996 case of *Armstrong*³⁹⁰ the Supreme Court determined the necessary standard to obtain discovery in the context of selective prosecutions claims:

The claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose".... To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.³⁹¹

In addition to these requirements, the Court completely cut off recourse to statistical evidence, and moreover demonstrated that this kind of evidence could operate to the detriment of the defendant. Not only did statistical evidence showing that federal prosecutors indicted only blacks for the relevant offenses not satisfy the Supreme Court for the purposes of ordering discovery, but the Court even criticized the Court of Appeals which assumed, as a basis for granting a discovery order, "that people of *all* races commit *all* kinds of crimes," in contrast to the data of the federal authorities which showed that the critical majority of those sentenced for crack cocaine trafficking were black ³⁹². Applying these proof demands to the situation under discussion led the Court to the conclusion that the defendants were not entitled to discovery because they had identified those of the same race who were prosecuted, but failed to identify similarly situated individuals who were not black, who could have been prosecuted under the same charges, but were not ³⁹³.

The *Armstrong* rule, which was extended later to situations in which the claimed selectivity was not on a racial basis³⁹⁴, elicited wide-spread criticism from different directions. *First*, it is very difficult to prove the unprosecuted control group of similarly situated individuals of a different race. The decision itself exemplifies a situation in which the requirement to produce specific evidence of an unprosecuted control group before granting discovery subjects the defendant to what was called "Catch 22," for the defendant needs discovery to obtain the information necessary to entitle him to discovery³⁹⁵. *Second*, even if the defendant succeeds in proving the existence of a control group, it is difficult to assume that he will succeed in proving

³⁸⁹ Zoubek & Susswein (*supra* note 220), at 257-258; Schott (*supra* note 331), at 31.

 $[\]frac{1}{Supra}$ note 140.

³⁹¹ *Id.* at 465.

³⁹² *Id*. at 469

³⁹³ *Id*. at 470.

³⁹⁴ *Hasting (supra* note 384) (a member of the Republican party, who was indicted of failing to pay federal income tax, claimed that he was selectively prosecuted because he was Republican).

that the prosecution was *aware* of its existence³⁹⁶. *Third*, even if the defendant succeeds in proving awareness of the existence of the control group, there is still the additional barrier of proving the *intention to discriminate*, since even if evidence revealing the motive is found to exist, no doubt the prosecution has sole possession of it. In this case the mere doubt cast on the rationality of the decision to indict, for example by pointing to a disparate impact of the prosecution policy on a suspect class, was not sufficient to shift the burden of proof³⁹⁷.

The result is that the "victims" of selective enforcement in the form of racial profiling are robbed of both alternatives, because they fall between the two stools of the objective and the subjective claims. If there was a minor objective reason to stop and detain them – the Fourth Amendment claim is denied. If they cannot provide a control group of Caucasians, for example, in the same situation who are treated differently, or cannot prove that they were intentionally discriminated against on the basis of race – the equal protection claim is denied ³⁹⁸. Thus, even if there was abuse of power by taking into account an irrelevant consideration of race, the defendant is not protected by judicial review. Paradoxically, the concept of the "suspect" class, which originally indicated the need for social introspection in regard to racial classifications that disadvantage those previously assumed to be inferior ³⁹⁹, places on the members of that very group a *heavier* burden of proof, one that can hardly ever be met, and hence makes selective enforcement "a hornbook law," ⁴⁰⁰ hardly ever producing a practical remedy ⁴⁰¹.

The idea of a *normative duality*, namely an additional level of administrative insights accompanied by the perception of the criminal enforcement authorities as administrative authorities subject to judicial review, can help to link the doctrines of selective enforcement and racial profiling and so create a more coherent legal framework.

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³⁹⁶ Compare: Givelber (*supra* note 149), at 108.

³⁹⁷ Compare: Clymer (*supra* note 139), at 733.

³⁹⁸ For an example of the connection between racial profiling and selective enforcement, and the denial of both of the claims, see: *Flowers v. Fiore*, 239 F. Supp. 2d 173 (1st Cir. R.I., 2004). The court held that the defendant officer had ample reason to detain Flowers and therefore denied the Fourth Amendment claim (*id.* at 177). Indeed, the court also stated that "selective enforcement of motor vehicle laws on the basis of race, also known as 'racial profiling', is a violation of equal protection (*id.* at 178). However, the selective enforcement claim was denied, too, because Flowers did not present evidence that he was treated differently from similarly situated white motorists, nor did he present evidence that would support a claim that he had been detained because of his race (*id.*) ³⁹⁹ For the concept of the suspect class, see: Frances Raday, "Socio-Dynamic Equality: The Contribution of the

³⁹⁹ For the concept of the suspect class, see: Frances Raday, "Socio-Dynamic Equality: The Contribution of the Adversarial Process", *The Constitutional Bases of Political and Social Change in the United States* (Shlomo Slonim ed., 1990) 141, 151: "It is an acknowledgment of the need to discard habits of thought and stereotypes that have obstructed the recognition of the basic premise that members of stigmatized subgroups are 'like' other members of society."

⁴⁰⁰ Compare: N Douglas Wells, "Prosecution as an Administrative System: Some Fairness Concerns", 27 *Capital U. L. Rev.* 841, 843 (1999).

⁴⁰¹ For the inability to meet the proof demands, see also: Stefan H. Krieger, "Defense Access to Evidence of Discriminatory Prosecution", 1974 *U. Ill. L. F.* 648, 661; McAdams (*supra* note 380), at 606.

VIII. The Practical Implications after September 11th

The "War on Drugs" in the 1980s led to the construction and introduction of the so-called drug courier profile, which in turn triggered racial profiling in the matter of pretexts for stop and search procedures; 402 the war on terror following the horrific events of September 11th led similarly to terrorist profiling, manifested in different forms and covering different areas. 403 Not surprisingly, analogies were quick to appear: "The race and religion-based profiling that has taken place in the Arab and South Asian Muslim communities is an extension of law enforcement methodologies used against other identity groups in the United States prior to September 11"; 404 "The government has used the imperatives of the 'War on Terror' to justify unchecked law enforcement practices, in the same way that the 'War on Drugs' was used to justify the arrest and imprisonment of a disproportionate number of African-American and Latino men". 405 As Heumann & Cassak put it: "'Flying While Arab' threatened to replace 'Driving While Black'."406

The issue of racial profiling in the context of the war on terror is complicated, to begin with, because it involves the expression of state power as national security, namely the right of a state to take measures to protect itself against internal or external threats to its existence, independence or the security of its citizens. Discussions of national security often suffer from over-generalization. One of the reasons is insufficient differentiation between various activities, since national security itself is not an activity; it is rather an objective which other activities are intended to achieve. Another reason is the reckless and imprecise use of the term "rule of law", which the objectives of national security and defense may be perceived as meeting – or at times

⁴⁰² On the connection between the practice of racial profiling and the war on drugs, see: Fredrickson & Siljander (*supra* note 334), at 21-22; Heumann & Cassak (*supra* note 332), at 69-70; Callahan & Anderson (*supra* note 378). ⁴⁰³ For elaboration, see: Heumann & Cassak (*supra* note 332), at 162-164.

⁴⁰⁴ Zoubek & Susswein (*supra* note 220), at 224.

⁴⁰⁵ Ashar (*supra* note 360), at 1196.

Heumann & Cassak (*supra* note 332), at 4. See also: David Harris, "flying While Arab: Lessons From the Racial Profiling Controversy", *Civil Rights Journal* (Winter 2002) 8-13, http://www.usccr.gov/pubs/crj/wint2002/wint02.pdf.

⁴⁰⁷ The National Security Act, 50 U.S.C. § 401 (1947) does not define "national security". For various definitions, see: Menachem Hofnung, *Democracy, Law and National Security in Israel* (Dartmouth, 1996) 3; Elspeth Guild, "The Face of Securitas: Redefining the Relationship of Security and Foreigners in Europe", in *Law and Administration in Europe – Essays in Honour of Carol Harlow* (Paul Craig & Richard Rawlings eds., Oxford, 2003) 139, 144. For the role of the federal government in protecting the nation's critical infrastructure as a fundamental concern of congress after 9/11, see: Paul W. Parfomak, *Guarding America: Security Guards and U.S. Critical Infrastructure Protection* (CRS Report for Congress; November 12, 2004) 2, http://www.fas.org/sgp/crs/RL32670.pdf.

⁴⁰⁸ Brice Dickson, "Judicial Review and National Security", in *Judicial Review – A Thematic Approach* (Brigid Hadfield ed., Gill & Macmillan, 1995) 187, 188.

negating. 409 Indeed, the interests of national security may conflict with the rights and interests of individuals, but using "rule of law" as a slogan does not lead to a serious balance between them.

These general problems, inherent in any discussion of state security, are accompanied by problems specific to the issue of racial profiling. As mentioned, even the relative neutral definition I chose for racial profiling preserves the negative sense of the use of race. Thus, problems are bound to arise when enforcement authorities address crimes committed by a group of individuals who share racial or ethnic characteristics. On the one hand, this situation does not fall within the classical, legitimate practice of "case probability", is since the authorities do not use race or ethnicity to determine whether a person matches a specific description of a particular suspect. On the other hand, if the evidence regarding the racial or ethnic characteristic of the individuals is well established, it might create a legitimate case for "class probability". In other words, situations may conceivably arise in which racial profiling is part of the legitimate practice of criminal profiling.

Against this background, this part does not aim to exhaust the discussion on racial profiling after September 11th, but to point out that the approach of *normative duality*, and in line with it, the alternative propositions I have suggested to the selective enforcement and racial profiling doctrines, can shed light on the issue and explain why the analogies described above are misleading.

First, as explained above, pretext stops may constitute illegitimate selective enforcement and even infringement upon Fourth Amendment rights because the police create classifications which are not authorized by law. The aim of traffic laws is to maintain safety on the roads and the police are not allowed to exercise discretion in enforcing these laws for a purpose (finding drugs) which is not even implied in the relevant law. The unauthorized classification leads to an improper purpose underlying the police act, and hence makes it illegitimate. However, in contradistinction, in the case of counter-terrorism, the relevant enforcement agencies use their

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⁴⁰⁹ Hofnung (supra note 407), at 3; Guild (supra note 407), at 146.

⁴¹⁰ See *supra* note 338 and the related case.

⁴¹¹ The Report (*supra* note 338), at 3. For racial profiling in antiterrorism efforts as an example of indeterminacy of the notion of racial discrimination, see: R. Richard Banks, "Racial Profiling and Antiterrorism Efforts", 89 *Cornell L. Rev.* 1201, 1217 (2004).

⁴¹² "Case Probability" describes situations where we comprehend some factors relevant to a *particular* event, but not all such factors. See: Callahan & Anderson (*supra* note 372). For race as a legitimate consideration in such situations, see *United States v. Travis* 62 F3d 170, 173 (6th Cir. 1995): "Obviously race or ethnic background may become a legitimate consideration when investigators have information on this subject about a particular suspect".

⁴¹³ For the distinction between profiling of individual and profiling of group, see: Fredrickson & Siljander (*supra* note 334), at 27; Banks (*supra* note 411), at 1205-1206.

⁴¹⁴ For class probability, see *supra* notes 371-373 and the related text.

⁴¹⁵ Compare: Zoubek & Susswein (*supra* note 220), at 229-230: "...the issue, not yet definitively or at least uniformly resolved by the courts, is whether race, ethnicity, or national origin may be considered as one among an array of factors that police may use to infer that a particular individual is more likely than others to be engaged in criminal activity".

authority to achieve the goals of the enabling laws, namely to promote homeland security and to detect and prosecute crimes against the United States. ⁴¹⁶ Furthermore, one of the major legal developments after September 11th is new enactments trying to address the higher level of encountered terrorism threats. ⁴¹⁷ While the authority vested in enforcement agencies by these acts may be controversial, ⁴¹⁸ there is no doubt regarding their explicit existence.

Second, while race, ethnicity or nationality are totally *irrelevant considerations* regarding traffic enforcement (and even regarding drug couriers, since empirical evidence discredits the argument that more minority drivers are found with contraband), these factors are by definition relevant to counter-terrorism in the aftermath of the attacks, since the hijackers were Muslims born in Middle Eastern countries. That is by no means to say that race can be the only factor in a decision to stop someone, but rather to note that while in the issues discussed above this factor should be overruled, it may be one factor among many in a decision to stop someone in the context of the fight against terrorism. The discussion of what the "other factors" are that could legitimately be added to the profile is far beyond the scope of this article. However, it is important to point to one of the phenomena of the "over-constitutionalist discussion", which focuses on the issue of race as an unconstitutional classification, while ignoring the institutional aspects ⁴²³ and thus neglecting the point that ethnicity may indeed be one of the relevant factors. Thus, writings on racial profiling after September 11th are full of claims of the following type:

 $^{^{416}}$ See, for example, the investigative authority of the FBI in 28 U.S.C.A § 533; and the declaration of policy regarding the CIA in 50 U.S.C § 401.

⁴¹⁷ See, for example, the USA Patriot Act which is officially titled "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001."

⁴¹⁸ See, for example, Peter Siggins, "Racial Profiling in the Age of Terrorism", *Markkula Center for Applied Ethics*, http://www.scu.edu/ethics/publications/ethicalperspectives/profiling.html. (criticizing especially Section 412 of USA Patriot Act, which permits the attorney general of the United States to detain aliens he certifies as threats to national security for up to seven days without bringing charges).

⁴¹⁹ Heumann & Cassak (*supra* note 332), at 162-164.

⁴²⁰ One of the common arguments is that enforcement officials focused special investigative efforts upon foreign nationals from Middle Eastern countries, often in disregard of any other factors warranting suspicions. See: Siggins (*supra* note 418): "If ethnic profiling of middle eastern men is enough to warrant disparate treatment, we accept that all or most middle eastern men have a proclivity for terrorism".

⁴²¹ Compare to the Supreme Court's approach regarding the search for illegal aliens on the American-Mexican border. The Supreme Court ruled that "the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens". See: *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-887 (1975); See also: *United States v. Martinez-Fuerte*, 428 U.S. 543, 563-564 (1976).

⁴²² Heumann & Cassak (supra note 332), at 173.

The fact that racial profiling is an institutional practice more than racism implied in the data showing that blacks experience higher rates of stops and searches at the hands of white and black officers alike. See: Harris (*supra* note 335), at 101.

⁴²⁴ Some authors weakly mention the difference. For example, Zoubek & Susswein (*supra* note 220) deal with the problem of "driving while black" in New Jersey and the search for legal aliens in the US. Only in a footnote they make the differentiation, according to which: "unlike the situation that might conceivably have existed with respect to roving patrols searching for illegal aliens along the Mexican-United States border, the likelihood that a minority

There appeared to be no discernible reason for the arrest of my client, other than the fact that he was brown-skinned, Muslim, and present at the Brooklyn mosque on the morning of the INS sweep. 425

Without expressing any view about this specific case, it should be emphasized that the factors involved here, of someone being a Muslim, born in Pakistan and visiting a mosque (especially if there is, for example, intelligence information about a certain mosque as an extreme one) can be relevant and legitimately weighed by enforcement authorities engaging in counter-terrorism acts, though of course such factors cannot by themselves determine guilt⁴²⁶.

Third, while the practice of pretext stops is generally disproportional, some important distinctions indicate that the balance might be different in certain situations of counter-terrorism. As explained above, in the absence of crucial evidence that African-Americans are more inclined to carry drugs, the infringement upon the presumption of their innocence definitely exceeds the social benefit of the stops. In the war on terror, in contrast, there is crucial evidence about the religion and origin of the potential terrorists. These factors, accompanied by other relevant factors, might weaken the presumption of innocence. Indeed, we cannot avoid the conclusion that antiterrorism efforts burden innocent Arabs and Muslims to a much greater extent than other innocent persons, 427 but we must also bear in mind that proportionality is a relational principle and nothing is proportional by itself. 428 In this context, some writers have pointed out that terrorist activity results in mass murder, which is still higher on the scale of immediate damage than drug trafficking. 429 Even without comparing the efforts against terrorism to any other form of legal conflict, there is no doubt that in some situations quantity has a quality of its own. The danger of potential terrorist attacks which the United States faces is enormous, and this factor reflects on the mean-ends evaluation. This is by no means to claim that everything that is done is proportional; as in any war "real and imaginary examples for disproportionality are equally easy to find". 430 The important distinction is that racial profiling practice is not generally disproportional, as in the pretext stops case, and every specific case should be examined according to its circumstances.

motorist in New Jersey is engaged in criminal activity is minuscule and certainly not high enough to make the person's race, ethnicity or national origin a relevant factor for purposes of constitutional analysis." (*id.* at footnote 16) ⁴²⁵ Ashar (*supra* note 360), at 1188.

⁴²⁶ For a different opinion, according to which even if race or ethnicity is just one factor among others, it still present dangers, see Harris (*supra* note 406), at 13.

⁴²⁷ Banks (*supra* note 411), at 1217.

⁴²⁸ Nick Fotion, "Proportionality", in *Moral Constraints on War* (Bruno Coppieters & Nick Fotion eds., Lexington, 2002) 91.

⁴²⁹ See, for example: Sophia E. Harris, "Seeking out Terrorists: Will Racial Profiling Do?" 36 *UWLA L. Rev.* 249, 252 (2005).

⁴³⁰ Fotion (*supra* note 428), at 91.

A *fourth* important distinction should be drawn between actions which are conducted *in response* to specific incidents/information/call (low-discretion searches), and high-discretion searches which are the result of *proactive policing*. ⁴³¹ Actions which are initiated by the enforcement authorities are more sensitive to selective enforcement, since they involve discretional decisions regarding allocation of resources. By and large, we can say that while pretext stops are part of proactive policy to find drugs, and therefore create selective enforcement as the allocation decision is to focus on blacks; in the case of the war on terror there are actions of different kinds, including immediate reactions to specific events. In the later situation, selective enforcement claims are inherently weaker.

The administrative insights lead, consequently, to the *prima facie* counter-constitutional result, according to which racial profiling can be a legitimate practice in the war on terror. If so, what should be the protection against abuse of power? This question brings us back to judicial review. An holistic approach to public law perceives all the enforcement agencies engaging in counter-terrorism - local police, the FBI or the CIA - as holding widely discretional administrative authorities and hence subject to judicial review. As discussed above, 432 the arguments in favor of the professionalism of the enforcement authorities, 433 which are in this case combined with the need to combat terrorism 434 – cannot hold against judicial review, enforcing the public law rules and protecting against abuse of power. 435 In this context, the long experience of other nations with terrorism can provide some perspective and demonstrates why judicial review is so important in the nation's counter-terrorism arsenal. 436 Indeed, even judges in England, who traditionally were loath to question decisions taken on the grounds of national security, are now prepared to assert themselves more forcibly, mainly by using the principles of proportionality, good faith and natural justice. 437 In Israel, there is a unique solution to ensure judicial review in emergency situations, in which an injured person can turn directly to the High Court of Justice. 438 Moreover, even the administrative acts of military commanders, taking place

⁴³¹ The Report (*supra* note 338), at 41-42.

⁴³² Supra notes 147-149 and the related text.

For the "professionalism argument", see, for example: Jowell (*supra* note 41), at 81.

⁴³⁴ See: Adam Liptak, "In Terror Cases, Administration Sets Own Rules", *The New York Times* (November 27, 2005) *Yurica Reports*, http://www.yuricareport.com/Civil%20Rights/AdminSetsItsOwnRulesInTerrorCases.html. (referring to decisions to transfer terrorist suspects to the federal justice system from military detention, the author notes that citing the need to combat terrorism, the administration had argued, with varying degrees of success, that judges should have essentially no role in reviewing its decisions).

⁴³⁵ Compare: Dickson (*supra* note 408), at 219.

⁴³⁶ Compare: Jeremy Shapiro, "French Lessons: The Importance of the Judicial System in Fighting Terrorism", *U.S.-French Analysis Series* (March 2003) 1, http://www.brookings.edu/fp/cusf/analysis/shapiro20030325.htm. (referring to the importance of prosecuting terrorists in a civilian judicial process).

⁴³⁷ Dickson (*supra* note 408), at 219.

⁴³⁸ Hofnung (*supra* note 407), at 205.

in the disputed territories, are subject to judicial review by the High Court of Justice. 439 This judicial review has proved to be successful both on the conceptual and practical level. On the conceptual level, it is important that all the enforcement authorities, engaging in counterterrorism, know that their actions are subject to judicial review. 440 This in itself helps in decreasing the chances for abuse of power. 441 When such an abuse is proven, on the practical level, remedies are rendered. 442

IX. **Final Note**

The holistic approach has by this stage more than one meaning. It refers to the relationship between constitutional and administrative law, which are both parts of public law. But it refers also to the holism between the Amendments of the Constitution itself. As we saw, a level of administrative rules can reconcile the doctrines of the Fourth and Fourteenth Amendments, regarding selective enforcement and racial profiling, and tie them to a more coherent one. Furthermore, the principle of proportionality, according to this approach, no longer falls under the exclusive purview of the Eighth Amendment. In the previous section this holistic approach helped to clear up the discrepancy between the legitimate practice of racial profiling in the war on terror, and the unconstitutionality of the practice with regard to the war on drugs. Generally, a holistic approach views enforcement authorities as obliged by all the rules of public law, enforced by judicial review protecting against abuse of power.

I do not anticipate that the Supreme Court will rush to embrace the approach this article proposes. Rather, it is my hope that the *normative duality* approach suggested in the article will stimulate the legal community to think about a more holistic approach to public law. In this way, I would like to provoke a discussion of how administrative insights, incorporated to the constitutional review, can solve some paradoxical results stemming from strict constitutional rules, and thus enhance the protection against abuse of power and the rule of law.

⁴³⁹ *Id.* at 225.

⁴⁴⁰ See: Arjub v. IDF Commander in Judea and Samaria, in Landau (supra note 124), at 55, 58-59. Despite the fact that the arguments of the petitioners for "the right of appeal" - based on international law - failed, the Supreme Court ruled that the right of appeal should be introduced in the administered territories. One of the rationales of the decision was to strengthen the administration of justice in these areas.

⁴⁴¹ For the importance of legal process as influencing governmental behavior, see *supra* note 152 and the related text. ⁴⁴² See, for example: Audeh and Others v. IDF Commander in Judea and Samaria, in Landau (supra note 124), at 122-125; Nasmaan v. IDF Commander in Gaza Strip, in Landau (supra note 124), at 147-150.