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CRIMINAL LAW--INVISIBLE IN THE COURTROOM TOO: MODIFYING THE LAW OF SELECTIVE ENFORCEMENT TO ACCOUNT FOR WHITE PRIVILEGE

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CRIMINAL LAW—INVISIBLE IN THE COURTROOM TOO: MODIFYING THE LAW OF SELECTIVE ENFORCEMENT TO ACCOUNT FOR WHITE PRIVILEGE[1]

INTRODUCTION

On February 3, 2008, two men viciously taunted a University of Massachusetts Amherst (UMass) student through his dormitory window.[2] "Come out and fight!" they urged him.[3] The men were not students and had come to UMass to socialize.[4] At the time of this exchange, they were both "highly intoxicated[.]"[5] When the student demanded that they leave him alone, the men broke his window.[6] Then, after gaining access to his dormitory, one of the men turned the verbal assault physical, throwing a punch that broke the student's nose.[7] Believing that his life was in danger, the student defended himself with a knife.[8] When he was able, he escaped

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1. The defendant in *Commonwealth v. Vassell*, the principal case discussed in this Note, was represented by attorneys David Hoose and Luke Ryan of the law firm Sasson, Turnbull, Ryan, & Hoose. Attorney Luke Ryan is the author's husband.

2. Memorandum of Law in Support of Motion to Dismiss at 1, Commonwealth v. Vassell, HSCR 2008-00056 (Mass. Super. Ct. Dec. 29, 2008) [hereinafter Motion to Dismiss].

3. Rachel Anthony-Levine, *A Black Student Fights for His Life in Massachusetts*, CAMPUS PROGRESS (Apr. 27. 2010), http://campusprogress.org/articles/a_black_student_fights_for_his_life_in_massachusetts.

4. Motion to Dismiss, *supra* note 2, at 13; *see also* Commonwealth's Preliminary Memorandum of Law in Opposition to the Defendant's Motion to Dismiss at 3, Commonwealth v. Vassell, HSCR 2008-00056 (Mass. Super. Ct. Feb. 17, 2009) [hereinafter Commonwealth's Opposition].

5. Commonwealth's Opposition, *supra* note 4, at 4; Commonwealth's Petition for Extraordinary Relief Pursuant to G.L. c.211, § 3, Commonwealth v. Vassell, SJC-2009-231 (Mass. May 1, 2009) [hereinafter Petition for Relief]; *see also* Motion to Dismiss, *supra* note 2, at 13, 27 (relating how one of the men "said that he had no more than ten beers" and the other man "admitted that he had a few beers") (internal brackets and quotations omitted); Defendant's Motion to Strike References to the Trial and Outcome of Docket Number 0898CR290 at 15, Commonwealth v. Vassell, HSCR 2008-00056 (Mass. Super. Ct. Sept. 18, 2009) [hereinafter Motion to Strike] (noting that the blood alcohol levels of the two men were .18 and .24, above the legal limit of .08).

6. Motion to Dismiss, *supra* note 2, at 1; *see also* Anthony-Levine, *supra* note 3 (reporting that when Vassell told Bowes and Bosse through his window that "he wasn't going to fight . . . [they] smashed [the] window"); Commonwealth's Opposition, *supra* note 4, at 4 ("The encounter culminated in one of the defendant's room window panes . . . being broken.").

7. Motion to Dismiss, *supra* note 2, at 1; *see also* Anthony-Levine, *supra* note 3.

8. Motion to Dismiss, *supra* note 2, at 1, 11; *see also* Anthony-Levine, *supra* note 3 (reporting that Vassell's neighbor, Barbara Rutman, had observed Vassell "pull[ ] out

from his attackers, joining fellow students who had observed the fight from behind an interior dormitory door.[9] Though they had been stabbed, the men pounded on the door and continued to taunt the student.[10] These men, John Bowes and Jonathan Bosse, are white.[11] The student, Jason Vassell, is black.[12] From the moment Bowes and Bosse first addressed Vassell through his dormitory window, the language they used was brutally racist.[13]

Even though Bowes and Bosse had instigated the fight, Vassell was the only one of the three men who was arrested and vigorously prosecuted, leading many in the community to decry law enforcement's response as racist.[14] Indeed racism likely fueled the arrest and prosecution of Jason Vassell, and it was on this basis that his defense attorneys sought to dismiss the charges against him in a motion to dismiss for selective prosecution.[15] However, in addition to racism, this Note posits that Bowes's and Bosse's white privilege, which can be understood as an "invisible [knapsack] of unearned assets,"[16] powerfully influenced law enforcement's response to the February 3rd altercation. White privilege, though it was never explicitly named, was certainly lurking.

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a knife and [tell Bosse and Bowes] he didn't want to use it and [that] they should leave" once they had gained entry to his dormitory and continued to verbally accost him. To Rutman, "it looked like the first punch was thrown by the taller of the white males [Bosse]").

9. Motion to Dismiss, *supra* note 2, at 6-7.

10. *Id.* at 7.

11. *Id.* at 3; *see also* Anthony-Levine, *supra* note 3.

12. Motion to Dismiss, *supra* note 2, at 4; *see also* Anthony-Levine, *supra* note 3.

13. *See* Anthony-Levine, *supra* note 3 (reporting that according to Vassell's neighbor, Barbara Rutman, Bowes, and Bosse shouted at Vassell, "You're a dirty nigger. Come out and fight . . ."); Commonwealth's Opposition, *supra* note 4, at 4 ("Bowes cursed at the defendant by uttering profanity and racial epithets or slurs."); Motion to Dismiss, *supra* note 2, at 4-7 (documenting the barrage of racist language directed at Vassell).

14. Anthony-Levine, *supra* note 3 ("Many concerned citizens . . . joined the organization Justice for Jason, which has had a constant presence at every court proceeding related to the case. The group believes the disparity in charges in the case is racially motivated.").

15. See *infra* Part III.C.1 for a discussion of Vassell's Motion to Dismiss for selective prosecution. The author generally uses the term, "selective enforcement," though when referring specifically to *Commonwealth v. Vassell*, she uses the term, "selective prosecution," to remain consistent with the pleadings.

16. STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 17 (Richard Delgado & Jean Stefancic eds., 1996) (citing Peggy McIntosh, *Unpacking the Invisible Knapsack: White Privilege*, CREATION SPIRITUALITY, Jan.-Feb. 1992 at 33).

White privilege has been scantily mentioned in any subject area of the case law.[17] Specifically in the context of selective enforcement claims, courts focus on whether people of color are arrested or prosecuted for belonging to a racial minority group (a result of racism) rather than on whether people like Bowes and Bosse evade arrest or prosecution for being white (a result of white privilege).[18] One problem with the practice of focusing on the defendant's race in selective enforcement cases is that differential treatment is not necessarily the result of racial animus.[19] If racial animus, conscious or unconscious, is not the cause of a particular instance of selective enforcement, then the focus on the defendant's race is misguided. Another flaw with existing selective enforcement law is that it only deals in half-truths. By keeping the invisible

17. *See infra* Part III.B.

18. *See*, *e.g.*, Commonwealth v. Lora, 886 N.E.2d 688, 703 (Mass. 2008) (observing that "Justices of [the Supreme Judicial Court] have expressed considerable concern about [the problem of driving while black]"); State v. Soto, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) (noting that "[i]t is indisputable . . . that the police may not stop a motorist based on race . . ."). Since both cases deal with racial profiling, it is logical that the courts focus on the question of whether people of color are targeted because they belong to a racial minority group. Yet the courts fail to address the inverse issue—whether white motorists are treated preferentially. *See also* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (focusing on the harms created for the minority group by the unequal application of laws rather than on the benefits generated for the dominant group).

19. *See generally* Donna Coker, *Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 860 (2003) (discussing how the "intentional discrimination standard is wholly inadequate to address most of the racial disparity in the criminal justice system"). In some jurisdictions, a showing of discriminatory intent is necessary to prove selective enforcement. *See, e.g.*, Jones v. Sterling, 110 P.3d 1271, 1278 (Ariz. 2005) ("Because a selective enforcement claim rests on an assertion that the Equal Protection Clause has been violated, the claimant must demonstrate that state action 'had a discriminatory effect *and that it was motivated by a discriminatory purpose*.'") (emphasis added). This, however, is not a requirement in Massachusetts. *See* Commonwealth v. Franklin, 385 N.E.2d 227, 233 (Mass. 1978). Though Massachusetts defendants must overcome a presumption that discriminatory intent *was not* a factor in their arrests or prosecutions, their burden does not include a mandate to demonstrate discriminatory intent. *Id*. The focus of this Note is on Massachusetts' selective enforcement law and a more in-depth look at jurisdictional variances is beyond its scope. However, in jurisdictions where a showing of discriminatory intent or racial animus is required, some selective enforcement claims may fail for the reason that a particular act of selective enforcement may have been caused not by racial animus, but rather by white privilege. Unearthing unconscious racism with a legal standard that requires a showing of intentional discrimination may be nearly impossible. *See* Coker, *supra* at 860; *infra* note 25 (discussing unconscious racism). Using the same legal standard to reveal white privilege, then, is entirely impracticable. For this reason, jurisdictions like Arizona, which require a showing of discriminatory intent, should formally recognize white privilege in order to make their laws more effective in remedying instances of selective enforcement. *See Jones*, 110 P.3d at 1278.

knapsack (and the very real and entirely unearned benefits contained therein) completely shrouded, this area of the law cannot achieve one of the goals it aims to address: ending racial bias in the enforcement of criminal laws.[20]

Using *Commonwealth v. Vassell* as an illustration, this Note argues that the law of selective enforcement in Massachusetts should explicitly account for white privilege.[21] Part I looks at law enforcement's response to the February 3rd altercation, exploring the interplay between discretion, discrimination, and privilege. Part II examines the development of the law of selective enforcement in Massachusetts, after taking a brief look at two seminal federal cases. Part III addresses the concept of white privilege and the role it played in *Commonwealth v. Vassell*. Finally, Part IV argues that the law of selective enforcement is ripe for the incorporation of white privilege into its formal legal doctrine. Furthermore, a legal recognition of white privilege is necessary in order to curb the ability of courts hostile to selective enforcement claims from too readily dismissing such claims. To this end, this Note proposes language modifying the Massachusetts law of selective enforcement to account for white privilege.

I. *Commonwealth v. Vassell*—A Case of Discretion, Discrimination, and Privilege

Following the February 3rd altercation, the UMass Police Department (UMPD) arrested Jason Vassell and charged him with two counts each of armed assault with intent to murder, and aggravated assault and battery with a dangerous weapon.[22] Four days after the incident, the UMPD filed a criminal complaint against John Bowes, asking that he be charged with disorderly conduct, a civil rights violation resulting in bodily injury, and assault and battery to intimi-

20. *See Yick Wo*, 118 U.S. at 369 ("[The provisions of the Fourteenth Amendment] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.").

21. This Note focuses exclusively on Massachusetts' selective enforcement law, with a brief look at two key federal cases. *See infra* Part II.A. Of course, a change in Massachusetts law can have implications for other jurisdictions as well.

22. Motion to Dismiss, *supra* note 2, at 22; *see also* Petition for Relief, *supra* note 5, at 1-2.

date with bodily injury.[23] The UMPD never filed a criminal complaint against Jonathan Bosse.[24]

It is not unusual for police officers to perform their official duties in a discriminatory manner.[25] When acting with discretion in terms of whom they choose to apprehend, arrest, or charge, police officers access and act upon their "subjective beliefs, biases, hunches, and prejudices."[26] Accordingly, the UMPD may have targeted Vassell because of prejudices they held, even unconsciously, about African American men.[27] The inverse is also true. Since police officers "are *not* required to make an arrest when they observe conduct creating probable cause" that a crime has occurred, "their [use of] discretion may result in the failure to detain or arrest whites who commit acts for which their African American counterparts would often be detained or arrested."[28] The February 3rd altercation provides a stark illustration of this practice. Despite witness statements that the police took of Bowes's and Bosse's criminal behavior, the officers did not arrest either of the two white men.[29] Unlike Vassell, Bowes and Bosse benefited from the UMPD's use of discretion.

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23. Motion to Dismiss, *supra* note 2, at 29-30. Bowes was never arrested; rather, he was informed of these charges when the clerk-magistrate sent him a summons on February 8, 2008 in anticipation of his February 26th arraignment. *Id.* at 30.

24. *Id.* at 20.

25. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 26-27 (1998) ("Police officers often act in a discriminatory manner in the performance of their official duties when they disproportionately stop, detain, and arrest African American men, with or without probable cause, and with or without articulable suspicion.").

26. *Id.* at 27. *See generally* Shaun Ossei-Owusu, *Gimme Some More: Centering Gender and Inequality in Criminal Justice and Discretion Discourse*, 18 AM. U. J. GENDER SOC. POL'Y & L. 607, 613 (2010) for a discussion of "the interstices of discretion," places in the criminal justice system where police and prosecutors can make decisions without transparency and accountability.

27. *See, e.g.*, M.K.B. Darmer, *Teaching* Whren *to White Kids*, 15 MICH. J. RACE & L. 109, 112 (2009) ("[D]eeply entrenched police practices [like the practice of racial profiling, persist because of] the myth of inherent black criminality . . . stubbornly entrenched in American consciousness.") (internal quotations omitted); *see also* Coker, *supra* note 19, at 864 ("[T]he deeply embedded belief among whites of black criminality 'create[s] the criminalblackman.'") (emphasis omitted) (citations omitted); Geiza Vargas-Vargas, *White Investment in Black Bondage*, 27 W. NEW ENG. L. REV. 41, 51 (2005) (discussing the "white conception of blacks and criminals as synonymous").

28. Davis, *supra* note 25, at 27 (emphasis added).

29. *See* Anthony-Levine, *supra* note 3 (describing how police permitted Bowes and Bosse to leave the police station after the incident).

Prosecutors, too, may conduct their official duties in a discriminatory manner.[30] Like police officers, they enjoy a considerable amount of discretion.[31] On February 4, 2008, the office of the Northwestern District Attorney, Elizabeth D. Scheibel (DA) moved to have Vassell detained as a dangerous person.[32] The DA asserted that "[n]o conditions of release imposed upon the defendant [would] reasonably assure the safety of . . . John Bowes and Jonathan Bosse, or the community."[33] With this motion, the prosecutor took the position that Vassell posed a serious threat, despite the fact that he had no prior record of arrest.[34] Unlike Vassell, Bowes and Bosse had a long history of engaging in criminal behavior,[35] and still the DA, like the UMPD, chose to treat the white men preferentially. The prosecutor did not seek to detain Bowes as a dangerous person or impose any conditions on his release,[36] and the DA never prosecuted Bosse for any of his criminal conduct.[37]

The preferential treatment that Bowes and Bosse received, first from the UMPD and later from the DA, is an example of white privilege. The contents of their invisible knapsacks proved extremely valuable to Bowes and Bosse after the February 3rd altercation. As a result of their whiteness, the men received the benefit of the doubt in circumstances where evidence indicated that they had committed hate crimes, damaged public property, instigated a fight, and broken a man's nose.[38] This exercise of white privilege so tainted the prosecution's case against Vassell that he and his attor-

30. Davis, *supra* note 25, at 32 ("Like police officers, prosecutors often make decisions that discriminate against African American victims and defendants.").

31. *See, e.g.*, Renée M. Landers, *Sexual Activity Between Minors, Prostitution, and Prosecutorial Discretion; What Difference Should Age and Sex Make?*, BOSTON B. J. 11 May/June 2009 (critiquing "[t]he notion that prosecutors should have unreviewable discretion in charging and other decisions that precede judicial involvement . . .").

32. Motion to Dismiss, *supra* note 2, at 24.

33. *Id.*

34. *Id.*; *see* Fred Contrada, *Jason Vassell Probation Ends After 2½ years; Supporters Rally in Northampton*, MASSLIVE.COM (Aug. 3, 2010), http://www.masslive.com/news/index.ssf/2010/08/jason_vassell_probation_ends_a.html for an example of how the DA's office portrayed Vassell. In this article, the author notes that the original prosecuting attorney in Vassell's case "called [him] a menace to society." *Id.* (quoting UMass professor emeritus of Afro-American Studies, Ekwueme Michael Thelwell).

35. Motion to Dismiss, *supra* note 2, at 18; *see infra* note 181.

36. Motion to Dismiss, *supra* note 2, at 30.

37. *Id.* at 35.

38. *See supra* notes 2-7 and accompanying text.

neys sought a dismissal of the indictment on the basis of selective prosecution.[39]

II. The Law of Selective Enforcement

Before discussing the development of the law of selective enforcement in Massachusetts, this section will briefly address two seminal Supreme Court cases. The first provides a foundational look at the concept of equal protection.[40] The second explores the separation of powers doctrine.[41]

A. *Equal Protection and the Separation of Powers Doctrine: The Federal Approach*

In its 1886 *Yick Wo* decision, the Supreme Court famously ruled that the Fourteenth Amendment prohibited the government from "mak[ing] unjust and illegal discriminations between persons in similar circumstances."[42] There, a San Francisco ordinance prohibited laundry operators from running their businesses out of wooden buildings without first obtaining the permission of city supervisors.[43] The supervisors refused to grant permission to over 200 Chinese laundry operators, while simultaneously granting permission to eighty laundry operators who were not Chinese.[44] Finding no apparent reason for the differential treatment afforded to Chinese versus non-Chinese laundry operators, the Court concluded "that no reason for it exists except hostility to the race and nationality to which the petitioners belong."[45] Accordingly, the Court ordered that the Chinese laundry operators, who had been jailed for operating their businesses without permission, be released.[46] The spirit of this seminal equal protection case—that the law must not

39. Motion to Dismiss, *supra* note 2. Before the motion was heard on its merits, the Commonwealth agreed to drop the criminal charges against Vassell in exchange for an additional two months of pretrial probation. James F. Lowe, *Probation for Vassell: "Regret" Admitted, but not Guilt in 2008 Stabbing at UMass Dorm*, GazetteNET.com (June 5, 2010), http://www.gazettenet.com/2010/06/05/probation-for-vassell.

40. Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886).

41. United States v. Armstrong, 517 U.S. 456, 458 (1996).

42. *Yick Wo*, 118 U.S. at 374.

43. *Id.* at 368.

44. *Id.* at 374.

45. *Id.*

46. *Id.*

be administered "with an evil eye and an unequal hand"[47]—sits at the core of all selective enforcement claims.[48]

Another concept integral to the law of selective enforcement is the judiciary's interest in preserving the separation of powers, resulting in its great deference to the prosecution. In *United States v. Armstrong*, multiple black defendants were indicted on charges of conspiring to possess with the intent to distribute over fifty grams of crack cocaine.[49] The defendants filed motions both to dismiss their indictments on the basis of selective prosecution and also to obtain discovery that might substantiate their claim.[50] Reasoning that it would be a misappropriation of power for it to interfere with the responsibilities of the executive's delegates, the Court found a presumption of prosecutorial regularity and denied the defendants' discovery requests.[51] The Court ruled that only clear evidence of improper conduct could defeat the broad exercise of prosecutorial discretion.[52] In arriving at this conclusion, the Court was concerned that any less stringent standard would "undermine prosecutorial effectiveness" and jeopardize the separation of powers.[53] Under *Armstrong*, the separation of powers doctrine requires that the government be afforded significant discretion in choosing whom to prosecute criminally. This is true of Massachusetts' selective prosecution law, as well.[54]

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47. *Id.* at 373-74.

48. *See infra* Part II.B.

49. United States v. Armstrong, 517 U.S. 456, 458 (1996). The Supreme Court granted certiorari to determine the appropriate discovery standard for defendants seeking to demonstrate selective prosecution. *Id.* at 461; *see infra* note 96 for a discussion of the discovery standard promulgated in *Armstrong*.

50. *Armstrong*, 517 U.S. at 459.

51. *Id.* at 464.

52. *Id.* See Coker, *supra* note 19, at 827 for a discussion of the "Catch-22" created by an evidentiary standard that requires a defendant to present clear evidence of prosecutorial misconduct in order to demonstrate prosecutorial misconduct.

53. *Armstrong*, 517 U.S. at 465. In addition to its interest in remaining deferential to the government, the Court was concerned about the application of Rule 16(a)(1)(c) of the Federal Rules of Criminal Procedure. *Id.* at 462. It reasoned that the expansive discovery permitted by the rule applies to "shield" defenses only (i.e. defenses made in direct response to the government's case in chief) rather than "sword" defenses (i.e. challenges, such as selective prosecution, to the government's conduct in prosecuting the case). *Id.*

54. In a recent decision, the Supreme Judicial Court in Massachusetts addressed the issue of prosecutorial discretion in the context of preserving the separation of powers. Commonwealth v. Bernardo B., 900 N.E.2d 834, 838 (Mass. 2009). "[J]udicial review of [the prosecution's] decisions must proceed circumspectly lest we intrude on a function constitutionally vouchsafed to another branch of government." *Id.* The Court warned, however, that "prosecutorial discretion may not transgress the limits set out in

B. *The Law of Selective Enforcement in Massachusetts*

This section now turns to Massachusetts where defendants face fewer barriers in demonstrating selective enforcement than their federal counterparts.[55] Commencing in 1977, with its decision in *Commonwealth v. King*, the Supreme Judicial Court (SJC) has developed a strong body of law for Massachusetts defendants seeking to demonstrate selective enforcement.[56]

1. Establishing the Tripartite Burden: Two Foundational Cases on Race- and Sex-Based Selective Enforcement

In *Commonwealth v. King*, three female defendants presented the SJC with "a broad scale attack on the Massachusetts law against prostitution."[57] Although the court refused to reverse the defendants' convictions for prostitution and common night walking,[58] it did affirm one of their equal protection arguments, thereby establishing the foundation for subsequent selective enforcement claims in Massachusetts.[59]

The defendants alleged that their convictions were the result of an unconstitutional and discriminatory application of the law.[60] Specifically, they argued that "law enforcement policies and practices [existed] whereby female prostitutes were prosecuted under [anti-prostitution laws] while male prostitutes and male customers

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our Federal and Massachusetts Constitutions; in the final analysis, it is the judicial branch's solemn duty to ensure that such overreaching does not occur." *Id.*

55. *See* Coker, *supra* note 19, at 829 ("The Supreme Court's discovery rule in *United States v. Armstrong* . . . made it practically impossible for defendants to prevail on selective prosecution claims."). See *infra* notes 108-109 and accompanying text for a discussion of how the *Armstrong* discovery rule compares to the equivalent rule in Massachusetts.

56. Commonwealth v. King, 372 N.E.2d 196 (Mass. 1977).

57. *Id.* at 198.

58. *Id.* at 199. The court observed that some statistical evidence, which the defendants provided in their appellate briefs, seemed to support one of their equal protection claims, but since the evidence had not been presented to the trial court, it could not be considered during appellate review. *Id.* at 204-05. Unable to consider this evidence, the court held that the record was too "conjectural" to come to any conclusions about the veracity of the defendants' claim. *Id.* This corollary issue in *King*—statistical evidence used for the purpose of demonstrating selective enforcement—foreshadows a central issue in a case adjudicated by the SJC twenty-one years later. Commonwealth v. Lora, 886 N.E.2d 688 (Mass. 2008); *see infra* note 91 and accompanying text.

59. *King*, 372 N.E.2d at 207.

60. *Id.* at 203. The defendants raised a host of other constitutional challenges as well, including due process and the right of privacy. *Id.* at 201-03. None of these pertain to the issue of selective enforcement.

of prostitutes were not."[61] The court disposed of the second issue, reasoning that it was the legislature's prerogative to criminalize the prostitute's conduct and not the customer's.[62]

However, the SJC did not so readily dismiss the first issue: whether law enforcement discriminated between female and male prostitutes.[63] There, the court held that female defendants charged with prostitution could win a motion to dismiss on a "showing that the police department or the prosecutor's office followed an unjustifiable policy of selective enforcement against female prostitutes and *not* male prostitutes."[64] A defendant could meet her initial burden[65] of showing selective enforcement by "presenting . . . evidence which strongly suggests or raises a reasonable inference that there existed in connection with her arrest or prosecution a sex-based distinction in law enforcement practice in the consistent and unjustifiable failure to prosecute male prostitutes."[66] If the defendant successfully raised a "reasonable inference" of sex-based selective enforcement, the Commonwealth would have to "rebut that

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61. *Id.* at 204.

62. *Id.* Nevertheless Chief Justice Hennessey, in his concurrence, urged the Court to

> [recognize] the validity of the defendants' argument that unlawful discrimination in enforcement can be proved by a showing that the police department or prosecutor's office followed an unjustifiable policy of prosecuting prostitutes and not their customers. This policy in turn may be shown to be sex-based discrimination (and thus subject to strict scrutiny) by a showing that most prostitutes are women and most customers are male.

Id. at 207 (Hennessey, C.J., concurring) (citation omitted). The Chief Justice went on to explain that "even though the Legislature has made no express provision for the prosecution of the customers of prostitutes, the existence of correlative statutory crimes [e.g. lewd, wanton and lascivious speech or behavior] . . . may give support to a charge of unconstitutional discrimination . . . ." *Id.* at 208 (Hennessey, C.J., concurring).

This proposition gained traction in *Commonwealth v. Lafaso* where a Massachusetts Appeals Court held that the defendant, a woman charged with common night walking, had raised a reasonable inference of selective prosecution by presenting evidence that the "police not only did not arrest the men who picked up the defendant, they made no effort to investigate or obtain additional evidence to support the prosecution of the defendant's clients or johns in general." Commonwealth v. Lafaso, 727 N.E.2d 850, 854 (Mass. 2000).

63. *King*, 372 N.E.2d at 204-05.

64. *Id.* at 205 (emphasis added).

65. *Id.* at 207. The defendant bears the initial burden, because courts "presume that criminal arrests and prosecutions are undertaken in good faith, without [the] intent to discriminate." *Id.* As previously discussed, courts afford the prosecution broad deference at the outset in an effort to preserve the separation of powers. *See supra* Part II.A.

66. *King*, 372 N.E.2d at 207.

inference or suffer [a dismissal of] the underlying complaint . . . ."[67] Though the court rejected the *King* defendants' particular arguments, it established principles it would recall in future selective enforcement claims.

The year after it decided *King*, the SJC revisited the issue of selective enforcement in *Commonwealth v. Franklin*, permitting it to more finely tune the applicable legal standard.[68] Boston during the mid-1970s was a place of great racial tension, and the East Boston Maverick Street Housing Project, in particular, was the locus of ongoing racially motivated conflict.[69] The *Franklin* court described the environment in the following way:

> [G]angs of white youths began roaming the housing project, stoning the homes of black residents, breaking their windows, firebombing their apartments and assaulting the blacks themselves. When asked to make arrests, the police refused and, in some cases, did so mockingly. When the black residents sought to have complaints issued in the East Boston District Court on their own, the clerk first held hearings and then refused, although he routinely issued complaints against black persons without hearings when such complaints were sought by whites.[70]

These were the circumstances in which two black men armed themselves and were subsequently charged with assault and battery with dangerous weapons and the unlawful possession of firearms, among other related charges.[71] Both men moved to dismiss their indictments for "being selective and racially motivated."[72]

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67. *Id.*

68. Commonwealth v. Franklin, 385 N.E.2d 227 (Mass. 1978).

69. *Id.* at 232. *See generally* JACK TAGER, BOSTON RIOTS: THREE CENTURIES OF SOCIAL VIOLENCE 194 (2001) for a discussion on how "[t]he violence that occurred in Boston from 1974 to 1976 astounded the nation and smeared its reputation as the cradle of liberty and hub of intellectual liberalism." East Boston was one of several "defended neighborhoods," where the residents "shared an impulse to stop time, to resist change, and to hold fast to an ideal of society as it had been before the upheavals of the 1960s." RONALD P. FORMISANO, BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970S 108-09 (1991). One of the changes these neighborhoods most strongly resisted was the busing of public school children by a city attempting to comply with court orders for desegregation. *Id.* at 1. Nowhere in Boston did a majority of residents strongly support busing, but in several neighborhoods, East Boston included, busing was met with "strong disapproval (over 70 percent)." *Id.* at 109. This disapproval was the source of great racial tension and ensuing violence. *Id.*

70. *Franklin*, 385 N.E.2d at 232.

71. *Id.* at 230.

72. *Id.* The defendants' motions were denied, but upon appeal, the SJC found error in the trial court's rulings and remanded the case for a new hearing. *Id.* at 230-31. The SJC noted that this had been a case of first impression for the trial court, and that

Drawing from a large array of federal and state cases, and building on the principles established in *King*, the SJC formulated the following selective enforcement legal standard.[73] In order to meet the initial burden in raising a reasonable inference of impermissible discrimination, defendants must demonstrate (1) "that a broader class of persons than those prosecuted has violated the law," (2) "that failure to prosecute was either consistent or deliberate," and (3) "that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex."[74] Once a defendant has satisfied this tripartite burden, the prosecution must rebut the inference or suffer a dismissal of the underlying claim.[75] The SJC found that the defendants had successfully raised a reasonable inference that the prosecution had been motivated by the impermissible classification of race.[76] The onus, then, was transferred onto the prosecution to rebut that inference.[77]

2. Sharpening the Sword for a Robust Defense: Recent Selective Enforcement Cases on Evidentiary and Discovery Matters[78]

In some instances where defendants have made a selective enforcement claim, the proper remedy is the suppression of evidence rather than a total dismissal of the charges.[79] Pursuant to the exclusionary rule[80] and the related fruits doctrine,[81] evidence obtained in the course of unconstitutional police conduct cannot be used to ob-

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"the judge was presented with a constitutional concept (discriminatory enforcement) as to which there were no Massachusetts precedents for his guidance." *Id.* at 231 n.3. While *Commonwealth v. King* addresses the issue of sex-based selective enforcement, that case was decided by the SJC after the *Franklin* trial had been concluded. *Id.*

73. *Id.* at 233-34.

74. *Id.*

75. *Id.* at 234.

76. *Id.*

77. *Id.*

78. See *supra* note 53 for a brief discussion of the "sword defense."

79. Commonwealth v. Lora, 886 N.E.2d 688, 698 (Mass. 2008) (explaining that suppression was the proper remedy in a case where "[the defendant] does not contend that he was *charged* . . . because of his race, and consequently has not moved to dismiss [the] charge on the ground of selective enforcement[,]" but rather that the vehicle *was stopped* because of its occupants' skin color) (emphasis added).

80. *See* BLACK'S LAW DICTIONARY 647 (9th ed. 2009) ("A [ ] rule that excludes or suppresses evidence.").

81. *See id.* at 740 ("The rule that evidence derived from an illegal search, arrest, or interrogation is inadmissible because the evidence (the 'fruit') was tainted by the illegality (the 'poisonous tree').").

tain a conviction.[82] Suppression is considered appropriate to deter future police misconduct.[83]

Suppressing cocaine seized from the defendant would have been the appropriate remedy in *Commonwealth v. Lora* had the defendant successfully demonstrated selective enforcement.[84] In *Lora*, a police officer pulled over a vehicle when its driver committed a minor traffic infraction.[85] Before activating his cruiser's blue lights, the officer observed the dark skin color of the vehicle's occupants.[86] In the course of the traffic stop, the officer discovered cocaine in a small glassine bag on the floor of the vehicle.[87] The defendant filed a motion to suppress in response to the charge of trafficking cocaine.[88] He alleged that the officer had made the decision to pull over the vehicle because of its occupants' skin color, thus "impermissibly engag[ing] in the practice of racial profiling."[89]

The SJC in *Lora*—though it ruled against the defendant—made a significant contribution to the law of selective enforcement. First, it held that the suppression of evidence is indeed the proper remedy in cases where traffic stops are the result of racial profiling.[90] Furthermore, the court ruled that a defendant may use statistical evidence to meet the initial burden of "rais[ing] a reasonable inference of impermissible discrimination."[91] Nevertheless, the

82. *See Lora*, 886 N.E.2d at 698 ("The suppression of evidence under the exclusionary rule is a 'judicially created remedy,' whose 'prime purpose is to deter future unlawful police conduct.'") (citations omitted).

83. *Id.*

84. *Id.*

85. *Id.* at 691. The driver had failed to operate in the right travel lane. *Id.*

86. *Id.* The defendant was riding in the passenger's seat of the vehicle. *Id.*

87. *Id.*

88. *Id.* at 692.

89. *Id.*

90. *Id.* at 699. Still, the court noted that the evidence should not be suppressed on these grounds if "the connection between the unconstitutional stop by the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" *Id.* at 699-700.

Racial profiling can be defined as "when law enforcement interprets race as 'a mark of increased risk of criminality.'" Steven Wu, Comment, *The Secret Ambition of Racial Profiling*, 115 YALE L.J. 491, 492 (2005) (citations omitted). In the context of traffic stops, racial profiling "has resulted in the proportion of African-Americans among the drivers searched by police far exceeding the proportion in the general population of drivers." Melissa Whitney, Note, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 B.C. L. REV. 263, 264 (2008) (internal brackets and quotations omitted).

91. *Lora*, 886 N.E.2d at 701; *cf.* McCleskey v. Kemp, 481 U.S. 279, 287, 293 (1987) (concluding that "statistical proof normally must present a 'stark' pattern to be accepted as the sole proof of discriminatory intent under the Constitution" in a case where a black defendant unsuccessfully sought to demonstrate that his death sentence

court was not persuaded that the evidence provided by the instant defendant was sufficient to meet this burden.[92]

At the conclusion of its *Lora* decision, the SJC noted that "[t]he practical weight" of the defendant's initial burden to produce evidence that similarly situated persons were treated differently because of their race may be "daunting."[93] Yet, the court opined, the hurdle was not "impossible" to surmount.[94] One manner in which a defendant may seek to demonstrate selective enforcement is by way of evidence obtained from the prosecution through discovery.[95] Both the Supreme Court and the SJC have considered the same question: what is "the showing necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of [an impermissible classification?]"[96] In the past few years, several cases have come before the SJC that have permitted it to develop its response to this question.

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was unconstitutional, because based on a statistical analysis of over 2,000 murder cases, black defendants convicted of murdering white victims were more likely to be sentenced to death than any other sort of defendant/victim pairings in racial makeup). *But see* Jones v. Sterling, 110 P.3d 1271, 1279 (Ariz. 2005) ("[W]hile helpful, purely statistical evidence is rarely sufficient to support an equal protection claim.") (citations omitted).

92. *Lora*, 886 N.E.2d at 704. The court came to "the inescapable conclusion that the use of census benchmarking to compare the demographics of a small community with citation ratios on a major interstate highway, which happens to pass through it, is unreliable and not accepted in the scientific community." *Id.* at 702. See also *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996) for a discussion of the use of statistical evidence in demonstrating the existence of racial profiling. "Statistics may be used to make out a case of targeting minorities . . . provided the comparison is between the racial composition of the motorist population violating the traffic laws and the racial composition of those arrested for traffic infractions on the relevant roadway patrolled by the police agency." *Id.* at 360. *Soto* was successful in demonstrating racial profiling, while *Lora* was not, because the two defendants measured the alleged examples of racially-motivated traffic stops against different benchmarks. *See Lora*, 886 N.E.2d at 702 ("Having concluded that properly gathered, analyzed, and relevant statistical data may be used to meet a defendant's burden"—as was the case in *Soto*—the court then found that *Lora*'s benchmarking data was "unreliable and not accepted in the scientific community.").

93. *Lora*, 886 N.E.2d at 703. For a discussion of a related issue—the barriers to demonstrating discriminatory impact faced by plaintiffs in equal protection suits in response to law enforcement abuses—see generally Whitney, *supra* note 90, at 282.

94. *Lora*, 886 N.E.2d at 703.

95. Vassell, for example, sought to obtain discovery that would aid him in demonstrating selective enforcement. Defendant's Memorandum of Law in Support of Motion for Discovery Pursuant to Mass. R. Crim. P. 14, Commonwealth v. Vassell, HSCR 2008-00056 (Mass. Super. Ct. Feb. 19, 2009) [hereinafter Motion for Discovery].

96. United States v. Armstrong, 517 U.S. 456, 458 (1996). In this sort of discovery request, the SJC has provided a more reasonable threshold requirement for defendants than the United States Supreme Court, which has made it practically impossible for

In two racial profiling cases decided on the same day as *Lora*, the SJC held that the defendants were not entitled to the discovery they had requested from the Commonwealth pursuant to Rule 14 of the Massachusetts Rules of Criminal Procedure.[97] The court reasoned that unless a defendant can make a preliminary showing that a reasonable basis exists to require the information sought, the discovery rule cannot be used "to impose such an onerous burden on the Commonwealth."[98] In the first case, *Commonwealth v. Betances*, the defendant was charged with trafficking heroin and cocaine after he was stopped for driving erratically.[99] In the second case, *Commonwealth v. Thomas*, the defendant was charged with possession of marijuana with intent to distribute after he was stopped for speeding and failure to operate in the right travel lane.[100] Both defendants sought discovery from the Commonwealth that would have aided them in making a *Lora*-like suppression motion, but in both cases, the SJC rebuffed their efforts.[101] Still, the court noted that "a properly presented and documented motion under Mass. R. Crim. P. 14(a)(2) . . . may be an appropriate

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defendants to obtain discovery from the government. *See supra* Part II.A. In *Armstrong*, the defendants sought evidence from the government regarding the prosecution of cocaine offenses in federal court in their effort to demonstrate race-based selective prosecution. *Armstrong*, 517 U.S. at 458-59. The Supreme Court held that they "failed to satisfy the threshold showing: They failed to show that the Government declined to prosecute similarly situated suspects of other races." *Id.* at 458. Because the evidence they provided of race-based prosecution was not sufficient to entitle them to obtain discovery from the prosecution, the defendants were effectively barred from substantiating their selective enforcement claim.

97. *See* Commonwealth v. Betances, 886 N.E.2d 679 (Mass. 2008); Commonwealth v. Thomas, 886 N.E.2d 684 (Mass. 2008). Rule 14(a)(1)(A) of the Massachusetts Rules of Criminal Procedure requires

> the Commonwealth to furnish facts and information "relevant to the case and . . . in the possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case."

Betances, 886 N.E.2d at 682. Another avenue for discovery is through Rule 14(a)(2), which permits the defendant to move for discovery of "other material and relevant evidence not required by subdivision (a)(1)." *Id.* at 683 n.6 (internal quotations omitted).

98. *Id.* at 683.

99. *Id.* at 680-81.

100. *Thomas*, 886 N.E.2d at 685.

101. *See Betances*, 886 N.E.2d at 683 (finding that the defendant's discovery motion, accompanied by two unrelated police reports noting the races of the arrestees, did not "contain reliable information . . . demonstrating a reasonable basis to infer that profiling" had occurred); *Thomas*, 886 N.E.2d at 686-87 (finding that the defendant's discovery motions, seeking materials from the arresting officer that would demonstrate the occurrence of racial profiling, "were vague and overbroad").

vehicle by which a defendant . . . may obtain statistical evidence required, under the *Lora* decision, to demonstrate [racial profiling]."[102]

In two subsequent statutory rape cases, the SJC was presented with similar Rule 14 discovery motions, and in both cases, the court found in favor of the defendant.[103] *Commonwealth v. Bernardo B.* illuminates the importance of Rule 14 discovery for defendants seeking to demonstrate selective enforcement.[104] There, a fourteen-year-old boy was charged with nine counts of sexual offenses for consensual acts he engaged in with three younger female peers.[105] Since the girls were not charged, though they had also violated the law, the boy sought discovery "in order to investigate and, if possible, support his claim that he was being selectively prosecuted because of his [sex]."[106] The court wondered where else than the prosecutor's office could the boy "look to. . . as the most comprehensive, reliable source of raw information from which to develop" his selective enforcement claim.[107]

The Commonwealth's argument in opposition tracked the government's in *Armstrong*—that the defendant's request failed to raise a reasonable inference that the prosecutor had declined to prosecute "similarly situated individuals."[108] Yet, the SJC—unlike the Supreme Court—recognized that requiring this kind of showing "put[s] the cart before the horse."[109] The court explained that:

> "[t]he reasonable inference" standard asks whether the defendant, seeking dismissal of the charges against him, has made a prima facie case of selective prosecution. What the boy seeks here is discovery, not dismissal. At the discovery stage, the ques-

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102. *Thomas*, 886 N.E.2d at 687.

103. *See* Commonwealth v. Washington W., 928 N.E.2d 908 (Mass. 2010); Commonwealth v. Bernardo B., 900 N.E.2d 834 (Mass. 2009). In *Washington W.*, the defendant alleged selective prosecution based on sexual orientation. *Washington W.*, 928 N.E.2d at 910. The SJC found that the defendant was "foreclosed from making a proper threshold showing of relevance, in light of the facts of the case and the inaccessible nature of juvenile court records." *Id.* at 914. Still, the court ruled that "the juvenile's claim is sufficiently serious to warrant further inquiry." *Id.* Therefore, the court ordered limited discovery that would potentially enable the defendant to make a showing of relevance, such that would entitle him to full discovery. *Id.* at 915.

104. *Bernardo B.*, 900 N.E.2d. 834.

105. *Id.* at 837. At the time of the sexual encounters, the defendant was fourteen, two of the females were twelve, and one was eleven. *Id.*

106. *Id.*

107. *Id.* at 843.

108. United States v. Armstrong, 517 U.S. 456, 465 (1996).

109. *Bernardo B.*, 900 N.E.2d at 843 (internal quotations omitted).

> tion is whether the defendant has made a "threshold showing of relevance" under rule 14(a)(2). To adopt the higher burden suggested by the Commonwealth would place criminal defendants in the untenable position of having to produce evidence of selective enforcement in order to obtain evidence of selective enforcement.[110]

Applying this legal standard, the court held that the defendant had indeed made a threshold showing by demonstrating that his "behavior was [not] so dissimilar from that of the girls in nature, kind, and degree as to nullify the possibility that his discovery request might yield information relevant to a claim of selective prosecution."[111] Accordingly, he was entitled to the requested discovery.[112]

Over the past quarter century, the SJC has developed a strong body of law for Massachusetts defendants seeking to demonstrate selective enforcement. The earlier cases, *King* and *Franklin*, established the tripartite burden, which *Lora* reaffirmed.[113] In their efforts to meet their initial burden, defendants may employ statistical evidence and are able to obtain discovery from the Commonwealth in order to corroborate their claims.[114] These are all valuable tools for protecting defendants from impermissible discrimination in the enforcement and prosecution of criminal laws. What the law lacks, however, is an acknowledgment of privilege—the inverse of discrimination—which functions implicitly in many selective enforcement cases.

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110. *Id.* at 843-44 (citation omitted). The SJC makes no reference to *United States v. Armstrong* in its decision. But with this statement, it clearly rejects the Supreme Court's established legal standard for defendants seeking discovery in selective enforcement claims, establishing, as is its prerogative, greater protections for the citizens of Massachusetts than for the citizens of the United States.

111. *Id.* at 846. The SJC also found that the defendant's requests were material and relevant to his claim of sex-based selective prosecution, and that they were properly supported. *Id.* at 847.

112. *Id.* at 846.

113. Commonwealth v. Lora, 886 N.E.2d 688, 698 (Mass. 2008) (internal quotations, citations, and ellipses omitted). The SJC in *Lora* explained that

> In order to meet [the initial] burden, the defendant must . . . present evidence which raises at least a reasonable inference of impermissible discrimination, including evidence [1] that a broader class of persons than those prosecuted has violated the law, [2] that failure to prosecute was either consistent or deliberate, and [3] that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex.

Id. As previously discussed, this standard was originally set forth in *Commonwealth v. Franklin*, 385 N.E.2d 227, 233-34 (Mass. 1978).

114. *See* Commonwealth v. Washington W., 928 N.E.2d 908 (Mass. 2010); *Bernardo B.,* 900 N.E.2d 834; *Lora,* 886 N.E.2d 688.

III. White Privilege: Very Real, Entirely Unearned Benefits

Raising the issue of white privilege in his motion to dismiss for selective prosecution would have provided Jason Vassell with meager doctrinal justification upon which to rest his legal argument. The law simply does not acknowledge the advantages and privileges that white people experience in their encounters with law enforcement.[115] At the same time, white privilege implicitly undergirds the law of selective enforcement. The next segment of this Note provides an overview of white privilege, a discussion of the case law's failure to engage in any meaningful discourse on white privilege, and a look at how white privilege played a role in the arrest and prosecution of Jason Vassell.

A. *An Overview of White Privilege*

"White privilege, a collective assortment of various conceptual definitions,"[116] has been described by scholars and activists in a variety of ways that range in form from highly technical dictionary-like definitions to narratives rich with real life examples.[117] Peggy McIntosh describes white privilege as an

> invisible package of unearned assets which [a white person] can count on cashing in each day, but about which [she or he] was "meant" to remain oblivious. White privilege is like an invisible

115. Wildman, *supra* note 16, at 8 ("The notion of privilege, although part of the consciousness of popular culture, has not been recognized in legal language and doctrine.").

116. Maurice R. Dyson, *When Government is a Passive Participant in Private Discrimination: A Critical Look at White Privilege & the Tacit Return to Interposition in* PICS v. Seattle School District, 40 U. Tol. L. Rev. 145, 164 (2008).

117. For an example of a dictionary-like definition of white privilege, see *Defining "White Privilege"*, Race, Racism and the Law: Speaking Truth to Power! http://academic.udayton.edu/race/01race/whiteness05.htm (last updated Dec. 31, 2010) (describing white privilege as a "social relation" that can be manifested in a number of ways, such as the "right[s], advantage[s], or immunit[ies] granted to or enjoyed by white persons beyond the common advantage of all others").

For an example of a narrative definition of white privilege, see Tim Wise, *White Privilege, White Entitlement and the 2008 Election*, BuzzFlash.com (Sept. 13, 2008), http://blog.buzzflash.com/contributors/1755. Wise provides the following examples of white privilege:

> [W]hen you can get pregnant at seventeen like Bristol Palin and everyone is quick to insist that your life and that of your family is a personal matter, and that no one has a right to judge you or your parents, because "every family has challenges," even as black and Latino families with similar "challenges" are regularly typified as irresponsible, pathological and arbiters of social decay.

Id.

> weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.[118]

The contents of the invisible knapsack benefit white people in countless ways—from the comfort in finding members of their race represented in textbooks and popular media, to never having to wonder whether they were targeted by the police because of their race in a traffic stop.[119]

In her article, *Teaching* Whren *to White Kids*, M. K. B. Darmer describes an instance in which she experienced the comfort and security of her white privilege when her vehicle was pulled over by a police officer:

> [D]espite a slight case of nerves, I was pretty sure of what would happen and, more importantly, what would not happen: I would not be frisked. I would not be pulled out of my car. I would not be asked if I had a weapon. I would not be asked if there were drugs in the car. I would not be asked if I had a criminal record. I would not be treated harshly. My whiteness endows me with benefits that were realized that day.[120]

Similarly, Jacob Willig-Onwuachi writes that he is "reminded of [his] own white privilege when [he] shop[s]. . . and [is] neither followed around in stores nor asked to produce various forms of identification when purchasing items."[121] Both of these accounts attest

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118. WILDMAN, *supra* note 16, at 17-18 (citing Peggy McIntosh, *Unpacking the Invisible Knapsack: White Privilege*, CREATION SPIRITUALITY, Jan.-Feb. 1992 at 34).

119. Peggy McIntosh, in her essay, *White Privilege: Unpacking the Invisible Knapsack*, *available at* http://www.nymbp.org/reference/WhitePrivilege.pdf (last visited Apr. 15, 2012), enumerates twenty-six ways in which she believes she benefits from white privilege. Several examples include:

> I can if I wish arrange to be in the company of people of my race most of the time . . . When I am told about our national heritage or about "civilization," I am shown that people of my color made it what it is . . . Whether I use checks, credit cards or cash, I can count on my skin color not to work against the appearance of my financial reliability . . . I am never asked to speak for all the people of my racial group . . . I can be pretty sure that if I ask to talk to "the person in charge," I will be facing a person of my race [and] . . . If a traffic cop pulls me over or if the IRS audits my tax return, I can be sure I haven't been singled out because of my race.

Id.; *see also* Commonwealth v. Lora, 886 N.E.2d 688, 703 (Mass. 2008) (acknowledging the problem of "police profiling, commonly referred to as 'DWB—driving while black.'").

120. Darmer, *supra* note 27, at 113.

121. Angela Onwuachi-Willig & Jacob Willig-Onwuachi, Special Project, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231, 232 (2009).

to the large array of privileges that white people experience due only to their skin color.[122]

White privilege, though exceedingly powerful, is largely unseen by white people.[123] One cause of its invisibleness to white people is that "the characteristics of the privileged group define the societal norm."[124] Imagine that every house you have ever seen in your entire life were painted the color red. If this were so, you would not necessarily notice when a friend painted her new home red. You would not notice the color of your friend's house, because as far as you are concerned, there is *nothing* to notice. In your eyes, house color = red. Similarly, when a white person "turn[s] on the television or open[s] to the front page of the paper [she or he] see[s]

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122. The inverse is also true: people of color experience "a *lack*, an absence, a deficiency" due to white privilege. WILDMAN, *supra* note 16, at 17 (emphasis added). When a black person "read[s] the newspaper, watch[es] television, or listen[s] to the news . . . [she or he is bombarded with] negative and stereotypical images of black people." Onwuachi-Willig & Willig-Onwuachi, *supra* note 121, at 222, 232. When Joey Mazzarino, head writer of Sesame Street, observed his daughter—who is black—playing with her dolls, he noticed that she "wanted to have long blond hair and straight hair, and she wanted to be able to bounce it around." "*I Love My Hair": A Father's Tribute to his Daughter*, NATIONAL PUBLIC RADIO (Oct. 18, 2010), http://www.npr.org/templates/story/story.php?storyId=130653300. The societal norm of what hair should look like has been defined by the privileged group (when white people purchase toys for their children, it is easy to find their own physical attributes represented), and consequently people of color experience the absence of privilege in this context, as well.

123. WILDMAN, *supra* note 16, at 17 ("[White] privilege is not visible to its holder; it is merely there, a part of the world, a way of life, simply the way things are."). Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 645 (2008) ("While mainstream thought in the United States would now consider white supremacy to be morally repugnant and explicitly rejected, white privilege remains largely unacknowledged.").

Professors Darmer and Willig-Onwuachi are exceptions to the rule that white people do not perceive their white privilege. Certainly, some white people have strived to perceive the privilege that their skin color affords them. Even those who make this effort, however, doubtlessly fail to observe every instance of white privilege. And even in instances where they observe their privilege, they may silently enjoy it because to confront it would be uncomfortable or inconvenient. *See infra* notes 128-132 and accompanying text.

124. WILDMAN, *supra* note 16, at 13 (citation omitted); *see also* BRUCE A. JACOBS, RACE MANNERS: NAVIGATING THE MINEFIELD BETWEEN BLACK AND WHITE AMERICANS 106 (1999). Jacobs describes the normalization of whiteness:

> [W]hite culture [is kept] firmly at the center of approved American reality while the perceived "ethnic" cultures whirl about as orbiting social satellites. By this definition, the sound of salsa music blaring from an apartment window and the wafting aroma of a black chicken-and-ribs restaurant are both "ethnic," while the munching of a tuna sandwich on white bread by a white Anglo-Saxon man in green pants is, hysterically enough, "normal."

Id.

people of [her or his] race widely represented."[125] Because the societal norm is defined by whiteness,[126] white people commonly fail to perceive whiteness and fail to question the privileges it confers upon them.[127]

Another reason why white privilege is largely invisible to white people is due to their inclination to "rely on their privilege and avoid objecting to oppression."[128] Describing an experience that she had while performing jury duty, Stephanie Wildman recalls how she considered challenging the racist assumptions made by an attorney during *voir dire* when she noticed that the attorney asked all Asian-looking prospective jurors if they spoke English.[129] She contemplated introducing herself in the following way: "I'm Stephanie Wildman, I'm a professor of law, and yes, I speak English," to call attention to the attorney's "subordinating conduct."[130] Instead, she decided to "opt out" and exercise her privilege by remaining silent on the matter.[131] Even white people who are committed to challenging oppression can fall back into the comfort of their privilege when it would be inconvenient or uncomfortable to do so. Thus, "the implicit option to ignore oppression" is yet another object of value in the invisible knapsack.[132]

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125. McIntosh, *supra* note 119.

126. WILDMAN, *supra* note 16, at 14 ("The characteristics and attributes of those who are privileged group members are described as societal norms—as the way things are and as what is normal in society.") (citation omitted).

127. *Id.* at 17 (stating that "[p]rivilege is not visible to its holder; it is merely there, a part of the world, a way of life, simply the way things are"); *see also* Coker, *supra* note 19, at 870 ("Whites seldom think of themselves through the lens of race; whiteness is invisible to most whites.").

128. WILDMAN, *supra* note 16, at 13.

129. *Id.* at 16.

130. *Id.*

131. *Id.*

132. *Id.* at 13-14. White privilege, as understood by scholars like Professors Wildman, Darmer, and McIntosh builds upon the "black critical reflection on the ways and means of whiteness." Ronald E. Chennault, *Giving Whiteness a Black Eye: An Interview with Michael Eric Dyson*, *in* WHITE REIGN: DEPLOYING WHITENESS IN AMERICA 305 (Joe L. Kincheloe et al. eds., 1998). The contemporary study of whiteness owes a great "debt to [the] hidden black intellectual tradition" of W.E.B. DuBois, Langston Hughes, Zora Neale Hurston, and Fannie Lou Hamer, among others. *Id.* While a discussion of these origins is beyond the scope of this Note, the author wishes to acknowledge this debt.

B. *Blind-Spots and Belittlement: How the Case Law Has Regarded White Privilege*

Despite the reality of white privilege[133] and the rich documentation of its existence by both academics and activists, the courts have never considered the topic in any meaningful way. A Westlaw search of all state and federal cases for decisions that contain the phrase "white privilege" produces seventeen results.[134] Two cases document "[t]he efforts of non-Native American adherents to adopt Indian religions" and how in their efforts they may benefit from white privilege.[135] Several other cases operate in the employment discrimination context, and generally characterize white privilege as a concept that provides an exceedingly unpersuasive basis upon which to rest any legal reasoning.[136] One case addresses the

133. Some people deny the existence of white privilege. Tim Wise responds to the "deniers" in his blog piece, *Explaining White Privilege to the Deniers and the Haters*, RED ROOM (Sept. 18, 2008), http://www.redroom.com/blog/tim-wise/explaining-white-privilege-deniers-and-haters.

134. Westlaw Search of "All State and Federal Cases," https://law-school.westlaw.com (follow "Westlaw" hyperlink; then search "Terms & Connectors" for "white privilege"). Six of these cases do not address white privilege, but rather contain misleading phrases, which the search engine is not capable of distinguishing, such as "White's privilege" (referring to the defendant, White, and his privilege against self-incrimination). *See* United States v. White, 879 F.2d 1509, 1516 (Ind. 1989); *see also* Avins v. White, 627 F.2d 637 (3d Cir. 1980); I.C.C. v. Gould, 629 F.2d 847 (3d Cir. 1980); White v. Rockingham Radiologists, Ltd., 1986 WL 965, No. 03-0051-H (W.D. Va., June 12, 1986); Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44 (N.D. Cal 1971); Munroe v. Gulf, C. & S.F. Ry. Co., 254 S.W. 213 (Tex. Civ. App. 1923).

135. See *United States v. Hardman*, 622 F. Supp. 2d 1129, 1137, 1154-55 (D. Utah 2009) for an example of a court inquiring into whether non-Native Americans who adhere to Native American religions should be entitled to possess eagle feathers for religious purposes in violation of existing federal laws designed to protect endangered bird species. The court held that the government failed to demonstrate that its ban on the possession of eagle feathers as applied to the non-native American defendants was "the least restrictive means of furthering its compelling interests." *Id.* In dicta, the court described how some commentators decry the efforts of "New Agers" to "play Indian" by appropriating Native American religions all the while retaining "the white privilege and power to make themselves heard at the expense of [N]ative Americans." *Id.* at 1137; *see also* United States v. Wilgus, 606 F. Supp. 2d 1308 (D. Utah 2009) (dealing with the same issue as *Hardman*).

136. *See* Bowman-Farrell v. Cooperative Educ. Serv. Agency 8, No. 02-C-818, 2007 WL 3046283, at *6, *30 (E.D. Wis. Oct. 17, 2007) (granting summary judgment to defendants where plaintiffs argued that both racism and white privilege were responsible for the discrimination they alleged to have occurred); Wilcoxon v. Ramsey Action Programs, Inc., No. 04-92 (JRT/FLN), 2005 WL 2216289, at *2, *7 (D. Minn. Sept. 12, 2005) (granting summary judgment to defendants where plaintiff had circulated an email on white privilege prior to her dismissal); Scott v. Univ. of N.H. Co-op Extension, No. 03-027-M, 2004 WL 235258, at *3 n.5, *4, *10 (D.N.H., Feb. 9, 2004) (granting summary judgment to the defendant after noting that "[the plaintiff's] invocation of 'white privilege,' without more, is insufficient to state a claim under Title VII"); Cole-

constitutionality of the Defense of Marriage Act (DOMA).[137] In her dissent, the Honorable Bobbe J. Bridge analogizes DOMA to "segregation laws [once] sought to 'defend' white-privilege from people of color."[138] Though some courts may recognize the existence of white privilege, none of them has engaged with it in any meaningful way.

The single Supreme Court decision wherein the phrase, "white privilege" appears is *Parents Involved in Community Schools v. Seattle School District*.[139] There, the Court held that the goal of creating racially diverse schools must not be achieved by way of "assigning students on a racial basis."[140] In his concurrence, Justice Thomas extolled a "color-blind Constitution" that cannot tolerate "[elite] racial theories [such as] cultural racism[141] [or] white privilege."[142] Justice Thomas provided these two concepts as examples of what happens when "local school boards . . . [are] entrusted with the power to make decisions on the basis of race."[143] Thomas's quip suggests that it is repugnant for a school board to encourage

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man v. Exxon Chem. Corp., 162 F. Supp. 2d 593, 622 (S.D. Tex. 2001) (finding that a white employee's opinions on an article entitled "White Privileges" that amounted to a criticism of affirmative action was not the equivalent of racial bias in a Title VII employment discrimination claim); Rylander v. Hasart, 2001 WL 1346791, No. 25675-4-II, at *4, *12 (Wash. App. Div. Nov. 2, 2001) (rejecting on relevancy grounds the white male plaintiff's argument that materials on white privilege viewed by a hiring committee demonstrated "an intent to inject race into the . . . hiring process"). *But see* Miller v. Cont'l Can Co., 544 F. Supp. 210, 229 (D.C. Ga. 1981) (noting that the delay in making a merger between pulp and paper mills "of approximately two years [was a] vain attempt to protect white privilege").

137. Anderson v. King Cnty., 138 P.3d 963, 1010 (Wash. 2006) (holding that "Washington's long-standing definition of marriage as the union of one man and one woman and DOMA are both constitutional").

138. *Id.* at 1030 (Bridge, J. dissenting). Justice Bridge's use of the phrase, "white privilege," seems to connote "white supremacy," a different—more deliberate and overt—system of domination. *See* Audrey G. McFarlane, *Operatively White?: Exploring the Significance of Race and Class Through the Paradox of Black Middle-Classness*, 72 LAW & CONTEMP. PROBS. 163, 165 (2009) (describing a societal and economic structure based on white privilege as "seemingly less-virulent . . . [and] more-benign" than the structure of white supremacy that preceded it).

139. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 781 n.30 (2007).

140. *Id.* at 747.

141. Justice Thomas cited a former Seattle school district website containing the following definition of cultural racism: "Those aspects of society that overtly and covertly attribute value and normality to white people and whiteness, and devalue, stereotype, and label people of color as 'other,' different, less than, or render them invisible." *Id.* at 781 n.30 (Thomas, J. concurring).

142. *Id.* at 781.

143. *Id.* at 781 n.30.

members of its community to engage in any sort of dialogue on matters having to do with power and privilege.

None of these cases provides any legal language or frameworks with which to discuss white privilege.[144] Though not all courts disparage the concept of white privilege in the manner of one Supreme Court justice,[145] none considers it meaningfully or even attempts to carve out a narrow entryway through which the concept might be introduced to legal doctrine.[146] Far from being an elitist theory,[147] white privilege affects criminal defendants' experiences in very real ways. Still, it seems that white privilege remains invisible in the courtroom.

C. *The Function of White Privilege in* Commonwealth v. Vassell

Vassell's motion to dismiss for selective prosecution identified racism as a motivating factor in much of the UMPD's conduct and the DA's handling of the case.[148] Undoubtedly, Vassell and his attorneys were aware of the role that white privilege played in his case. No formal mechanism existed, however, by which they could raise the issue. Consequently, they were confined to identifying ra-

144. Professor Wildman describes how "privilege . . . has [never] found articulation in the legal vocabulary." WILDMAN, *supra* note 16, at 141.

145. *See Parents Involved in Cmty Sch.*, 551 U.S. at 781 n.30 (Thomas, J. concurring).

146. *See supra* notes 133-138 and accompanying text.

147. *Parents Involved in Cmty. Sch.*, 551 U.S. at 781 n.30 (Thomas, J. concurring).

148. Motion to Dismiss, *supra* note 2, at 46 (stating that "racism is the only plausible explanation for the criminal charges . . . pending" against Vassell). Certainly there was good reason to identify racism as playing a role in the prosecution. After all, "Jason Vassell was the target of a racist hate crime," *Jason's Story*, JUSTICE FOR JASON, http://www.justiceforjason.org/ (last visited Apr. 15, 2012), and yet the DA refused to recognize this fact at any stage in the prosecution. *See* Commonwealth's Opposition, *supra* note 4. The DA described the Commonwealth's "race neutral factual basis for [Vassell's] indictment" as stemming from the "defendant's acts of repeatedly stabbing, *without legal justification or excuse*, two unarmed men." *Id.* at 8 (emphasis added). That Vassell was "terrified" when Bowes and Bosse attacked him—that he believed "if [he didn't] do something, [he would] die"—played no role in the prosecution's handling of the case. Motion to Dismiss, *supra* note 2, at 11 (internal quotations omitted). Recording artist and UMass student Giddens W. Rateau described the racism underlying Vassell's prosecution in the following way: "[Bowes and Bosse] tried to steal his rights . . . / But then Jason saved his life with a pocketknife / But here's the great schism / You look me in my eye and say he's going to prison?" *Justice for Jason Campaign at UMass Amherst*, YOUTUBE at 2:10 (Mar. 5, 2009), http://www.youtube.com/watch?v=W9gnyFvXXh8.

cism as the cause of the differential treatment afforded the participants of the February 3rd altercation.[149]

Before discussing the function of white privilege in *Commonwealth v. Vassell*, this section provides a summary of the court proceedings dealing with Vassell's Motion to Dismiss for selective prosecution. Many of Vassell's arguments allude to white privilege in the same way that the selective enforcement legal standard does: both illuminate the invisible knapsack without ever explicitly naming it or its contents.

1. Jason Vassell's Motion to Dismiss for Selective Prosecution

On December 29, 2008, Vassell's counsel filed a motion to dismiss the charges against him on the grounds of selective prosecution.[150] In the memorandum of law in support of this motion, defense counsel noted that "[p]rior to raising the specter of an impermissible motive in this case, [they had] conducted a rigorous evaluation of the evidence and sought alternative explanations for each questionable exercise of prosecutorial discretion."[151] However, the motion argued, a conclusion that the DA had engaged in race-based selective prosecution was unavoidable.[152] As evidence of this claim, defense counsel argued that Bosse, who was not charged with any crime, could have been charged with four separate felonies "as either a principal or joint venturer with Bowes."[153] At a minimum, Vassell's attorneys argued, Bosse should have been

149. In oral argument for Vassell's Motion for Discovery, Attorney David Hoose explained, "we don't make the[se] allegations lightly. I'm not suggesting for a minute that [the prosecutors have] a Ku Klux Klan flag in their office, or that someone at some point in time said, 'He's black. Let's just prosecute a black person.' Racism is a lot more subtle than that." Hearing on Motion for Discovery before the Honorable Judd Carhart at 12, Commonwealth v. Vassell, HSCR 2008-00056 (Mass. Super. Ct. Feb. 18, 2009) [hereinafter Discovery Hearing]. Although Attorney Hoose may have been referring to less explicit forms of racism such as unconsciously-held bias, see *supra* note 27 and accompanying text, he may also have been alluding to white privilege as a subtler relation to racism.

150. *Lawyers File Motion to Dismiss; Cite Racist Selective Prosecution*, JUSTICE FOR JASON, http://www.justiceforjason.org/motion (last visited Apr. 15, 2012).

151. Motion to Dismiss, *supra* note 2, at 46.

152. *Id.* at 51.

153. *Id.* at 37. The four separate felonies enumerated were: Civil Rights Violation with Bodily Injury, Assault or Battery for Purpose of Intimidation, Entering without Breaking at Night with Intent to Commit a Felony, and Malicious Destruction of Property. *Id.*

prosecuted for five separate misdemeanor offenses.[154] Additionally, the motion asserted that the Commonwealth failed to prosecute Bowes as aggressively as his conduct warranted, which "demonstrated [an] indifference to the fate of Jason Vassell, as well as [to] the safety of other people of color in the community."[155] All this evinced that "the District Attorney [had] engaged in selective prosecution on the basis of race."[156] Accordingly, defense counsel argued that the indictment should have been dismissed.[157]

To further pursue the claim of selective prosecution, Vassell's counsel filed a motion for discovery pursuant to Rule 14 of the Massachusetts Rules of Criminal Procedure.[158] This request became the subject of much dispute, resulting in a review by a single SJC Justice.[159] Finally, on October 7, 2009, a Superior Court Order ruled in favor of Vassell's motion, finding that "[he had] met his burden of showing that the [discovery requests were] material and relevant to his claim of race-based selective prosecution."[160]

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154. *Id.* at 42-43. The five separate misdemeanors enumerated were: Assault and Battery, Threat to Commit a Crime, Disorderly Conduct, Defacement of Injury to State Building, and Trespass on Public Property. *Id.* at 43.

155. *Id.* at 51. Later, defense counsel argued that "the Commonwealth intentionally pulled its punches both before and during the Bowes' [sic] trial in order to avoid casting further doubt on the constitutionality of its prosecution of Mr. Vassell." Motion to Strike, *supra* note 5, at 3. Specifically, defense counsel noted that the Commonwealth had moved to amend the charges against Bowes "[to strike] the words 'with injury.'" *Id.* at 4. By amending the charges, the Commonwealth was free to prosecute Bowes in District, rather than, Superior Court. *Id.* at 5. Additionally, defense counsel called attention to the fact that the Commonwealth assented to Bowes's motion to dismiss the assault and battery charge against him. *Id.* at 5-6. Defense counsel also "moved in limine to exclude video evidence of a drunken Bowes taunting and threatening Mr. Vassell before punching him in the face." *Id.* at 7. Vassell's defense counsel documented other ways in which the Commonwealth appeared to have sabotaged its case against Bowes. *Id.* at 8-18. All this, Vassell's counsel argued, demonstrated "that [the] prosecutors decided that they would rather lose the District Court case against John Bowes than complicate the Superior Court case against Jason Vassell." *Id.* at 7.

156. Motion to Dismiss, *supra* note 2, at 51.

157. *Id.* at 52. In the Commonwealth's Preliminary Memorandum of Law in Opposition to the Defendant's Motion to Dismiss, the prosecution averred that the decision to arrest Jason Vassell was not based on race despite the "regrettable [use of] profanity" by an officer of the UMPD. Commonwealth's Opposition, *supra* note 4, at 12. The DA did *not* argue, however, that the decision to prosecute Vassell was free of race-based taint. Rather, the DA argued that the court should defer to "the decisions . . . of executive officers" to avoid the "unnecessary impair[ment of] the performance of a core executive constitutional function." *Id.* at 9.

158. Motion for Discovery, *supra* note 95.

159. Further Findings and Order at 2, Commonwealth v. Vassell, HSCR 2008-00056 (Mass. Super. Ct. Oct. 7, 2009) [hereinafter Discovery Order].

160. *Id.* at 11.

Despite the DA's effort to characterize Bowes and Bosse as victims,[161] the Superior Court found that "[Vassell's] behavior was sufficiently similar to that of Bowes and Bosse 'in nature, kind and degree' to demonstrate the possibility that his discovery requests might yield information relevant to his claim of selective prosecution."[162] Specifically, the court noted that:

> Vassell was charged with serious offenses in the Superior Court, while Bowes was only charged with arguably less serious offenses which were significantly reduced on motion by the Commonwealth. The Commonwealth's decision not to proceed against

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161. *See* Commonwealth's Opposition, *supra* note 4. The DA objected to defense counsel's portrayal of Bowes and Bosse as similarly situated to Vassell. *Id.* at 10. In its memorandum, the Commonwealth argued that "[Vassell] was the only person armed, and thus the only person inflicting knife wounds . . . Bosse and Bowes were not similarly situated to him." *Id.* The Commonwealth's telling of the events that occurred on February 3, 2008 seems aimed at portraying Bowes and Bosse as having been drawn into the fight rather than having instigated it:

> Bowes and Bosse . . . stopped at the defendant's street level room window to ask for assistance for entry into the building. . . . A verbal argument between the defendant and Bowes ensued. As the men argued, Bowes cursed at the defendant by uttering profanity and racial epithets or slurs. The encounter culminated in one of the defendant's room window panes . . . being broken.

Id. at 4. The memorandum employs the passive voice to describe the broken window, thereby enabling the Commonwealth to avoid addressing the issue of *who* broke the window. The memorandum described the altercation in the lobby in the following way:

> [T]he defendant raised the knife in a threatening manner towards Bowes and Bosse on multiple occasions . . . . Bowes reached over . . . and punched the defendant's upper body to disarm him. . . . The defendant responded by stabbing Bowes repeatedly as he retreated toward the entrance door . . . . Bosse . . . grabbed at the defendant, punching him, to stop him from stabbing Bowes. In response, the defendant stabbed Bosse, repeatedly . . . as Bosse retreated away from the defendant toward the inner security door . . . . No further physical interaction occurred between the men and the defendant left the lower lobby . . . .

Id. at 7. This telling of the events portrays Vassell as the aggressor and Bowes and Bosse as the victims. As such it differs greatly from the account corroborated by multiple eyewitnesses. *See supra* Part I; *see also* Petition for Relief, *supra* note 5. Furthermore, the DA's narrative omits the fact that Bowes and Bosse sought to engage with Vassell after he had fled the room. *See supra* Introduction.

162. Discovery Order, *supra* note 159, at 8. Attorney Hoose argued that "[the black defendant and his white counterparts] don't have to be identically situated. They just have to be similarly situated." Discovery Hearing, *supra* note 149, at 23 When the court issued its discovery request, it stated that the parties were similarly situated for purposes of the discovery request, but did not make a final determination on the issue as it related to the motion to dismiss. *See* Discovery Order, *supra* note 159, at 7. Compare the Superior Court's finding to the Supreme Court of the United States' in *Armstrong* and other selective prosecution cases, which essentially permit "[c]ourts that are hostile to selective prosecution claims [to] always find white comparators dissimilar." Coker, *supra* note 19, at 830.

> Bosse at all, and to reduce the charges against Bowes, despite the evidence against them, while pursuing far more serious charges against Vassell, further supports the reliance and materiality of the discovery sought by Vassell.[163]

Before the Commonwealth had fully met its discovery obligations, the DA offered to dismiss the charges against Vassell if he complied with a pretrial probation order.[164] Vassell accepted the offer and his motion to dismiss was never heard on the merits.[165]

2. Bowes and Bosse as Beneficiaries of White Privilege

White privilege, in the form of benefits conferred upon Bowes and Bosse, is the "flipside of [the] discrimination" experienced by Vassell.[166] In the immediate aftermath of the altercation, officers from the UMPD treated Bowes and Bosse with familiarity and concern.[167] One of the two officers who interviewed Bosse responded to his admission to having had "a few beers"[168] by joking, "I wish I had a few beers . . . ."[169] The second officer playfully admonished Bosse, whose Tom Brady jersey had been taken into evidence, that "[If the Patriots lose the upcoming Super Bowl] we're going to give your name to the *Boston Globe*. It's all John's fault."[170] This familiarity and friendliness was completely absent from the officers' interactions with Vassell. By treating the participants to the altercation in such a disparate manner, the UMPD privileged the white participants over the black participant—disregarding the evidence that Vassell, in fact, was the victim.[171]

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163. Discovery Order, *supra* note 159, at 9.

164. Lowe, *supra* note 39. On August 3, 2010—two and a half years after the February 3rd altercation—Vassell's probationary period ended. Contrada, *supra* note 34. "According to the terms of his agreement, Vassell acknowledged stabbing Bowes and Bosse and was allowed to serve out the 2½-year pre-trial probationary period imposed at his arraignment in 2008. He will have no criminal record because the charges against him are expunged." *Id.*

165. Contrada, *supra* note 34.

166. Wise, *Explaining White Privilege*, *supra* note 133 (explaining how "privilege is the flipside of discrimination. If people of color face discrimination, in housing, employment and elsewhere, then the rest of us are receiving a de facto subsidy, a privilege, an advantage in those realms of daily life. There can be no down without an up . . .").

167. Motion to Dismiss, *supra* note 2, at 14-17.

168. *Id.* at 13.

169. *Id.* at 14.

170. *Id.* at 16.

171. Bowes and Bosse had become repeat offenders, perhaps for the reason that no one had ever addressed their criminal conduct with all due seriousness. Vassell's attorneys asserted that it was clear upon reviewing Bowes's and Bosse's police reports that the men "had been given literally dozens of breaks by law enforcement yet contin-

Certainly evidence of racial bias at this stage of the case is replete. On several occasions, Vassell was subjected to suspicious and hateful conduct by the police.[172] The same officer who joked about wishing he had a few beers referred to Vassell as an "asshole" and "donkey" while discussing the case with another officer.[173] He urged the second officer to interview Vassell while he was still lethargic after receiving medical treatment.[174] Additionally, he speculated that Vassell was a drug dealer without any corroborating evidence.[175] This antagonism flourished in spite of the UMPD's official and self-proclaimed charge to "[ensure] that all members of our community live, work, and learn on campus without concerns about safety."[176] So deep was the officers' racial prejudice that they chose to credit violent, white trespassers over a black member of their community. That Bowes and Bosse benefited from this racial prejudice is another example of white privilege.

White privilege continued to function at the prosecutorial level. The charges made against Bowes were minor compared to those against his victim.[177] Furthermore, by striking "with injury" from Count Two of the complaint against Bowes, the DA granted Bowes another palpable privilege—the benefit of his case remaining in District rather than Superior Court.[178]

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ued to commit random, and sometimes racist, acts of violence." Second Supplemental Memorandum of Law in Support of Motion to Dismiss at 2-3, Commonwealth v. Vassell, HSCR 2008-00056 (Mass. Super. Ct. Jan. 22, 2009) [hereinafter Second Supplemental Motion]. It is likely that the UMPD officers who interviewed Bowes and Bosse have only encouraged their tendency towards lawlessness.

172. Motion to Dismiss, *supra* note 2, at 9-13.

173. *Id.* at 12.

174. *Id.* at 13. In contrast, one of the UMPD officers interviewing Bosse "elected to conclude the interview based on his concern that the painkillers might be affecting Bosse's faculties." *Id.* at 16.

175. *Id.* at 9.

176. UMASS AMHERST POLICE DEPARTMENT, http://www.umass.edu/umpd (last visited Apr. 15, 2012).

177. Motion to Dismiss, *supra* note 2, at 35 ("Vassell face[d] a maximum sentence of thirty years in state prison; Bowes face[d] a maximum sentence of four years in the house of correction; and Bosse [had] not been charged with a single crime.").

178. *Id.* at 35 ("In taking this action, the Commonwealth effectively turned a blind eye to: (i) medical records that show Vassell's nose was broken; (ii) its own application for a criminal complaint which states that Vassell's nose was broken; [and] (iii) . . . a statute that defines bodily injury to include fractures and even something as minor as a subdural hematoma."). *Id.*

The decision to amend Count Two by striking the reference to bodily injury reduced the maximum penalty Bowes faced for that offense from ten years in state prison to one year in the house of correction. *See* MASS. GEN. LAWS. ch. 265 § 37 (2008) ("Any person convicted of violating this provision shall be . . . imprisoned not more than one year . . . ; and if bodily injury results, shall be punished by . . . imprisonment

Vassell's counsel argued in the motion to dismiss that the history of racially motivated violence and general misfeasance exhibited by Bowes and Bosse should have played a role in the DA's decision-making.[179] The same day that the UMPD officer joked with Bosse about his Tom Brady jersey, a Milton, Massachusetts police officer forwarded several reports documenting Bowes's and Bosse's involvement in similar incidents to the UMPD.[180] From these reports, the DA learned that Bowes and Bosse had a long history of engaging in disorderly and hateful conduct.[181] Their past conduct, however, seemed to play no role whatsoever in the DA's decision-making. One would assume that a DA who aggressively prosecutes a student for defending himself against a racially motivated attack would also aggressively prosecute two violent youths

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for not more than ten years . . . ."). This reduction was required to permit the prosecution to proceed in District rather than Superior Court. *See* Commonwealth v. Zawatsky, 670 N.E.2d 969, 972-74 (Mass. App. Ct. 1996) (concluding that the District Court lacked jurisdiction to hear a case involving an allegation of a civil rights violation resulting in bodily injury). Interestingly, the DA did not move to amend Count Three, which charged Bowes with inflicting a bodily injury in the midst of violating Section 39 of Chapter 265 of the Massachusetts General Laws. Under this statute:

> Whoever commits an assault or a battery upon a person . . . with the intent to intimidate such person because of such person's race . . . shall be punished . . . by imprisonment in a house of correction for not more than two and one-half years . . . . Whoever commits a battery in violation of this section and which results in bodily injury shall be punished by . . . imprisonment in the state prison for not more than five years . . . .

MASS. GEN. LAWS ch. 265 §§ 39(a)-(b) (2008). Pursuant to another statute, the District and Superior Courts have dual jurisdiction over "all felonies punishable by imprisonment in the state prison for not more than five years." MASS. GEN. LAWS. ch. 218 § 26 (2008). Accordingly, it appears clear that when the prosecution amended Count Two to remove the allegation of bodily injury it did so for the sole purpose of keeping the case against Bowes in District Court.

This exercise of prosecutorial discretion stood in stark contrast to decision-making which occurred in the case against Vassell. Although the crimes he was charged with committing—two counts of assault and battery with a dangerous weapon resulting in serious bodily injury—could have been prosecuted in District Court, the DA elected to proceed in Superior Court and thereby increased the potential penalty Vassell faced from five years in the house of correction to thirty years in state prison. *See* MASS. GEN. LAWS. ch. 265 § 15A(c)(1) (2008) ("Whoever . . . by means of a dangerous weapon, commits an assault and battery upon another and by such assault and battery causes serious bodily injury . . . shall be punished by imprisonment in the state prison for not more than 15 years *or* in the house of correction for not more than 2 1/2 years . . . .") (emphasis added).

179. Motion to Dismiss, *supra* note 2, at 18.

180. *Id.* at 18-21.

181. *See id.*; Second Supplemental Motion, *supra* note 171, at 3-10 (enumerating close to ten incidents in which Bowes and Bosse allegedly perpetrated violent and sometimes racially-motivated attacks).

for trespassing and attacking the student in his dormitory.[182] Instead, the DA chose to treat the white offenders with kid gloves: another instance of white privilege.

IV. Making White Privilege Visible in the Courtroom

By focusing on whether defendants of color are treated differently because of their race, existing selective enforcement law fails to identify a principal factor contributing to the differential application of criminal laws—white privilege. Professor Wildman describes how antidiscrimination advocates may "focus only on one portion of the power system, the subordinated characteristic, rather than seeing the essential links between domination, subordination, and the resulting privilege."[183] In a similar manner, selective enforcement law has typically focused on a single "portion of the power system"[184]—how defendants are targeted because of their protected characteristics.[185]

Within the legal field, where the goal is the administration of justice, serious shortfalls occur when powerful mechanisms of injustice are kept invisible.[186] Until white privilege is made visible, legal professionals cannot effectively address systemic racial injustice.[187] Professor Wildman writes:

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182. *See* Supplemental Memorandum of Law in Support of Motion to Dismiss at 12, 14, Commonwealth v. Vassell, HSCR 2008-00056 (Mass. Super. Ct. Jan. 16, 2009) [hereinafter Supplemental Motion] (discussing how pursuant to the Prosecution Standards promulgated by the National District Attorneys' Association, the DA "was obliged 'to make a charging determination which appropriately reflected the offense and the offender . . .' [and] because Bosse's criminal conduct both in and outside [Vassell's dormitory] was so repugnant, the District Attorney's refusal to seek criminal charges against him is indefensible") (brackets omitted).

183. Wildman, *supra* note 16, at 19.

184. *Id.*

185. In *Commonwealth v. Franklin*, the defendants argued that they were targeted because of being black. Commonweath v. Franklin, 385 N.E.2d 227, 232 (1978). In *Commonwealth v. King*, the defendants argued that they were targeted because of being female. Commonwealth v. King, 372 N.E.2d 196, 204 (1977). While the function of privilege remains obfuscated, these protected characteristics—race and sex—become the explicit focus of the inquiry. Conversely, an inquiry accounting for privilege would pose the following questions: Why did the police fail to arrest the white members of the Maverick Street Housing Project for their violent acts? Why did the Boston police opt not to arrest male prostitutes and male customers of prostitutes?

186. Wildman, *supra* note 16, at 8 ("[The] failure to acknowledge privilege, to make it visible in legal doctrine, creates a serious gap in legal reasoning rendering law unable to address issues of systemic unfairness."). *See also* Davis, *supra* note 25, at 52 ("[S]ociety has an interest in a fair and nondiscriminatory criminal justice system.").

187. See, for example, Coker, *supra* note 19, at 862 on systemic racial injustice in the administration of criminal laws (discussing "a system that systemically and dispro-

> The rule of law can operate in conjunction with justice only where its substantive content is codified . . . . Only when we discuss what has been invisible can any movement toward justice occur. Examining privilege is a way to make these power systems visible. The rule of law has focused on discriminatory, differential treatment, not on privilege. As a result these systems remain.[188]

Codifying white privilege into the law of selective enforcement is necessary, then, to advance the "movement toward justice."[189] As long as white privilege remains invisible in the courtroom, there will be no incentive for law enforcement to contend with the ways in which it results in selective enforcement. As long as white privilege remains invisible, judges will be unequipped to remediate its effects. As long as white privilege remains invisible, some members of the legal community will continue to imagine that it does not exist.[190] As long as white privilege remains invisible, it will persist.

The next segment of this Note proposes a modification to existing selective enforcement law in Massachusetts and argues that the modification is imperative in order to prevent hostile courts from too readily dismissing selective enforcement claims. A second segment identifies additional benefits that may result from the explicit recognition of white privilege. In conclusion, this Note urges the SJC to modify the law of selective enforcement to account for white privilege.

A. *A Proposed Modification to Massachusetts's Selective Enforcement Law*

Under current Massachusetts law, a defendant wishing to demonstrate selective enforcement "bears the initial burden to present evidence. . . [1] that a broader class of persons than those prosecuted violated the law. . . [2] that failure to prosecute was either consistent or deliberate,. . . and [3] that the decision not to prosecute was based on an impermissible classification."[191] Then, "[once the defendant has] raised a reasonable inference of selective [en-

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portionately burdens communities of color with excesses of law enforcement without many of the benefits").

188. WILDMAN, *supra* note 16, at 146.

189. *Id.*

190. *See, e.g.*, Vargas-Vargas, *supra* note 27, at 56 ("Whites fail to recognize that a legal system that consistently offers and protects white privilege will always seem objective and rational from their perspective.").

191. Commonwealth v. Bernardo B., 900 N.E.2d 834, 843 (Mass. 2009).

forcement] by presenting credible evidence that persons similarly situated to himself have been deliberately or consistently not prosecuted because of their race," the burden shifts to the Commonwealth to "rebut that inference."[192] An implicit acknowledgement of privilege is contained in the phrase, "persons similarly situated to [the defendant who] have been deliberately or consistently *not* prosecuted because of their race."[193] That is, defendants of color are able to demonstrate selective enforcement when they present evidence that white people who committed comparable offenses are *not prosecuted because of their race.* This is white privilege precisely. It would not be such a great leap conceptually for the law to name explicitly that which it already implicitly acknowledges. Privilege, on the tip of the tripartite test's tongue, needs only speaking aloud.

To account for white privilege, this Note advocates that the following language be added to the tripartite test:

> Evidence that persons similarly situated to the defendant have been deliberately or consistently not prosecuted because of their race may include direct or statistical evidence that white offenders were not prosecuted or were prosecuted with less vigor as a result of white privilege—the benefits conferred upon them for no reason other than their skin color.

By permitting defendants to introduce evidence of white privilege in support of their contention that white offenders similarly situated to them have not been prosecuted due to their race, the modification takes the focus off of the defendants' actions and resultant charges, and more appropriately onto the white offenders' actions and law enforcement's failure to bring (appropriate) charges against them. Furthermore, the modification would provide the practical benefit of preventing hostile courts from too readily dismissing selective enforcement claims.

A court more hostile to Jason Vassell's selective prosecution claim might have ruled against him in his discovery request. The focus in that matter was "whether Jonathan Bosse and John Bowes could be considered 'similarly situated' to the defendant."[194] Ultimately, the court was willing to "[find] that Bowes' [sic] and Bosse's

192. Commonwealth v. Lora, 886 N.E.2d 688, 698 (Mass. 2008) (internal quotations omitted).

193. *Id.* (emphasis added).

194. Motion for Discovery, *supra* note 95, at 2. Defense counsel sought discovery from the Commonwealth in furtherance of its selective prosecution claim. A full discussion of the argument counsel made is beyond the scope of this Note.

conduct was sufficiently similar to that of Vassell's to conclude that Vassell [had] made a threshold showing based on credible evidence that he [was] entitled to discovery under Rule 14(a)(2) to investigate his claim of selective prosecution."[195] The court was able to come to this conclusion without naming white privilege. However, "courts hostile to selective prosecution claims may find that any white comparator is not 'similarly situated'" due to the improbability of the offenses being exactly identical in nature, timing, execution, etcetera.[196]

The DA repeatedly made the argument that Bowes and Bosse were not similarly situated to Vassell, because "[he] was the only person armed, and thus the only person inflicting knife wounds."[197] In response, Vassell's attorneys argued that Vassell and his attackers did not need to be "identically situated," only similarly situated.[198] Similarity is an amorphous concept in this context. According to Vassell's attorneys, Bowes and Bosse were similar to Vassell in two ways: they participated in the "same incident" and they "committed serious felonies."[199] However, they were dissimilar to Vassell in one way that became the focal point for the DA: they were not armed.[200] If the court had been hostile—unwilling to take seriously Vassell's claim of selective prosecution—it could have inflated this difference to permit it to find Bowes and Bosse dissimilar to Vassell.[201]

If the law of selective enforcement accounted for white privilege, it would have been harder for a hostile court to dismiss a claim like Vassell's, or, at a minimum, to deny the defendant's discovery requests. Though it was not framed as such, Vassell's preliminary showing actually contained evidence of the sort described in the author's proposed modification: direct and statistical evidence that white offenders were not prosecuted or were prosecuted with less

195. Discovery Order, *supra* note 159, at 9.
196. Coker, *supra* note 19, at 847.
197. Commonwealth's Opposition, *supra* note 4, at 10.
198. Discovery Hearing, *supra* note 149, at 23.
199. *Id.* at 11.
200. Commonwealth's Opposition, *supra* note 4, at 10.
201. *See, e.g.*, Coker, *supra* note 19, at 847-48 (discussing how an Eleventh Circuit case found comparable offenders "not 'similarly situated' because [they] engaged in the conduct only once or twice each while one defendant was alleged to have done so seven times and a second defendant to have done so three times"). *But see* Commonwealth v. Franklin, 385 N.E.2d 227, 234 (Mass. 1978) (noting that "there are common sense distinctions between using firearms and using rocks and firebombs . . . [but w]hen executed with the requisite venom, all are crimes of violence involving the possibility of death or serious bodily injury").

vigor as a result of white privilege. Vassell's direct evidence consisted largely of Bowes's and Bosse's criminal records.[202] Although the two men had long criminal histories—in contrast to Vassell's unsullied record—one was not prosecuted (Bosse) and the other was prosecuted with less vigor (Bowes) than the defendant.[203] Having the benefit of a clean slate even after having made a habit of criminal activity is direct evidence of white privilege.

Vassell also presented statistical evidence of white privilege. He alleged that the UMPD may have had a practice of responding to interracial altercations on the UMass Amherst campus by declining to arrest and/or prosecute the white participants even while arresting and prosecuting participants of color.[204] In support of this allegation, the defense cited the prosecution of Demian Vennell, a black man who came to the aid of another black man whom he observed being violently assaulted by a white mob.[205] Vennell was arrested and charged; none of the white assailants were ever charged.[206] Essentially, Vassell's attorneys argued that the Vennell case demonstrated a statistical likelihood that the UMPD had engaged in or had a practice of engaging in selective enforcement. Acknowledging that they "[did not] know what kind of statistics are available to show how many interracial assaults are dealt with by the [UMPD and DA],"[207] defense counsel argued that the evidence they had presented was sufficient to make a threshold showing in support of additional discovery.[208]

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202. *See supra* notes 171 and 181.

203. *See* Second Supplemental Motion, *supra* note 171, at 14 (discussing how the National District Attorney Association's Prosecution Standards provide that in considering whether to prosecute an offender, the prosecutor should consider "[w]hether the defendant is a first-time offender").

204. Supplemental Motion, *supra* note 182, at 2.

205. Discovery Order, *supra* note 159, at 7-8.

206. *Id.* at 8.

207. Discovery Hearing, *supra* note 149, at 9.

208. As noted previously, the Superior Court agreed that this preliminary showing was sufficient and ordered that the Commonwealth produce:

> 1) all police reports, witness statements, and Grand Jury minutes in the case of *Commonwealth v. Demian Vennell* . . .
>
> 2) any and all documentation showing the number of cases charged in Hampshire County in the past five years of assault and battery, assault and battery with a dangerous weapon, and aggravated assault and battery with a dangerous weapon, where the accused(s) and named victim(s) were of different racial backgrounds; and
>
> 3) any and all documentation concerning the number of cases reported to the Northwest District Attorney in the last five years of civil rights violations or hate crimes, including cases where no formal charges resulted.

Discovery Order, *supra* note 159, at 1.

Vassell's evidence of white privilege would have been sufficient to raise a "reasonable inference"[209] of selective enforcement under the proposed modification, and had he made his discovery motion and motion to dismiss in a court hostile to selective enforcement claims, his claim could not be so easily dismissed. Under the current law, the DA urged the court to consider whether the white offenders were different from the black defendant in any way at all.[210] A hostile court could be easily persuaded by the DA's argument and could find that Bowes and Bosse were sufficiently dissimilar from Vassell so as to defeat his claim. The modification proposed by this Note, however, would make it harder for such a court to readily dismiss a selective enforcement claim on the grounds that members of "a broader class of persons . . . [who] violated the law" are not similarly situated to the defendant.[211]

B. *Additional Benefits Resulting from the Proposed Modification*

This Note has discussed how a failure to acknowledge white privilege in the law of selective enforcement has perpetuated a "serious gap in legal reasoning."[212] Closing this gap is necessary to permit the law of selective enforcement to address racial injustice effectively. However, closing this gap could also lead to benefits outside the law of selective enforcement; it could propel the concept of privilege into new territory—into other areas of law and into white people's consciousnesses.[213]

An explicit acknowledgement of white privilege in the selective enforcement context may result in the courts recognizing *other forms* of privilege[214] and the function of privilege in *other areas* of law. In the area of employment discrimination, for example, when plaintiffs are required to demonstrate discriminatory intent, the law fails to account for the fact that "discrimination has a systemic nature . . . includ[ing] the usually unseen hydra head of privilege."[215]

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209. Commonwealth v. Lora, 886 N.E.2d 688, 698 (Mass. 2008).

210. Commonwealth's Opposition, *supra* note 4, at 10.

211. *Lora*, 886 N.E.2d at 698 (quoting Commonwealth v. Franklin, 385 N.E.2d 227, 233-34 (Mass. 1978).

212. WILDMAN, *supra* note 16, at 8.

213. See *supra* Part III.A on the invisibleness of white privilege to white people.

214. Other forms of privilege include classism, heterosexism, male privilege, and able-ism. *See generally* Kristin Kalsem & Verna L. Williams, *Social Justice Feminism*, 18 UCLA WOMEN'S L.J. 131, 157 (2010) ("Social justice feminism strives to uncover and dismantle [patriarchal social and political structures] . . . such as white privilege, heterosexism, able-ism, and classism.").

215. WILDMAN, *supra* note 16, at 33.

Recognizing privilege in this area of law would result in a more complete "picture of the dynamic of subordination," and would support a legal system better suited to remedy discriminatory conduct in the workplace.[216] Recognizing privilege in any area of the law may force reluctant judges to contend with it rather than resorting to a belittling or (willfully) blind posture.[217]

Furthermore, the formal incorporation of white privilege into the law of selective enforcement could have a powerful effect on our society even outside of the courtroom.[218] When the Supreme Court ruled in 1954 that race-based segregation of public school children violated the Fourteenth Amendment, it based its opinion almost entirely on an argument originating in social theory.[219] The Court reasoned that segregation "generates a feeling of inferiority [amongst black school children] as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[220] Rejecting *Plessy v. Ferguson*'s "separate but equal" doctrine, the Court noted that a plethora of psychological studies and writings had amply documented the "detrimental effect" that segregation had upon black children.[221] By basing its decision on

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216. *Id.* Wildman describes the error in the Supreme Court's analysis in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in the following way:

> [I]t examines only discrimination and ignores privilege. A system of male privilege means that men are setting the standard to which women must conform . . . . An analysis of privilege . . . is necessary to examine the gender power system and how decisions based on it in the workplace harm women.

WILDMAN, *supra* note 16, at 39.

217. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 781-82 (2007) (Thomas, J. concurring).

218. *See generally* Armstrong & Wildman, *supra* note 123 at 672 (discussing how deepening our understanding of race, power, and privilege is necessary "to move this diverse nation closer to the democratic ideal of 'liberty and justice for all' "); Darmer, *supra* note 27, at 132 (emphasizing that achieving social justice requires us to "expos[e] racial disparities, not cover[ ]them up").

219. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

220. *Id.* at 494.

221. *Id.* at 494-95; *see also* Michael W. Combs & Gwendolyn M. Combs, *Revisiting* Brown v. Board of Education*: A Cultural, Historical-Legal, and Political Perspective*, 47 HOW. L.J. 627, 631 (2004) (discussing how "separate but equal . . . reflected and symbolized the historical cultural tradition . . . [in which w]hites were elevated, while African Americans were subordinated"). But see André Douglas Pond Cummings, *A Furious Kinship: Critical Race Theory and the Hip-Hop Nation*, 48 U. LOUISVILLE L. REV. 499, 526-27 (2010) for a discussion on Professor Derrick's Bell's belief "that the *Brown* decision was made not to provide equal opportunity to blacks, but rather to improve the image of the United States in the 1950s as the 'bellwether' nation of equality to Third World nations, in particular to those that supported communism."

The impact of *Brown v. Board of Education* on equality and access to education is beyond the scope of this Note. For discussions on this topic see Maurice R. Dyson, *De*

social and psychological findings, the Court lent a great deal of credibility to the concept of internalized inferiority as stemming from subordination. Similarly, were the courts to rely upon findings developed under the rubric of white privilege social theory in selective enforcement claims, the concept of white privilege may gain the additional traction and acceptance necessary to cause white members of our society to begin to "[i]dentify[ ] and confront[ ] whiteness. . . moving the nation forward toward a more complete realization of racial equality."[222]

CONCLUSION

When something inimical remains invisible to a large group of people, there is very little incentive for members of this group to take any actions to address the harm.[223] White privilege is largely invisible to white people and the courts have never formally acknowledged it in any serious manner.[224] However, as cases like

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Facto Segregation & Group Blindness: Proposals for Narrow Tailoring Under a New Viable State Interest in PICS v. Seattle School District, 77 UMKC L. REV. 697 (2009); Preston C. Green, III et al., *Achieving Racial Equal Educational Opportunity Through School Finance Litigation*, 4 STAN. J. C.R. & C.L. 283 (2008); Peter Halewood, Symposium, *Laying Down the Law: Post-Racialism and the De-Racination Project*, 72 ALB. L. REV. 1047 (2009); Amy Stuart Wells et al., Symposium, *The Space Between School Desegregation Court Orders and Outcomes: The Struggle to Challenge White Privilege*, 90 VA. L. REV. 1721 (2004). *See also* Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1023 (2010) (addressing the "compelling thesis that racialized mass incarceration stems from backlash to the civil rights movement").

222. Armstrong & Wildman, *supra* note 123, at 639.

223. For example, "greenhouse gases are invisible so that humans cannot tell where they come from and how dense they are by sight." Tsung-Sheng Liao, *Surviving by "Eating Coins" or Breathing with No Carbon Dioxide: The Dynamic Balance Model to Resolve the Potential Conflicts Between the WTO and the Kyoto Protocol*, 16 CURRENTS: INT'L TRADE L.J. 28, 42 (2007). As a result, the serious problem of global warming is not observed or taken seriously by many people. *See generally* Jules Lobel & George Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 CHI.-KENT L. REV. 1045 (2005) (discussing how the public may react powerfully to visible environmental crises, such as smog, but ignores invisible environmental threats, such as global warming). In order for the general public to care about global warming, it must be *made* visible. *See* Marc R. Poirier, *A Very Clear Blue Line: Behavioral Economics, Public Choice, Public Art and Sea Level Rise*, 16 SOUTHEASTERN ENVTL. L.J. 83, 92, 98 (2007) (describing "[the public's failure] to behave rationally with regard to information about the risk" of rising sea level, and the resultant blue line projects, which "plac[e] beacons in parks, linked by [a] chalk line," depicting the encroaching sea level in a visible and meaningful way).

224. *See supra* Part III.A and Part III.B.

Commonwealth v. Vassell illustrate, white privilege plays a very real role in the administration of criminal laws.[225]

The Fourteenth Amendment and the Massachusetts Declaration of Rights prohibit law enforcement from applying the law unequally.[226] Yet, the courts cannot effectively address instances of racial injustice in the enforcement of criminal laws until they contend with white privilege, a factor contributing to many instances of selective enforcement. Furthermore, great benefits would likely result in other areas of the law and in society at large if white privilege were acknowledged and made explicit in this context. For these reasons, this Note advocates that the SJC account for white privilege in the law of selective enforcement. One-hundred and twenty-five years ago, the Supreme Court applauded the state of Massachusetts's contribution to the law of equal protection.[227] Massachusetts should, once again, forge ahead in furtherance of equality.

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225. *See supra* Part II.C.2.

226. *See* Commonwealth v. Lora, 886 N.E.2d 688, 692 (Mass. 2008).

227. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[I]n the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not men.'").

* J.D., Western New England University School of Law, 2012. I dedicate this Note to Luke, whose tremendous insight, intellect, and heart continually amaze me.