

## **Proposal for the Seventh Annual Constitutional Law Scholars Forum**

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### Selective Prosecution, Selective Enforcement, and Remedial Vagueness: Abstract

The striking racial disparities in the American criminal justice system are in urgent need of redress. Fighting racial discrimination within the prosecution and the police is key for every successful criminal justice reform. The Supreme Court, however, has done poorly on this front. Legal scholars have long recognized that the Court has set nearly insurmountable requirements for proving selective prosecution or selective law enforcement. But the Court has not stopped there. In an unparalleled fashion, the Court has been keeping the constitutional remedy within the criminal process for such violations a secret. Quite simply, the Court has intentionally decided not to decide what remedy a criminal defendant proven to be the victim of selective prosecution or selective enforcement should be granted, if any.

My Article uncovers the systemic ramifications of this approach of the Court, which I refer to as remedial vagueness. Remedial vagueness has discouraged criminal courts handling selective prosecution or selective enforcement claims from ruling on the proper remedy question themselves. Consequently, courts are more likely to reject such claims on the merits, even when they suspect that a violation has in fact occurred. Remedial vagueness has also discouraged prosecutors and police officers contemplating whether to engage in discriminatory behavior from complying with the Constitution, and criminal defendants from ever raising such claims in court. And remedial vagueness has contributed to the fact that victims of selective enforcement fail not only in criminal proceedings, but also in civil suits for damages against police officers.

The conclusion of my Article is counterintuitive. Adoption of powerful remedies for selective prosecution and selective enforcement will improve their deterrence. But in the long run, more effective deterrence of discriminatory policing could also be achieved if the Court clarified that there is no remedy available within the criminal process for such violations.

### Biography

Guy Rubinstein is a John M. Olin Fellow in Law and Economics, Graduate Fellow, and S.J.D. (Doctor of Juridical Science) Candidate at Harvard Law School. Guy has previously served as a Law Clerk and as a Senior Law Clerk for Justice Meni Mazuz of the Supreme Court of Israel for nearly two years, as well as a Fair and Just Prosecution Summer Fellow in the Suffolk County (MA) District Attorney's Office. Guy's research focuses on discrimination in the American criminal justice system, remedies for police and prosecutorial misconduct, and anticorruption. His scholarship on the Israeli exclusionary rule was cited by the Supreme Court of Israel and served as a basis for several bills submitted by Israeli Parliament Members. Guy is a regular

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Key words: racial discrimination, constitutional criminal procedure, remedies, criminal justice, selective prosecution, selective enforcement