

THE REGULATORY OFFENCE REVOLUTION IN CRIMINAL JUSTICE: THE EXPANSIVE ROLE OF REGULATORY OFFENCES

TERRY SKOLNIK*

Criminal law scholarship and judicial decisions devote significant attention to crimes, especially the most salient ones. In contrast, regulatory offences receive much less scrutiny and matter much more than we think.

This first part of a two-part article on regulatory offences argues that these offences occupy an ever-expanding role in the criminal justice system. It advances four core arguments. First, police officers may enforce regulatory offences to gather information and produce intelligence. Second, these offences can facilitate pretextual police interventions and investigation cascades. Third, police departments may leverage regulatory offences to generate revenue in a manner that evades political backlash against local governments. Fourth, these offences can contribute to criminal law localism. Together, the volume of regulatory offences — and their expansive role — can also facilitate disparate and discriminatory enforcement practices. Ultimately, this article highlights the various functions of regulatory offences and demonstrates why they matter for reasons we typically overlook.

TABLE OF CONTENTS

I.	INTRODUCTION	778
II.	AN OVERVIEW OF CRIMES AND REGULATORY OFFENCES	779
III.	THE CONSEQUENCES OF REGULATORY OFFENCE VIOLATIONS	783
IV.	REGULATORY OFFENCES, DATA COLLECTION, AND INTELLIGENCE	787
	A. WHY DATA COLLECTION MATTERS	787
	B. REGULATORY OFFENCES, DATA COLLECTION, AND INTELLIGENCE	789
V.	REGULATORY OFFENCES AND PRETEXTUAL CRIMINAL INVESTIGATIONS	792
	A. THE PROBLEM OF PRETEXT	792
	B. REGULATORY OFFENCES, PRETEXT, AND INVESTIGATION CASCADES	794
VI.	REGULATORY OFFENCES AND REVENUE GENERATION	797
VII.	REGULATORY OFFENCES AND CRIMINAL LAW LOCALISM	801

* Interim Executive Director of the Academy for Justice at the Sandra Day O'Connor College of Law at Arizona State Associate (ASU). Visiting research fellow at the Center for Constitutional Design at ASU. Associate Professor, University of Ottawa, Faculty of Law. Co-director of the uOttawa Public Law Centre. I thank Anna Maria Konewka, Allison Christians, Eric Adams, John-Marc Keyes, Colin Grey, Sam Singer, Peter Oliver, Vanessa MacDonnell, and the anonymous reviewers for helpful comments on prior drafts. A previous version of this article was presented at the University of Ottawa and Queen's University Joint Public Law Workshop. All mistakes are my own.



A.	CRIMINAL LAW LOCALISM AND OVERLAPPING JURISDICTION	801
B.	LEGALIZATION, DECRIMINALIZATION, AND CRIMINAL LAW LOCALISM	804
VIII.	CONCLUSION	805

I. INTRODUCTION

Regulatory offences are everywhere. Provincial highway safety codes set out a litany of traffic offences that govern the conduct of motorists, cyclists, and pedestrians.¹ Municipal ordinances (or bylaws) establish norms of lawful behaviour on public property and regulate other forms of conduct at the local level.² These ordinances prohibit garden variety incivilities such as littering, loitering, public urination, jaywalking, and more.³ They also govern what individuals can and cannot lawfully do on their private property.⁴ Bylaws regulate acts such as excessive noise, the lawful placement of structures such as fences, sheds, and air condition units, and the appropriate times to dispose of one's garbage, recycling, and compost bins.⁵

Although regulatory offences may seem like small potatoes, they are not. The *Canadian Charter of Rights and Freedoms* tends to offer greater constitutional protection when individuals are charged with crimes versus regulatory offences.⁶ Some studies suggest that roughly 80 percent of convictions in Canada are for regulatory offence violations.⁷ And the quantity of these offences is staggering. In 1974, the number of federal regulatory offences was estimated to be roughly 20,000.⁸ Nearly one decade later, that number was estimated to have quadrupled to roughly 97,000; a figure that omits the tens of thousands of provincial and municipal regulatory offences that also exist.⁹ Given that prohibitions tend to function as a one-way ratchet — meaning that they are frequently enacted but are more rarely repealed — the quantum of regulatory offences has likely continued to grow.¹⁰

¹ Terry Skolnik, "Policing in the Shadow of Legality: Pretext, Leveraging, and Investigation Cascades" (2023) 60:3 *Osgoode Hall LJ* 505 at 514–15 [Skolnik, "Shadow of Legality"].

² Dennis Baker, "The Temptation of Provincial Criminal Law" (2014) 57:2 *Can Public Administration* 275 at 276 [Baker, "Provincial Criminal Law"]; Terry Skolnik, "How and Why Homeless People Are Regulated Differently" (2018) 43:2 *Queen's LJ* 297 at 298 [Skolnik, "Homeless Regulated Differently"].

³ Terry Skolnik, "Rethinking Homeless People's Punishments" (2019) 22:1 *New Crim L Rev* 73 at 75 [Skolnik, "Homeless People's Punishments"].

⁴ Nicholas Blomley, "The Borrowed View: Privacy, Propriety, and the Entanglements of Property" (2005) 30:4 *Law & Soc Inquiry* 617 at 629–30.

⁵ See e.g. William A Fischel, "Zoning and Land Use Regulation" in Alain Marciano & Giovanni Battista Ramello, eds, *Encyclopedia of Law and Economics* (New York: Springer, 2019) 403 at 403–404.

⁶ Part II, below; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. See also Terry Skolnik, "The Regulatory Offence Revolution in Criminal Justice: The Choice Architecture of Regulatory Offences," 62:1 *Alta L Rev* [forthcoming in September 2024] (specifically, Part IV).

⁷ Scott Requadt, "Regulatory Offences Since *Wholesale Travel*: The Need to Re-Evaluate Sections, 1, 7 and 11(d) of the *Charter*" (1993) 22:3 *Can Bus LJ* 407 at 409.

⁸ Rick Libman, "Is Presuming Guilt for Regulatory Offences Still Constitutional but Wrong? *R v Wholesale Travel Group Inc* and Section 1 of the *Charter of Rights and Freedoms* 20 Years After" (2012) 43:3 *Ottawa L Rev* 455 at 459.

⁹ Rick Libman, *Sentencing Purposes and Principles for Provincial Offences: The Modernization of the Provincial Offences Act* (Ottawa: Law Reform Commission of Ontario, 2010) at 59 [Libman, *Modernization*].

¹⁰ *Ibid.* See e.g. William J Stuntz, "The Pathological Politics of Criminal Law" (2001) 100:3 *Mich L Rev* 505 at 508–509, 546–47 [Stuntz, "Politics of Criminal Law"].

Typically, scholars focus on the following aspects of regulatory offences. Some distinguish the moral difference between crimes and regulatory offences.¹¹ Others explore their respective moral fault requirements.¹² Certain scholars analyze the double jeopardy doctrine for overlapping crimes and regulatory offences.¹³ Others focus on whether regulatory offence penalties constitute a cruel and unusual punishment.¹⁴ Each of these analyses is important and deepens our knowledge. But they may also discount some of the most problematic ways in which regulatory offences are enforced and why it matters.

This is the first part of a two-part article on the regulatory offence revolution in criminal justice. It argues that regulatory offences fulfil an expansive role and are sometimes enforced for reasons that we overlook. It focuses on provincial and municipal offences — such as highway safety codes and municipal bylaws — that police officers enforce routinely. This article advances four core arguments. First, officers may enforce regulatory offences to gather information and generate intelligence.¹⁵ Second, these offences can facilitate pretextual police encounters that snowball into more invasive criminal investigations.¹⁶ Third, regulatory offences may help generate revenue in a manner that avoids the political costs of taxation.¹⁷ Fourth, these offences can contribute to criminal law localism.¹⁸ Together, the volume of regulatory offences — and their expansive role — may also contribute to disparate and discriminatory enforcement practices.

The structure of this article is as follows. Part II sets out the distinction between crimes and regulatory offences. Part III explains the consequences of regulatory offence violations. Parts IV, V, VI, and VII describe the various reasons mentioned above for which regulatory offences are sometimes enforced. Ultimately, this article highlights the expansive role of regulatory offences and shows why they increasingly matter.

II. AN OVERVIEW OF CRIMES AND REGULATORY OFFENCES

The criminal law distinguishes between crimes and regulatory offences.¹⁹ Begin with the former. Crimes govern behaviour that is inherently wrong (or *mala in se*).²⁰ In contrast to torts that are construed as private wrongs, crimes constitute public wrongs they are matters of concern for the community.²¹ The criminalization power falls within the federal

¹¹ Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: Oxford University Press, 2008).

¹² Louise Viau, “La Charte et la nouvelle conception de la *mens rea*” (1995) 26:1 RGD 81 at 86–89.

¹³ Steven Penney, “‘Chartering’ in the Shadow of *Lochner*: *Guindon*, *Goodwin* and the Criminal-Administrative Distinction at the Supreme Court of Canada” (2016) 76 SCLR 307 at 315–24.

¹⁴ Terry Skolnik, “Beyond *Boudreault*: Challenging Choice, Culpability, Punishment” (2019) 50 Crim R (7th) 283 at 291–92.

¹⁵ James Sheptycki, “The Police Intelligence Division-of-Labour” (2017) 27:6 Policing & Society 620 at 626–27. This argument was first advanced in: Terry Skolnik, “Policing, Technology, and the Erosion of Constitutional Rights” (2023) 49:1 Queen’s LJ 40 at 47–48 [Skolnik, “Erosion of Constitutional Rights”]; Skolnik, “Shadow of Legality,” *supra* note 1 at 519–21.

¹⁶ This argument was first advanced in: Skolnik, “Shadow of Legality,” *ibid* at 518–21, 531–33.

¹⁷ Stephanos Bibas, “Small Crimes, Big Injustices” (2019) 117:6 Mich L Rev 1025 at 1029.

¹⁸ Baker, “Provincial Criminal Law,” *supra* note 2 at 276.

¹⁹ *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154 at 216–17 [*Wholesale Travel*].

²⁰ *Ibid*; Terry Skolnik, “Use of Force and Criminalization” (2022) 85:3 Albany L Rev 663 at 681 [Skolnik, “Use of Force and Criminalization”].

²¹ RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart, 2007) at 86; Arthur Ripstein, *Private Wrongs* (Cambridge: Harvard University Press, 2016) at 1.

government's exclusive jurisdiction.²² Criminal law scholarship tends to focus on crimes, especially the most salient ones, such as homicides, violent crimes, property offences, drug offences, sexual offences, and so on.²³ In Canadian criminal law, crimes are divided into three categories: indictable offences, summary conviction offences, and hybrid offences that can be prosecuted as an indictable or summary conviction offence.²⁴ Crimes characteristically require the State to prove the defendant's guilt beyond a reasonable doubt.²⁵ Notably, the prosecution must prove the *actus reus* (the physical element of the crime), the *mens rea* (the mental element of the crime), and the defendant's identity.²⁶

Regulatory offences are different. Unlike crimes, regulatory offences govern risk creating behaviours that are not inherently wrong.²⁷ These offences aim to promote public welfare and are characterized as *mala prohibita*, meaning they are wrong because they are prohibited.²⁸ The federal government, provincial governments, and municipalities all have the jurisdiction to enact regulatory offences.²⁹ Furthermore, provincial governments have the authority to impose imprisonment as a penalty for regulatory offence violations.³⁰ Public welfare offences rose to prominence due to the consequences of increased urbanization, industrialism, and innovation.³¹ These developments created new risks associated with health and sanitation, workplace safety, urban density, and more — contingencies that regulatory offences seek to mitigate.³²

Certain features distinguish crimes from regulatory offences. For one, criminal convictions are construed as more stigmatizing than regulatory ones.³³ Individuals who are convicted of a crime can receive a criminal record that modifies their normative status within the community.³⁴ Criminal convictions signal that an individual transgressed society's most sacrosanct norms.³⁵ Furthermore, individuals who are convicted of crimes are often branded

²² *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, Appendix II, No 5; Joseph J Arvay, "The Criminal Law Power in the Constitution: And Then Came *McNeil* and *Dupond*" (1979) 11:1 *Ottawa L Rev* 1 at 1.

²³ Stuntz, "Politics of Criminal Law," *supra* note 10 at 512.

²⁴ *R v Dudley*, 2009 SCC 58 at paras 14–15; Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada*, 3rd ed (Toronto: LexisNexis, 2022) at 13–14.

²⁵ *R v Lifchus*, [1997] 3 SCR 320 [*Lifchus*]; *R v JHS*, 2008 SCC 30 at para 13.

²⁶ *R v ADH*, 2013 SCC 28 at para 1 [*ADH*]; Alan N Young, "Done Nothing Wrong: Fundamental Justice and the Minimum Content of Criminal Law" (2008) 40 *SCLR* 441 at 486.

²⁷ *Wholesale Travel*, *supra* note 19 at 216–17; Philip Pettit, "Criminalization in Republican Theory" in RA Duff et al, eds, *Criminalization: The Political Morality of Criminal Law* (Oxford: Oxford University Press, 2014) 132 at 143.

²⁸ *Wholesale Travel*, *ibid*; AP Simester & Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford: Hart, 2011) at 24–25.

²⁹ Rick Libman, "The Regulatory Cycle and its Role in Shaping Purposes and Principles of Sentencing for Regulatory Offences" (2012) 59:1 *Crim LQ* 126 at 127.

³⁰ *Constitution Act 1867*, *supra* note 22, s 92(15).

³¹ Kernaghan R Webb, "Regulatory Offences, the Mental Element and the *Charter*: Rough Road Ahead" (1989) 21:2 *Ottawa L Rev* 419 at 427.

³² *Ibid*; *Wholesale Travel*, *supra* note 19 at 216–17.

³³ Marie Comiskey, "Justice Peter de Carteret Cory and His Charter Approach to Regulatory Offences" (2007) 65:2 *UT Fac L Rev* 77 at 85. However, many observe that the notion of stigma is not a valuable way to distinguish regulatory offences from crimes: see e.g. Chris Tollefson, "Ideologies Clashing: Corporations, Criminal Law, and the Regulatory Offence" (1991) 29:4 *Osgoode Hall LJ* 705 at 730; Richard Glover, "Regulatory Offences and Reverse Burdens: The 'Licensing Approach'" (2007) 71:3 *J Crim L* 259 at 266–67.

³⁴ See e.g. James B Jacobs, *The Eternal Criminal Record* (Cambridge: Harvard University Press, 2015) at 4.

³⁵ Skolnik, "Use of Force and Criminalization," *supra* note 20 at 681.

as criminals.³⁶ Punishments such as incarceration and probation are generally associated with criminal convictions and exemplify the moral gravity of the defendant's conduct.³⁷

In contrast, regulatory offence violations are perceived to import less stigma. For instance, in *R. v. Wholesale Travel Group*, Justice Cory observed that a regulatory offence conviction signals a failure to meet the requisite standard of care rather than a transgression of society's most fundamental norms.³⁸ Unlike criminal convictions, regulatory offence violations do not lead to a criminal record.³⁹ Instead, they typically result in fines rather than imprisonment or probation.⁴⁰

Second, the prosecution must prove the defendant's moral fault (or *mens rea*) beyond a reasonable doubt to secure a criminal conviction, whereas proof of moral fault is not required for a regulatory offence conviction.⁴¹ Depending on the criminal offence, the prosecution must establish the defendant's subjective *mens rea* — meaning their intent, recklessness, knowledge, or wilful blindness, or objective *mens rea* — meaning that their conduct constituted a marked departure from that of a reasonable person in the same circumstances.⁴² In contrast, regulatory offences rarely require proof of *mens rea* to secure a conviction.⁴³ Regulatory offences are classified into three categories: strict liability offences, absolute liability offences, and *mens rea* offences.⁴⁴ Regulatory offences are presumed to impose strict liability, unless the legislator clearly indicates that the offence imposes absolute liability or a *mens rea* requirement.⁴⁵ Although strict liability offences require the prosecution to only prove the *actus reus* of the offence, the defendant can exculpate themselves by proving their due diligence or a mistake of fact.⁴⁶ Absolute liability offences, for their part, only require the prosecution to prove the *actus reus* of the offence.⁴⁷ Defendants cannot establish their due diligence or a mistake of fact to exculpate themselves from an absolute liability offence.⁴⁸ The minority of regulatory offences impose a *mens rea* requirement.⁴⁹

³⁶ James B Jacobs & Elena Larrauri, "Are Criminal Convictions a Public Matter? The USA and Spain" (2012) 14:1 Punishment & Society 3 at 3–4.

³⁷ See e.g. Paul J Larkin Jr, "Strict Liability Offences, Incarceration, and the Cruel and Unusual Punishments Clause" (2014) 37:3 Harv JL & Pub Pol'y 1065 at 1115–16 (describing how punishments such as incarceration reflect society's perception regarding the reprehensibility of certain conduct).

³⁸ Justice Cory's exact quote is: "The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care" (Comiskey, *supra* note 33 at 85, citing *Wholesale Travel*, *supra* note 19 at 219).

³⁹ *Contraventions Act*, SC 1992, c 47, ss 4, 63, 64.

⁴⁰ Rick Libman, "Sentencing Purposes and Principles for Regulatory Offences: A New Approach for Regulatory Justice" (2011) 15:3 Can Crim L Rev 359 at 368.

⁴¹ *R v Brown*, 2022 SCC 18 at para 90 [*Brown SCC*]; *R v Sault Ste Marie*, [1978] 2 SCR 1299 at 1326 [*Sault Ste Marie*]; GL Peiris, "Strict Liability in Commonwealth Criminal Law" (1983) 3:2 LS 117 at 124.

⁴² *ADH*, *supra* note 26 at paras 15–16; Terry Skolnik, "Objective *Mens Rea* Revisited" (2017) 22 Can Crim L Rev 307 at 310–12.

⁴³ Kernaghan Webb, "Controlling Corporate Misconduct Through Regulatory Offences: The Canadian Experience" in Frank Pearce & Lauren Snyder, eds, *Corporate Crime: Contemporary Debates* (Toronto: University of Toronto Press, 1995) 339 at 340–41 [Webb, "Controlling Corporate Misconduct"] (observing that most regulatory offences are absolute or strict liability).

⁴⁴ *Sault Ste Marie*, *supra* note 41 at 1326.

⁴⁵ *Lévis (City) v Tétreault*, 2006 SCC 12 at paras 14–18.

⁴⁶ *Sault Ste Marie*, *supra* note 41 at 1326.

⁴⁷ *Ibid* at 1326–27.

⁴⁸ *Ibid*.

⁴⁹ Webb, "Controlling Corporate Misconduct," *supra* note 43 at 340–41.

Third, the onus and burden of proof differ for crimes and regulatory offences. In a criminal trial, the prosecution has the burden to prove the defendant's guilt beyond a reasonable doubt.⁵⁰ Defendants who invoke certain defenses — automatism, mental disorder, and extreme intoxication — must prove their validity on the balance of probabilities for the defense to succeed.⁵¹ Yet these defenses are invoked somewhat exceptionally and succeed in the minority of criminal prosecutions.⁵²

Strict liability regulatory offences operate differently. The prosecution is only required to prove the *actus reus* of these offences beyond a reasonable doubt to secure a conviction.⁵³ Defendants who are charged with a strict liability offence must prove their due diligence or a mistake of fact on the balance of probabilities to be acquitted.⁵⁴ Unlike mental disorder, automatism, and extreme intoxication, the defense of due diligence can apply to most prosecutions for a strict liability offence. For this reason, reverse onus defenses are relatively common in regulatory offence prosecutions, and defendants more frequently bear the burden to exculpate themselves on the balance of probabilities.

Crimes and regulatory offences also share certain features. For one, both forms of regulation operate like a one-way ratchet.⁵⁵ The volume of crimes and public welfare offences tends to grow rather than shrink.⁵⁶ Even conduct that is legalized or decriminalized can be subject to relatively heavy regulation (the legalization of marijuana and medical assisted dying are examples).⁵⁷

Furthermore, crimes and regulatory offences can regulate behaviour in an overlapping fashion.⁵⁸ Take the example of motor vehicle offences. Depending on the circumstances, speeding can result in a criminal charge for dangerous driving or a hefty regulatory fine under a province's traffic code.⁵⁹ Or, consider the overlapping nature of financial crimes.⁶⁰

⁵⁰ *Lifchus*, *supra* note 25.

⁵¹ *Criminal Code*, RSC 1985, c C-46, s 16(3) (reverse onus for mental disorder); *R v Daviault*, [1994] 3 SCR 63 at 102 (reverse onus for extreme intoxication); *Brown SCC*, *supra* note 41 at para 56 (also reverse onus for extreme intoxication); *R v Stone*, [1999] 2 SCR 290 at para 179 (reverse onus for automatism).

⁵² Florence Ashley, “Nuancing Feminist Perspectives on the Voluntary Intoxication Defence” (2020) 43:5 *Man LJ* 65 at 68 (discussing how extreme intoxication rarely succeeds); Colton Fehr, “Automatism and the Burden of Proof: An Alternative Approach” (2020) 25:2 *Can Crim L Rev* 115 at 121 (discussing how automatism claims are rare). Note that mental disorder claims are invoked more frequently than automatism and extreme intoxication.

⁵³ *Sault Ste Marie*, *supra* note 41 at 1326–27.

⁵⁴ *Ibid.*

⁵⁵ Stuntz, “Politics of Criminal Law,” *supra* note 10 at 501; Stephen Smith, “Overcoming Overcriminalization” (2013) 102:3 *J Crim L & Criminology* 537 at 576; Brenner M Fissell, “Against Criminal Law Localism” (2020) 81:4 *Md L Rev* 1119 at 1138–43.

⁵⁶ Erik Luna, “The Overcriminalization Phenomenon” (2005) 54:3 *Am U L Rev* 703 at 718.

⁵⁷ See e.g. Barbara Pesut et al, “Medical Assistance in Dying: A Review of Canadian Nursing Regulatory Documents” (2019) 20:3 *Policy, Politics, & Nursing Practice* 113 at 115–16; Jocelyn Downie & Udo Schuklenk, “Social Determinants of Health and Slippery Slopes in Assisted Dying Debates: Lessons from Canada” (2021) 47:10 *J Medical Ethics* 662 at 663–65; S Lancione et al, “Non-Medical Cannabis in North America: An Overview of Regulatory Approaches” (2020) 178 *Public Health* 7 at 10–12.

⁵⁸ Peter S Spiro, “Narrowing the Gap Between Regulatory and Criminal Offences in Canada” (2013) at 4 [unpublished], online: SSRN [perma.cc/8WKV-Q77T]

⁵⁹ See e.g. *Criminal Code*, *supra* note 51, s 320.13; *Highway Safety Code*, CQLR c C-24.2, s 516.1.

⁶⁰ See e.g. Lucian E Dervan, “White Collar Overcriminalization: Deterrence, Plea Bargaining, and the Loss of Innocence” (2013) 101:4 *Ky LJ* 723 at 723; Todd Haugh, “The Criminalization of Compliance” (2017) 92:3 *Notre Dame L Rev* 1215 at 1218, 1224, 1235.

Complex financial scams can give rise to fraud charges under the *Criminal Code* or a regulatory offence prosecution under provincial securities regulation.⁶¹

Lastly, criminal and regulatory convictions can result in harsh punishments and significant collateral consequences (more on this below). Regulatory offence violations can lead to fines that exceed \$1,000,000.⁶² Provinces have the jurisdiction to impose imprisonment when individuals are convicted of such offences.⁶³ Furthermore, much like crimes, regulatory infractions can result in arrests, searches and seizures, and other collateral consequences — such as civil asset forfeiture, driver’s licence suspensions, and more.⁶⁴ Despite their differences, crimes and regulatory offences impact individuals’ lives significantly.

III. THE CONSEQUENCES OF REGULATORY OFFENCE VIOLATIONS

Although scholars tend to focus on the effects of criminal convictions, regulatory offence violations can result in important consequences that evade constitutional scrutiny.⁶⁵ To illustrate this point, consider first the effects of a criminal conviction.⁶⁶ A criminal record can decrease access to housing,⁶⁷ reduce employment prospects,⁶⁸ and limit the capacity to travel internationally.⁶⁹ These adverse consequences also increase the prospect of future contact with the criminal justice system.⁷⁰ Furthermore, criminal convictions can result in the loss of child custody,⁷¹ deportation,⁷² and inadmissibility to sit on a jury.⁷³

⁶¹ See e.g. *Criminal Code*, *supra* note 51, s 380; *Securities Act*, CQLR c V-1.1, s 199.1; *Securities Act*, RSO 1990, c S-5, s 126.1 [*Ontario Securities Act*].

⁶² *Ontario Securities Act*, *ibid.*, ss 122, 127.

⁶³ *Constitution Act 1867*, *supra* note 22, s 92(15).

⁶⁴ *Code of Penal Procedure*, CQLR c C-25.1, ss 98, 99, 74, 75, 330, 364 (sections 98 and 99 relate to search warrants, section 74 and 75 relate to the power of arrest, section 330 relates to civil asset forfeiture, and section 364 relates to driver’s licence suspensions). See also Terry Skolnik, “Two Criminal Justice Systems” (2023) 56:1 UBC L Rev 285 at 289–91 [Skolnik, “Two Criminal Justice Systems”].

⁶⁵ The arguments in Part III were first advanced in: Skolnik, “Two Criminal Justice Systems,” *ibid.* Furthermore, the arguments and sources cited in this paragraph are taken directly from Skolnik, “Two Criminal Justice Systems,” *ibid.*

⁶⁶ See e.g. Jacobs, *supra* note 34 at 227–301; Devah Pager, “The Mark of a Criminal Record” (2003) 108:5 *American J Sociology* 937; Peter Leasure & Tara Martin, “Criminal Records and Housing: An Experimental Study” (2017) 13:4 *J Experimental Criminology* 527.

⁶⁷ Peter Leasure, “Securing Private Housing with a Criminal Record” (2019) 58:1 *J Offender Rehabilitation* 30 at 31; David Thacher, “The Rise of Criminal Background Screening in Rental Housing” (2008) 33:1 *Law & Soc Inquiry* 5 at 12–13.

⁶⁸ Amanda Agan & Sonja Starr, “Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment” (2018) 133:1 *Quarterly J Economics* 191 at 203–206; Amanda Agan & Sonja Starr, “The Effect of Criminal Records on Access to Employment” (2017) 107:5 *American Economic Rev* 560 at 563–64; Sarah Esther Lageson, Mike Vuolo & Christopher Uggen, “Legal Ambiguity in Managerial Assessments of Criminal Records” (2015) 40:1 *Law & Soc Inquiry* 175 at 181, 196.

⁶⁹ James B Jacobs & Dimitra Blitsa, “Sharing Criminal Records: The United States, the European Union and Interpol Compared” (2008) 30:2 *Loy LA Intl & Comp L Rev* 125 at 146, 151–52; Samantha McAleese & Catherine Latimer, *Reforming the Criminal Records Act* (Ottawa: John Howard Society, 2017) at 6 [McAleese & Latimer, *Reforming the Criminal Records Act*].

⁷⁰ Faith E Lutze, Jeffrey W Rosky & Zachary K Hamilton, “Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State’s Reentry Housing Program for High Risk Offenders” (2014) 41:4 *Crim Justice & Behavior* 471 at 484–85.

⁷¹ McAleese & Latimer, *Reforming the Criminal Records Act*, *supra* note 69 at 5.

⁷² Jennifer Koshan, Janet Mosher & Wanda Wieggers, “The Costs of Justice in Domestic Violence Cases: Mapping Canadian Law and Policy” in Trevor CW Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 149 at 154; Souheil Benslimane & David Moffette, “Continuing the Dialogue on the Canadian Carceral State: The Double Punishment of Criminal Inadmissibility for Immigrants” (2019) 28:1 *J Prisoners on Prisons* 44 at 46, 48–51.

⁷³ Keith Hogg, “Seeing Justice Done: Increasing Indigenous Representation on Canadian Juries” (2021) 26 *Appeal* 51 at 60. See e.g. *Juries Act*, RSO 1990, c J.3, s 4.

Prior criminal convictions adversely impact defendants during trials. Individuals who testify in their own defense can be cross-examined on their criminal record, which can undermine their credibility and increase their likelihood of conviction.⁷⁴ Defendants — including factually innocent ones — may refuse to testify for this reason.⁷⁵ Yet defendants who choose to remain silent to avoid such a cross-examination are more likely to be convicted than those who testify in their own defense.⁷⁶ Prior criminal convictions also justify sentence enhancements.⁷⁷

Regulatory offence convictions can also impose significant collateral consequences. First, the financial penalties, mandatory fees, and surcharges associated with regulatory offences can entrench individuals in poverty and homelessness.⁷⁸ In the city of Montreal, some unhoused persons have accumulated tens of thousands of dollars' worth of fines that stem from regulatory offence violations.⁷⁹ A significant portion of these fines were issued for conduct such as public intoxication, sleeping in a subway station, or loitering.⁸⁰ Certain studies indicate that most unhoused persons cannot afford to pay these fines.⁸¹

Unpaid fines generate other downstream consequences. Individuals may be charged additional fees for non-payment.⁸² The State may emit arrest warrants or warrants of committal against defendants who do not pay their fines.⁸³ Criminal justice debts can also be disclosed to consumer reporting agencies, which can harm a person's credit rating and decrease their capacity to secure housing or financial loans.⁸⁴ Some jurisdictions convert unpaid fines into default civil judgments that can be executed years later.⁸⁵ Criminal justice debt can result in driver's licence suspensions, which preclude certain forms of employment — such as being a rideshare driver, delivery person, or heavy machinery operator — and can

⁷⁴ *Canada Evidence Act*, RSC 1985, c C-5, s 12; *R v Corbett*, [1988] 1 SCR 670; Theodore Eisenberg & Valerie P Hans, "Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes" (2009) 94:6 *Cornell L Rev* 1353 at 1358–64.

⁷⁵ John H Blume, "The Dilemma of the Criminal Defendant with a Prior Record: Lessons from the Wrongfully Convicted" (2008) 5:3 *J Empirical Leg Stud* 477 at 480–81.

⁷⁶ Jeffrey Bellin, "The Silence Penalty" (2018) 103:2 *Iowa L Rev* 395 at 407–10; Alan D Hornstein, "Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction" (1997) 42:1 *Vill L Rev* 1 at 1–2.

⁷⁷ Rhys Hester et al, "Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences" (2018) 47 *Crime & Justice* 209 at 210.

⁷⁸ Skolnik, "Homeless People's Punishments," *supra* note 3 at 81–84. See also Terry Skolnik, *Homelessness, Liberty and Property* (Cambridge: Cambridge University Press), c 6 [forthcoming in 2024].

⁷⁹ Céline Bellot & Marie-Ève Sylvestre, "La judiciarisation de l'itinérance à Montréal: les dérives sécuritaires de la gestion pénale de la pauvreté" (2017) 47 *RGD* 11 at 31–34 [Bellot & Sylvestre, "La judiciarisation de l'itinérance à Montréal"].

⁸⁰ *Ibid* at 23.

⁸¹ Catherine T Chesnay, Céline Bellot & Marie-Ève Sylvestre, "Taming Disorderly People One Ticket at a Time: The Penalization of Homelessness in Ontario and British Columbia" (2013) 55:2 *Can J Corr* 161 at 175–76.

⁸² Beth A Colgan, "The Excessive Fines Clause: Challenging the Modern Debtors' Prison" (2018) 65 *UCLA L Rev* 2 at 35–40; Stephanie Ben-Ishai & Arash Nayerahmadi, "Over-Indebted Criminals in Canada" (2019) 42:4 *Man LJ* 207 at 211–14.

⁸³ Marilyn Coupennie & Édith Perrault, "De la rue à la prison et de la prison à la rue: une analyse du caractère cruel et inusité de l'emprisonnement pour non-paiement d'amendes des personnes en situation d'itinérance" (2020) 50:1 *RGD* 285 at 296.

⁸⁴ Chesnay, Bellot & Sylvestre, *supra* note 81 at 176; Marie-Eve Sylvestre & Céline Bellot, "Challenging Discriminatory and Punitive Responses to Homelessness in Canada" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) at 182–83 [Sylvestre & Bellot, "Challenging Discriminatory and Punitive Responses"].

⁸⁵ Chesnay, Bellot & Sylvestre, *ibid* at 176.

lengthen one's commute to work.⁸⁶ Driver's licence suspensions lead to unemployment for individuals who live in cities that lack public transportation infrastructure.⁸⁷

The quantum of fines can decrease individuals' access to housing and hinder the fulfilment of their basic needs.⁸⁸ During the COVID-19 pandemic, unhoused persons in Montreal received fines that ranged between \$1,000–\$6,000 for violating physical distancing laws.⁸⁹ Yet in 2020, the average cost of rent for a one-bedroom apartment in Montreal was \$810 per month.⁹⁰ Other laws impose similarly harsh fines. Ontario's *Safe Streets Act* punishes squeegeeing and panhandling harshly, and imposes fines of up to \$500 for a first offence, and up to \$1,000 and six months of imprisonment for a second offence.⁹¹ Individuals have received thousands of dollars of fines that placed them in a precarious position: pay the fine, or pay for their rent and other necessities.⁹² Certain empirical studies show that individuals pay their criminal justice debts rather than fulfil their basic needs, such as buying food or medication.⁹³

Some cities have jailed impecunious persons who could not afford to pay their criminal justice debts — an unconstitutional practice that skewed against impecunious and non-white persons.⁹⁴ Historically, in common law England, individuals could be incarcerated for unpaid debts.⁹⁵ In *R. v. Wu*,⁹⁶ the Supreme Court of Canada affirmed that the State cannot imprison indigent persons for unpaid fines that they cannot afford to pay. Yet indigent defendants continued to be imprisoned for debt despite the Supreme Court's admonition. For instance, until 2017, the city of Val d'Or imprisoned impecunious persons who could not afford to pay their debts, while Quebec City ended that practice in 2018.⁹⁷ Research has shown that 100 percent of indigent individuals who were imprisoned for unpaid fines in Val d'Or were Indigenous.⁹⁸ Similarly, as late as 2023, the city of Gatineau imprisoned unhoused persons

⁸⁶ Ben-Ishai & Nayerahmadi, *supra* note 82 at 213.

⁸⁷ Torie Atkinson, "A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons" (2016) 51:1 Harv CR-CLL Rev 189 at 218–19.

⁸⁸ Colgan, *supra* note 82 at 8.

⁸⁹ Selena Ross, "After Man's Death, Quebec Premier Says No to Curfew Exception, Claiming Others Would Pose as Homeless," *CTV News* (19 January 2021), online: [perma.cc/K2LZ-UAL3]; Jennifer Yoon, "Life After Curfew for Montreal's Homeless Means Lineups, Fear of Fines and Few Empty Beds," *CBC News* (21 January 2021), online: [perma.cc/FL5B-4Y2F].

⁹⁰ Canada Mortgage & Housing Corporation, *Rental Market Report: Canada and Selected Markets* (CMHC, January 2021) at 123.

⁹¹ Jackie Esmonde, "Criminalizing Poverty: The Criminal Law Power and the *Safe Streets Act*" (2002) 17 *J.L. & Soc. Pol'y* 63 at 71; *Safe Streets Act, 1999*, SO 1999, c 8, s 5.

⁹² Bill O'Grady, Stephen Gaetz & Kristy Buccieri, "Tickets ... and More Tickets: A Case Study of the Enforcement of the Ontario Safe Streets Act" (2013) 39:4 *Can Pub Pol'y* 541 at 554 (discussing how some individuals received many tickets); Chesnay, Bellot & Sylvestre, *supra* note 81 at 172.

⁹³ Colgan, *supra* note 82 at 8.

⁹⁴ Bellot & Sylvestre, "La judiciarisation de l'itinérance à Montréal," *supra* note 79 at 39 (noting that the City of Montreal imprisoned individuals for unpaid debts prior to 2004); Coupienne & Perrault, *supra* note 83 at 287 (noting that Quebec City ceased imprisoning impecunious persons for unpaid criminal justice debt in 2018).

⁹⁵ Christopher D Hampson, "The New American Debtors' Prisons" (2016) 44:1 *Am J Crim L* 1 at 15–18.

⁹⁶ 2003 SCC 73 at paras 2–3.

⁹⁷ Coupienne & Perrault, *supra* note 83 at 287; *Public Inquiry Commission on Relations Between Indigenous Peoples and Certain Public Services in Québec: Listening, Reconciliation and Progress: Final Report* (Quebec: Government of Quebec, 2019) at 318.

⁹⁸ Coupienne & Perrault, *ibid* at 288.

who could not afford to pay their fines (the City suspended the practice in mid-2023 following a class action lawsuit).⁹⁹

Second, regulatory offence violations can snowball into more intrusive criminal investigations that result in arrests, searches, and charges.¹⁰⁰ Traffic stops are an example. Police officers may pull over a vehicle for some low-level regulatory offence violation, such as failing to activate one's turn signal or having a burnt-out licence plate light.¹⁰¹ The officer can then run the driver's information through a police database, which reveals that they are sought by warrant or are in breach of their bail or parole conditions.¹⁰² In other cases, an officer may notice that the driver is impaired or that the vehicle contains narcotics or weapons. This sensory information may provide officers with the requisite grounds to arrest the driver and search them and their vehicle incidental to arrest.¹⁰³ Some provinces also authorize police officers to search a vehicle and its occupants when the vehicle contains improperly stored cannabis.¹⁰⁴ These searches may reveal unlawful objects that officers would not otherwise discover.¹⁰⁵

Furthermore, regulatory offence violations can also lead to police encounters that result in use of force incidents, injuries, and death.¹⁰⁶ Each police encounter creates a risk that individuals will not comply with police demands, or that officers will believe mistakenly that the individual constitutes a threat. Officers may escalate force when individuals are not cooperative or when they believe that the suspect is reaching for a weapon.¹⁰⁷

Certain salient civilian injuries or deaths began with a proactive police encounter related to a regulatory offence violation.¹⁰⁸ For instance, in the city of Montreal, Fredy Villanueva was killed by a police officer during a proactive encounter that escalated rapidly into a physical altercation.¹⁰⁹ One of the officers ultimately shot and killed Villanueva.¹¹⁰ The incident was highly mediatized and resulted in a riot and public protests.¹¹¹ The initial reason for the police intervention: a low-level regulatory offence violation. Notably, the deceased

⁹⁹ Julien David-Pelletier, "Itinérance et emprisonnement: Québec rappelle les cours municipales à l'ordre," *Radio-Canada* (7 February 2023), online: [perma.cc/2WQD-H4TH]; Julien David-Pelletier, "La Ville de Gatineau poursuivie au nom de personnes en situation d'itinérance," *Radio-Canada* (23 March 2023), online: [perma.cc/Y7FQ-AZHE]; Julien David-Pelletier, "Personnes sans-abri: le tribunal suspend 1600 mandats d'emprisonnement à Gatineau," *Radio-Canada* (17 April 2023), online: [perma.cc/Q72H-TNBS].

¹⁰⁰ This argument was first advanced in Skolnik, "Shadow of Legality," *supra* note 1 at 531–33.

¹⁰¹ *Ibid*; *Highway Traffic Act*, RSO 1990, c H.8, ss 142, 62(19) (section 142 deals with turn signals, and section 62(19) deals with licence plate lights).

¹⁰² Skolnik, "Shadow of Legality," *supra* note 1 at 518–19; Skolnik, "Two Criminal Justice Systems," *supra* note 64 at 294; Skolnik, "Erosion of Constitutional Rights," *supra* note 15 at 47–48.

¹⁰³ Skolnik, "Shadow of Legality," *ibid* at 520; Skolnik, "Two Criminal Justice Systems," *ibid* at 296; Skolnik, "Erosion of Constitutional Rights," *ibid* at 53.

¹⁰⁴ *Cannabis Control Act, 2017*, SO 2017, c 26, Schedule 1, s 12.

¹⁰⁵ See e.g. *R v Williams*, 2021 ONCJ 630 at paras 2–20.

¹⁰⁶ Skolnik, "Use of Force and Criminalization," *supra* note 20 at 663, 668.

¹⁰⁷ *Ibid*.

¹⁰⁸ Jon Woodward, "Probe Ordered After Witnesses Say Police Struck Cyclist with Car During Pursuit Over Helmet Bylaw," *CTV News* (12 August 2020), online: [perma.cc/X77M-UZRN].

¹⁰⁹ Ted Rutland, "Profiling the Future: The Long Struggle Against Police Racial Profiling in Montreal" (2020) 50:3 *American Rev Can Studies* 270 at 283–84.

¹¹⁰ *Ibid*.

¹¹¹ Paul Eid, Johanne Magloire & Michèle Turenne, *Racial Profiling and Systemic Discrimination of Racialized Youth: Report of the Consultation on Racial Profiling and its Consequences* (Montreal: Commission des droits de la personne et des droits de la jeunesse, 2011) at 26.

and his friends violated a municipal bylaw because they were playing dice and gambling in a public park.¹¹²

IV. REGULATORY OFFENCES, DATA COLLECTION, AND INTELLIGENCE

The role of regulatory offences continues to expand. Their purposes have grown from risk prevention and the regulation of discrete spheres of activity — driving, occupational safety, sanitation and so on — into a vital policing tool that serves new purposes and raises important concerns. As discussed more below, regulatory offences can be used to gather data and generate intelligence, facilitate pretextual criminal interventions that result in investigation cascades, raise revenue, and localize criminal law. Moreover, the volume of regulatory offences and their expansive scope can contribute to abusive and discriminatory enforcement practices.

A. WHY DATA COLLECTION MATTERS

Police officers may enforce regulatory offences to acquire data and produce intelligence.¹¹³ When enforcing regulatory offences, officers can identify individuals and gather valuable information.¹¹⁴ During a traffic stop, officers may identify the driver and passenger, which confirms that both individuals associate with one another and can help pin them as accomplices in a future criminal investigation.¹¹⁵ Traffic stops help officers identify whether a vehicle's owner is also its driver — data that may be relevant to show that a certain individual had the care and control of a particular vehicle.¹¹⁶ Moreover, traffic stop data can provide information about an individuals' patterns: where, when, and with whom they travel. This data can offer circumstantial evidence that links a defendant to certain places, periods, and people. Officers may also collect data during proactive police encounters with pedestrians. Officers may identify individuals and document their specific characteristics,

¹¹² Marie-Ève Sylvestre, "Quand le problème, c'est aussi la solution: les gangs de rue et la multiplication des systèmes normatifs de prise en charge pénale" (2010) 40:1 RGD 179 at 194, citing *Parks Regulation*, CQLR c P-3, s 6.

¹¹³ The arguments in Part IV.A were first advanced in the following articles: Skolnik, "Shadow of Legality," *supra* note 1 at 519; Skolnik, "Two Criminal Justice Systems," *supra* note 64 at 299–304; Skolnik, "Erosion of Constitutional Rights," *supra* note 15 at 47–48. See also Willard M Oliver, "The Fourth Era of Policing: Homeland Security" (2006) 20:1/2 Intl Rev L Comp & Tech 49 at 54, 60 (noting the connection between traffic stops and intelligence gathering); David A Harris, "Racial Profiling Redux" (2003) 22:1 St Louis U Pub L Rev 73 at 88 (providing the example of traffic stops to gather terrorism-related intelligence).

¹¹⁴ Carrie B Sanders, Crystal Weston & Nicole Schott, "Police Innovations, 'Secret Squirrels' and Accountability: Empirically Studying Intelligence-Led Policing in Canada" (2015) 55:4 Brit J Crim 711 at 716; Skolnik, "Two Criminal Justice Systems," *ibid* at 303–304; Skolnik, "Erosion of Constitutional Rights," *ibid* at 61; Skolnik, "Shadow of Legality," *ibid* at 519–20.

¹¹⁵ Nina Cope, "'Intelligence Led Policing or Policing Led Intelligence?' Integrating Volume Crime Analysis into Policing" (2004) 44:2 Brit J Crim 188 at 193.

¹¹⁶ Carrie B Sanders & Stacey Hannem, "Policing 'the Risky': Technology and Surveillance in Everyday Patrol Work" (2012) 49:4 Can Rev Sociology 389 at 400; Skolnik, "Two Criminal Justice Systems," *supra* note 64 at 303; Skolnik, "Shadow of Legality," *supra* note 1 at 519–20. See also Skolnik, "Erosion of Constitutional Rights," *supra* note 15 at 62.

such as tattoos or clothing that may suggest gang affiliation.¹¹⁷ Following a 911 call, officers may share information that a suspect was violent or threatened to harm other officers.¹¹⁸

This type of data is put into police databases, which generates intelligence for officers and can help them solve crimes.¹¹⁹ Officers access these databases to acquire information regarding individuals, vehicles, and investigations.¹²⁰ Police databases contain a litany of important law enforcement-related information and intelligence.¹²¹ For instance, these databases can indicate whether individuals are sought by warrant, have bail conditions, have a firearm registered under their name, are armed and dangerous, have a history of violence, have a mental health condition, and more.¹²² They can contain previous occurrence reports filled out by other officers.¹²³ Certain databases contain photos of individuals and provide their identifying information, such as their age, date of birth, address, and more.¹²⁴ This information can be relevant to subsequent police investigations.¹²⁵

During patrols, officers are encouraged to gather more rather than less information from individuals. Officers do not generally know and cannot accurately predict which data will be useful in a future criminal investigation. In many cases, criminal investigations rely on information that was acquired long before an individual committed a crime. This explains why DNA and fingerprint databases are crucial law enforcement tools; they connect past information to present wrongdoing.¹²⁶ Officers tend to cast a wide information gathering net so that they can acquire data that may later be relevant, even if they cannot ascertain which information will be relevant and why.¹²⁷

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- ¹¹⁷ Charles M Katz, Vincent J Webb & David R Schaefer, “The Validity of Police Gang Intelligence Lists: Examining Differences in Delinquency Between Documented Gang Members and Nondocumented Delinquent Youth” (2000) 3:4 *Police Quarterly* 413 at 421.
- ¹¹⁸ *R v Bacchus*, 2012 ONSC 5082 at para 8; *R v Frater*, 2008 CanLII 68179 (Ont Sup Ct) at para 3. See also Skolnik, “Two Criminal Justice Systems,” *supra* note 64 at 301.
- ¹¹⁹ Skolnik, “Erosion of Constitutional Rights,” *supra* note 15 at 47–48.
- ¹²⁰ *Ibid*; Skolnik, “Two Criminal Justice Systems,” *supra* note 64 at 302–303; Skolnik, “Shadow of Legality,” *supra* note 1 at 519; Kate Robertson, Cynthia Khoo & Yolanda Song, “To Surveil and Predict: A Human Rights Analysis of Predictive Policing in Canada” (Toronto: International Human Rights Program & Citizen Lab, 2020) at 33. See e.g. *Fraternité des policiers et policières de Saint-Jean-sur-Richelieu inc c St-Jean-sur-Richelieu (Ville de)*, 2016 QCCA 1086 at para 36.
- ¹²¹ Skolnik, “Two Criminal Justice Systems,” *ibid* at 302–303; Skolnik, “Policing in the Shadow of Legality,” *ibid* at 519; Skolnik, “Erosion of Constitutional Rights,” *supra* note 15 at 47–48.
- ¹²² Skolnik, “Two Criminal Justice Systems,” *ibid*; Skolnik, “Shadow of Legality,” *ibid* at 519; Skolnik, “Erosion of Constitutional Rights,” *ibid* at 47–48; Jennifer Hegel, Karen D Pelletier & Mark E Oliver, “Predictive Properties of the Ontario Domestic Assault Risk Assessment (ODARA) in a Northern Canadian Prairie Sample” (2022) 49:3 *Crim Justice & Behavior* 411 at 418–19; Darryl Plecas et al, “Evidence-Based Solution to Information Sharing Between Law Enforcement Agencies” (2011) 34:1 *Policing: An Intl J Police Strategies & Management* 120 at 125.
- ¹²³ Skolnik, “Two Criminal Justice Systems,” *ibid* at 303; Skolnik, “Erosion of Constitutional Rights,” *ibid* at 47–48; *Re Toronto Police Services Board* (30 April 2020), MO-3923 at para 18, online: *Information and Privacy Commissioner of Ontario* [perma.cc/NHP5-KYVU].
- ¹²⁴ Skolnik, “Two Criminal Justice Systems,” *ibid*; Skolnik, “Erosion of Constitutional Rights,” *ibid*; *R c Qiluqi*, 2020 QCCM 122 at paras 33, 37 (discussing individuals’ photos contained in the Montreal Police Service’s internal police database); *R c Viellot Blaise*, 2020 QCCM 26 at para 99 (discussing the same).
- ¹²⁵ Amanda Hoey, “Techno-Cops: Information Technology and Law Enforcement” (1998) 6:1 *Intl JL & IT* 69 at 74.
- ¹²⁶ See e.g. Skolnik, “Erosion of Constitutional Rights,” *supra* note 15 at 51, 57.
- ¹²⁷ See e.g. Meg Stalcup, “Policing Uncertainty: On Suspicious Activity Reporting” in Limor Samimian-Darash & Paul Rabinow, eds, *Modes of Uncertainty: Anthropological Cases* (Chicago: University of Chicago Press, 2015) 69 at 84 (describing how the police may gather certain data that serve an investigative purpose retrospectively).

Courts have recognized that officers have broad legal authority to initiate proactive police encounters for intelligence purposes.¹²⁸ Traffic stops are an example. The Ontario Court of Appeal decision *Brown v. Regional Municipality of Durham Police Service Board*¹²⁹ is the leading decision that governs traffic stops for intelligence-related reasons. In *Brown*, police officers obtained information that a motorcycle gang was going to hold a large scale meeting at its marine property.¹³⁰ In response, officers set up checkpoints where they pulled over all motorcyclists and drivers who wore motorcycle gang-related insignia or who officers believed were driving to the marine property.¹³¹ During the traffic stops, officers ordered the motorists to produce their driver's licences and questioned the drivers and the passengers.¹³² They also conducted police database searches, videotaped each traffic stop, and completed intelligence reports that identified motorcycle gang members and their associates.¹³³ The Ontario Court of Appeal decided that the officers' actions were lawful.¹³⁴ The Court concluded that officers can pull over a vehicle for intelligence purposes, provided some traffic-related reason also justifies the stop.¹³⁵ Other courts have arrived at similar conclusions.¹³⁶

B. REGULATORY OFFENCES, DATA COLLECTION, AND INTELLIGENCE

Four interrelated considerations explain why officers enforce regulatory offences to collect data and produce intelligence. First, although officers lack a general power to compel individuals to identify themselves, officers have the lawful authority to identify individuals who commit a regulatory offence.¹³⁷ To illustrate this point, consider how individuals lack a general duty to identify themselves to police officers. Officers can ask law-abiding individuals to identify themselves, and these individuals can lawfully refuse to do so.¹³⁸ Individuals have a right to silence and can decline to answer police questions, including questions regarding their identity.¹³⁹ Officers, in turn, cannot lawfully arrest or charge individuals with a crime because they exercised their right to silence and refused to identify themselves when they had no duty to do so.¹⁴⁰ The right to silence creates an obvious

¹²⁸ This argument was first advanced in: Skolnik, "Shadow of Legality," *supra* note 1 at 512–13, 520–21; Skolnik, "Erosion of Constitutional Rights," *supra* note 15 at 47–48.
¹²⁹ 43 OR (3d) 223 (Ont CA) [*Brown ONCA*].

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *R v Gonzales*, 2017 ONCA 543 at paras 45, 49 [*Gonzales*]; *R v Shipley*, 2015 ONCA 914 at para 7; *R v Morris*, 2013 ONCA 223 at para 7; *R v Schrenk (CA)*, 2010 MBCA 38 at para 44.

¹³⁷ Skolnik, "Two Criminal Justice Systems," *supra* note 64 at 303; Skolnik, "Shadow of Legality," *supra* note 1 at 523; *Moore v R*, [1979] 1 SCR 195 at 203–205 [*Moore*]; *R v Vasile*, 2021 SKPC 54 at paras 53–57 [*Vasile*].

¹³⁸ See e.g. *R v Mann*, 2004 SCC 52 at paras 15, 45 [*Mann*]; *R v Grafe*, 1987 CanLII 170 (Ont CA) [*Grafe*]; *R v RH(C)*, 2003 MBCA 38 at para 26; *R v Chanmany*, 2016 ONSC 3092 at paras 42–43 [*Chanmany*]; *R v Cooper*, 2005 NSCA 47 at para 47 [*Cooper*]; *R v Pauli*, 2014 SKQB 246 at para 22 [*Pauli*]; *Vasile, ibid* at para 56.

¹³⁹ Skolnik, "Shadow of Legality," *supra* note 1 at 509, 519; Skolnik, "Two Criminal Justice Systems," *supra* note 64 at 303; *R v Greaves*, 2004 BCCA 484 at paras 48–49 [*Greaves*]; *Rice v Connolly*, [1966] 2 All ER 649 at 652 [*Rice*]; *Chanmany, ibid.*

¹⁴⁰ *Greaves, ibid.*

problem for law enforcement: officers cannot conduct a police database search without certain identifying information.¹⁴¹ No identifying information, no police database search.

Regulatory offences solve this problem. Officers have the lawful authority to identify individuals who commit a regulatory offence — a gateway to gather information, conduct a police database search, and produce intelligence.¹⁴² Furthermore, individuals can be charged with obstructing a police officer when they commit a regulatory infraction but refuse to identify themselves.¹⁴³ The same is true for individuals who provide a false identity to officers or who lie about their identifying information, such as their address or date of birth.¹⁴⁴ Regulatory offence violations are crucial because they confer a police power to identify individuals that officers otherwise lack.

Second, officers enforce regulatory offences to gather information because the scope of the police power to identify individuals is unclear.¹⁴⁵ Surprisingly, Supreme Court of Canada decisions provide little insight into when officers have a lawful power to compel individuals to identify themselves.¹⁴⁶ Leaving aside provisions that govern arrest and extrajudicial pretrial release, no other *Criminal Code* provisions establish when officers have this power.¹⁴⁷ In contrast, Supreme Court of Canada decisions, provincial statutes, and municipal regulations confer the power to identify individuals who commit a regulatory offence.¹⁴⁸ Rather than operate in an area of legal uncertainty, officers may enforce regulatory offences to identify individuals and produce intelligence.

Third, officers enforce regulatory offences because they appear more legitimate than other data collection tactics, such as street checks and carding. Courts, academics, human rights commissions, and commissions of inquiry have all derided the practice of “carding,” meaning that officers request identification from individuals who are not suspected of wrongdoing.¹⁴⁹ Carding is admonished for various reasons. Empirical research demonstrates that Indigenous persons and racialized persons and disproportionately carded by the police.¹⁵⁰

¹⁴¹ Plecas et al, *supra* note 122 at 125. Note that officers may be able to investigate a vehicle and its owner. However, officers cannot generally investigate passengers or pedestrians without certain identifying information.

¹⁴² Skolnik, “Two Criminal Justice Systems,” *supra* note 64 at 303; Skolnik, “Shadow of Legality,” *supra* note 1 at 523; Moore, *supra* note 137; Vasile, *supra* note 137. In Quebec, see *Code of Penal Procedure*, *supra* note 64, ss 72, 73, 74.

¹⁴³ *R v Maradin*, 2018 ABCA 274 at paras 32–44 [Maradin].

¹⁴⁴ Greaves, *supra* note 139 at paras 49–52; *R v Longshaw*, 2022 ONCA 88 at paras 13–22 [Longshaw].

¹⁴⁵ Skolnik, “Shadow of Legality,” *supra* note 1 at 511–12.

¹⁴⁶ *Ibid.*

¹⁴⁷ See e.g. *Criminal Code*, *supra* note 51, ss 495(2), 498(1.1).

¹⁴⁸ Skolnik, “Two Criminal Justice Systems,” *supra* note 64 at 303; Skolnik, “Shadow of Legality,” *supra* note 1 at 523; Moore, *supra* note 137; Vasile, *supra* note 137. In Quebec, see *Code of Penal Procedure*, *supra* note 64, ss 72, 73, 74.

¹⁴⁹ *R v Le*, 2019 SCC 34 at paras 94–95; Ontario Human Rights Commission, *Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario* (Toronto: OHRC, 2017) at 37–41 [OHRC, “Under Suspicion”]; Michael H Tulloch, *Report of the Independent Street Checks Review* (Toronto: Queen’s Printer for Ontario, 2018) at 42; Heston Tobias & Ameil Joseph, “Sustaining Systemic Racism Through Psychological Gaslighting: Denials of Racial Profiling and Justifications of Carding by Police Utilizing Local News Media” (2020) 10:4 Race & Justice 424 at 426–27.

¹⁵⁰ Victor Armony, Mariam Hassaoui & Massimiliano Mulone, “Les interpellations policières à la lumière des identités racisées des personnes interpellées: Analyse des données du Service de Police de la Ville de Montréal (SPVM) et élaboration d’indicateurs de suivi en matière de profilage racial” (Montreal: SPVM, 2019) at 9–11; Tobias & Joseph, *ibid* at 427; John Sewell & Christopher J Williams, *Crisis in Canada’s Policing: Why Change is so Hard, and How We Can Get Real Reform in our Police Forces* (Toronto: James Lorimer, 2021) at 87.

Carding raises fairness concerns because individuals are asked to identify themselves when they have done nothing wrong.¹⁵¹ Others critique carding on the grounds that it is used to surveil racialized and Indigenous persons.¹⁵² Carding can be humiliating and demeaning.¹⁵³ It can adversely impact individuals' physical and mental health.¹⁵⁴ It can also decrease individuals' and the community's confidence in the police and in the justice system more generally.¹⁵⁵ All of these reasons explain why officers may be reluctant to gather data through carding but may exploit regulatory offence violations for that purpose.

Fourth, officers value regulatory offences because they confer greater psychological leverage compared to voluntary requests for data. As discussed above, individuals can refuse to identify themselves to police officers when they have no legal duty to do so.¹⁵⁶ Officers, for their part, cannot lawfully threaten to fine or arrest the person to induce compliance because the individual has no legal duty to provide identifying information. Police officers who unlawfully fine, arrest, or threaten individuals expose themselves to civil liability, ethics complaints, and reputational harm.¹⁵⁷ To be clear, many individuals still feel compelled to comply with officers' requests for information for various reasons.¹⁵⁸ Individuals may believe that their reticence to co-operate may be interpreted as a challenge to the officer's authority, which can result in use of force escalations.¹⁵⁹ And individuals may not know that they have the right to refuse to identify themselves, and officers may not inform them of this right.¹⁶⁰

Yet, all other things equal, officers enjoy greater legal and psychological leverage when individuals commit a regulatory offence. Officers can issue a warning rather than a fine.¹⁶¹ They can arrest an individual for obstructing a police officer if the individual refuses to identify themselves or provides false identifying information.¹⁶² Officers can search the individual incidental to arrest.¹⁶³ And they can charge that person with additional crimes if the search reveals drugs, guns, or some other unlawful object.¹⁶⁴ Officers can inform the

¹⁵¹ Tobias & Joseph, *ibid* at 426.

¹⁵² Desmond Cole, *The Skin We're in: A Year of Black Resistance and Power* (Toronto: Doubleday Canada, 2020) at 65.

¹⁵³ Danielle Sandhu, "A Reasonable Alternative to Guilt: Flight and Anti-Black Racism" (2021) 42 *Windsor Rev Legal Soc Issues* 51 at 66.

¹⁵⁴ OHRC, "Under Suspicion," *supra* note 149 at 40; Terry Skolnik, "Racial Profiling and the Perils of Ancillary Police Powers" (2021) 99:2 *Can Bar Rev* 429 at 438 [Skolnik, "Racial Profiling"].

¹⁵⁵ OHRC, "Under Suspicion," *ibid*.

¹⁵⁶ Skolnik, "Two Criminal Justice Systems," *supra* note 64 at 303; Skolnik, "Shadow of Legality," *supra* note 1 at 523; *Greaves*, *supra* note 139; *Rice*, *supra* note 139; *Chanmany*, *supra* note 138; *Mann*, *supra* note 138; *Grafe*, *supra* note 138; *R v RH(C)*, *supra* note 138; *Cooper*, *supra* note 138; *Pauli*, *supra* note 138; *Vasile*, *supra* note 137 at para 56.

¹⁵⁷ See e.g. Myles Frederick McLellan, "Innocence Compensation: The Success Rate of Actions for Negligent Investigation" (2020) 98:1 *Can Bar Rev* 34 at 66–68.

¹⁵⁸ *R v Le*, *supra* note 149 at para 103; *R v Lafrance*, 2022 SCC 32 at paras 37–40; Skolnik, "Shadow of Legality," *supra* note 1 at 523–31. See also Jocelyn Simonson, "Copwatching" (2016) 104:2 *Cal L Rev* 391 at 423.

¹⁵⁹ Skolnik, "Shadow of Legality," *ibid* at 525; Alice Ristroph, "The Constitution of Police Violence" (2017) 64 *UCLA L Rev* 1182 at 1185, 1189, 1192.

¹⁶⁰ David K Kessler, "Free to Leave: An Empirical Look at the Fourth Amendment's Seizure Standard" (2008) 99:1 *J Crim L & Criminology* 51 at 78, 84 (describing how many individuals do not know their rights).

¹⁶¹ Frank R Baumgartner, Derek A Epp & Kelsey Shoub, *Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race* (Cambridge: Cambridge University Press, 2018) at 86–87.

¹⁶² Clayton C Ruby, "Obstructing a Police Officer" (1973) 15:4 *Crim LQ* 375 at 387–88; Larry C Wilson, "Obstructing a Peace Officer: Finding Fault in the Supreme Court of Canada" (2000) 27:2 *Man LJ* 273 at 275; *Greaves*, *supra* note 139 at paras 49–52; *Longshaw*, *supra* note 144; *Maradin*, *supra* note 143. *Cloutier v Langlois*, [1990] 1 SCR 158 [Cloutier].

¹⁶⁴ Skolnik, "Shadow of Legality," *supra* note 1.

individual of each of these potential consequences to induce compliance and maximize data collection. Furthermore, some research shows that individuals who are co-operative or remorseful are more likely to receive verbal warnings or lower fines compared to those who are not.¹⁶⁵ In these ways, regulatory offences confer psychological leverage to gather data that officers would otherwise lack.

Officers may selectively enforce regulatory offences because they believe — consciously or subconsciously — that racialized persons or marginalized individuals are more prone to crime.¹⁶⁶ Certain empirical studies indicate that officers disproportionately pull over racialized drivers for traffic-related offences even though white persons commit these offences at a similar rate.¹⁶⁷ Moreover, in the context of traffic stops, research suggests that Black persons are more likely to be searched and arrested compared to white persons.¹⁶⁸ As discussed next, these outcomes highlight how regulatory offences can also be enforced as a pretext to investigate crimes.

V. REGULATORY OFFENCES AND PRETEXTUAL CRIMINAL INVESTIGATIONS

A. THE PROBLEM OF PRETEXT

Second, officers may enforce regulatory offences as a pretext to investigate crimes.¹⁶⁹ The notion of pretext implies that “officers invoke lawful justifications for unlawful conduct.”¹⁷⁰ Pretextual police interventions obscure the real reason for police action.¹⁷¹ As an unlawful policing strategy, pretext helps officers “do indirectly what they cannot do directly.”¹⁷² For instance, officers may wait until a driver commits a regulatory offence as a pretext to pull them over, conduct a visual search of the vehicle’s interior, and identify the driver to verify

¹⁶⁵ Martin V Day & Michael Ross, “The Value of Remorse: How Drivers’ Responses to Police Predict Fines for Speeding” (2011) 35:3 *L & Human Behavior* 221 at 228, 231; Wendy C Regoeczi & Stephanie L Kent, “Race, Poverty, and the Traffic Ticket Cycle: Exploring the Situational Context of the Application of Police Discretion” (2014) 37:1 *Policing: An Intl J Police Strategies & Management* 190 at 199, 201; Joseph A Schafer & Stephen D Mastrofski, “Police Leniency in Traffic Enforcement Encounters: Exploratory Findings From Observations and Interviews” (2005) 33:3 *J Crim Justice* 225 at 230–31.

¹⁶⁶ David Harris, “Flying While Arab: Lessons From the Racial Profiling Controversy” (2002) 6:1 *Civil Rights J* 8 at 12. See also David Rudovsky, “Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause” (2001) 3:1 *U Pa J Const L* 296 at 299–300, 304; Sherry F Colb, “Profiling with Apologies” (2004) 1:2 *Ohio State J Crim L* 611 at 612; Steven Penney, “Driving While Innocent: Curbing the Excesses of the ‘Traffic Stop’ Power” (2019) 24:3 *Can Crim L Rev* 339 at 364–65 [Penney, “Driving While Innocent”].

¹⁶⁷ Geoffrey P Alpert, Roger G Dunham & Michael R Smith, “Investigating Racial Profiling by the Miami Dade Police Department: A Multimethod Approach” (2007) 6:1 *Criminology & Public Policy* 25 at 29–31.

¹⁶⁸ Baumgartner, Epp & Shoub, *supra* note 161 at 86, 93.

¹⁶⁹ The arguments in Part V.A were first advanced in: Skolnik, “Shadow of Legality,” *supra* note 1 at 518–23.

¹⁷⁰ *Ibid* at 508. See also *R v Nolet*, 2010 SCC 24 at para 35 [*Nolet*], citing *R v Ladouceur*, 2001 SKCA 73 at para 66 (noting that pretext implies that “a nominally lawful aim is but a plausible facade for an unlawful aim”).

¹⁷¹ Skolnik, “Shadow of Legality,” *supra* note 1 at 519; Jordan Blair Woods, “Policing, Danger Narratives, and Routine Traffic Stops” (2019) 117:4 *Mich L Rev* 635 at 702; John M Burkoff, “The Pretext Search Doctrine: Now You See it, Now You Don’t” (1984) 17 *U Mich JL Ref* 523 at 523.

¹⁷² Skolnik, “Shadow of Legality,” *ibid* at 518–19. See also Christopher Slobogin, “Deceit, Pretext, and Trickery: Investigative Lies by the Police” (1997) 76 *Or L Rev* 775 at 782.

whether they have outstanding bail or probation conditions.¹⁷³ They may invoke some regulatory search power to uncover criminal wrongdoing.¹⁷⁴ And they may request to speak to an individual for some innocuous purpose as a pretext to investigate them.¹⁷⁵

The law addresses pretext to some extent. Appellate courts have held that officers cannot initiate pretextual traffic stops where the sole purpose of the police encounter is to conduct a criminal investigation.¹⁷⁶ Courts have also decided that police interventions are unlawful when officers engage in racial profiling but invoke some traffic-related rationale as a pretext for their intervention.¹⁷⁷ Furthermore, even when officers pull over a vehicle for a traffic-related purpose, the police encounter will be unlawful where the driver's race influenced suspect selection or treatment by the police.¹⁷⁸ Other courts suggest that searches of persons and vehicles incidental to arrest are unlawful when officers invoke safety reasons as a pretext to find evidence.¹⁷⁹

But constitutional criminal procedure provides relatively little protection against pretextual police interventions.¹⁸⁰ The cumulative effect of two judicial doctrines explains this tendency. First, the plain view search doctrine allows officers to gather sensory information during traffic stops, which can justify searches, arrests, and criminal charges.¹⁸¹ For instance, during a traffic stop, officers who detect signs of impairment can detain or arrest the driver.¹⁸² And officers who notice drug paraphernalia — such as small plastic bags or scales — can detain or arrest suspects.¹⁸³ The plain view search doctrine is helpful for a simple reason: it allows officers to see visible wrongdoing to uncover hidden crimes.¹⁸⁴

Second, the judicially devised “dual-purpose doctrine” permits officers to conduct a criminal investigation during a traffic stop provided the investigation has some ongoing

¹⁷³ *Ibid* at 518–20; David A Harris, “The Stories, the Statistics, and the Law: Why Driving While Black Matters” (1999) 84:2 Minn L Rev 265 at 266; Penney, “Driving While Innocent,” *supra* note 166 at 341; Devon W Carbado, “From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence” (2017) 105:1 Cal L Rev 125 at 157.

¹⁷⁴ Steven Penney, “The Reasonableness of Regulatory Searches: Saying Goodbye to the Criminal-Regulatory Binary” (2021) 26:1 Can Crim L Rev 77 at 84–89 [Penney, “Reasonableness of Regulatory Searches”].

¹⁷⁵ Slobogin, *supra* note 172 at 783.

¹⁷⁶ Skolnik, “Shadow of Legality,” *supra* note 1 at 519; *R v Mayor*, 2019 ONCA 578 at paras 7–8.

¹⁷⁷ *R v Dudhi*, 2019 ONCA 665 at paras 62, 91 [*Dudhi*]; *R v Sittladeen*, 2021 ONCA 303 at paras 52–54 [*Sittladeen*].

¹⁷⁸ *Dudhi*, *ibid* at paras 62–3; *Sittladeen*, *ibid* at para 52.

¹⁷⁹ See e.g. *R v Chubak*, 2009 ABCA 8 at para 22; *Mann*, *supra* note 138 at para 49.

¹⁸⁰ This argument was first advanced in: Skolnik, “Erosion of Constitutional Rights,” *supra* note 15 at 53–54 and in Skolnik, “Shadow of Legality,” *supra* note 1 at 521–23.

¹⁸¹ Skolnik, “Shadow of Legality,” *ibid* at 520; Christopher Sherrin, “Distinguishing Charter Rights in Criminal and Regulatory Investigations: What’s the Purpose of Analyzing Purpose?” (2010) 48:1 Alta L Rev 93 at 101 (describing the plain view search doctrine); Penney, “Reasonableness of Regulatory Searches,” *supra* note 174 at 86; Penney, “Driving While Innocent,” *supra* note 166 at 354.

¹⁸² Skolnik, “Shadow of Legality,” *ibid* note 1 at 520; Skolnik, “Erosion of Constitutional Rights,” *supra* note 15 at 53–54; Reuben Goetzl, “Common Scents: The Intersection of the ‘Plain Smell’ and ‘Common Enterprise’ Doctrines” (2013) 50:3 Am Crim L Rev 607 at 610–14 (describing the plain view and plain smell doctrines).

¹⁸³ Skolnik, “Erosion of Constitutional Rights,” *ibid* at 53–54. See e.g. *R v Perjalian*, 2011 BCCA 323 at paras 41–55.

¹⁸⁴ Skolnik, “Shadow of Legality,” *supra* note 1 at 532; Skolnik, “Erosion of Constitutional Rights,” *ibid* at 53–54.

regulatory purpose, such as traffic safety.¹⁸⁵ Traffic stops are lawful when they are conducted for road safety reasons and some additional purpose, such as collecting data, investigating crimes, or maintaining public peace.¹⁸⁶ The Supreme Court has rejected a “*predominant purpose*”¹⁸⁷ test that would invalidate the lawfulness of police investigations whose primary purpose was to conduct a criminal investigation.¹⁸⁸ Whereas the plain view search doctrine helps officers lawfully acquire information to conduct a more thorough criminal investigation, the dual purpose doctrine authorizes such tactics.

B. REGULATORY OFFENCES, PRETEXT, AND INVESTIGATION CASCADES

Pretextual interventions are problematic because they facilitate investigation cascades that circumvent legal safeguards.¹⁸⁹ The term “‘investigation cascade’ implies that officers exploit a police power’s lax or non-existent legal threshold to exercise a more intrusive power that has a more demanding legal threshold.”¹⁹⁰ Officers may pretextually enforce regulatory offences to generate an investigation cascade.¹⁹¹ For instance, suppose officers wish to detain a driver to conduct a criminal investigation or search a vehicle’s trunk to find drugs or firearms. Officers must have reasonable suspicion that the defendant is involved in a recent or ongoing crime to detain them for a criminal investigation.¹⁹² Furthermore, outside of searches incidental to arrest, officers must have reasonable and probable grounds to believe that illegal objects are in a vehicle to search its trunk.¹⁹³

Yet officers can exploit regulatory offences to pull over a vehicle, gather sensory information using the plain view doctrine, and form the necessary grounds to detain the driver and search the vehicle.¹⁹⁴ Officers who arrest drivers can then exercise various powers that can lead to the discovery of more incriminating evidence and additional criminal charges.¹⁹⁵ Depending on the circumstances, officers who arrest a driver can lawfully search their person, their vehicle, and their cellphone.¹⁹⁶ And depending on the context, officers who conduct a traffic stop and discover incriminating evidence in plain may then conduct a sniffer dog search,¹⁹⁷ strip search the defendant,¹⁹⁸ or request a warrant to search their residence.¹⁹⁹

¹⁸⁵ Skolnik, “Shadow of Legality,” *ibid* at 512–13; *Nolet*, *supra* note 170 at para 41. See also *R v Upright*, 2020 ABCA 227 at para 9; Penney, “Driving While Innocent,” *supra* note 166 at 341, 346; Wayne K Gorman, “The Constitutional Stopping of Motor Vehicles in Canada and the United States: A Comparative Analysis” (2020) 56:3/4 Court Rev 100 at 102–103.

¹⁸⁶ Skolnik, “Shadow of Legality,” *ibid*; *Gonzales*, *supra* note 136 at para 58; *Brown ONCA*, *supra* note 129.

¹⁸⁷ Skolnik, “Shadow of Legality,” *ibid* at 513 [emphasis in original].

¹⁸⁸ *Ibid* at 512–13; *Nolet*, *supra* note 170 at paras 35–41.

¹⁸⁹ This argument was first advanced in: Skolnik, “Shadow of Legality,” *ibid* at 531–33. See also *R v Ali*, 2016 ABCA 261 at para 3 (describing investigation cascades).

¹⁹⁰ Skolnik, “Shadow of Legality,” *ibid* at 531.

¹⁹¹ *Ibid* at 531–32.

¹⁹² *Mann*, *supra* note 138 at para 45.

¹⁹³ Steven Penney, “Standards of Suspicion” (2017) 65:1/2 Crim LQ 23 at 27.

¹⁹⁴ Skolnik, “Shadow of Legality,” *supra* note 1 at 520, 531–33; Skolnik, “Two Criminal Justice Systems,” *supra* note 64 at 296; Skolnik, “Erosion of Constitutional Rights,” *supra* note 15 at 53.

¹⁹⁵ Skolnik, “Shadow of Legality,” *ibid* at 531–33.

¹⁹⁶ *Ibid*; Colton Fehr, “Defending the Castle: Search Incident to Arrest after *R. v. Stairs*” (2022) 29 Can Crim L Rev 227; Wayne A Logan, “An Exception Swallows a Rule: Police Authority to Search Incident to Arrest” (2001) 19:2 Yale L & Pol’y Rev 381 at 381–82. See e.g. *Cloutier*, *supra* note 163; *R v Caslake*, [1998] 1 SCR 51; *R v Fearon*, 2014 SCC 77.

¹⁹⁷ *R v Chehil*, 2013 SCC 49.

¹⁹⁸ *R v Golden*, 2001 SCC 83.

¹⁹⁹ *R v Greer*, 2020 ONCA 795.

A banal regulatory offence violation can trigger this entire cascade of events. Empirical evidence highlights the value of pretextual regulatory offence enforcement. Some police forces estimate that roughly 40 percent of drug-related arrests stemmed from a traffic stop.²⁰⁰

Regulatory offences are valuable for a simple reason: they help officers exploit visible forms of wrongdoing to uncover hidden crimes.²⁰¹ Officers can form reasonable and probable grounds more easily for regulatory offence violations compared to more clandestine forms of criminality. Like everyone else, officers can easily see a vehicle's burnt-out tail light or a driver that changes lanes without signaling. But like everyone else, officers cannot see inside a vehicle's glove compartment or trunk unless they search these locations — they require more information to form the necessary reasonable and probable grounds to conduct the search. Regulatory offence violations are visible forms of wrongdoing that catalyze criminal investigations, help officers form probable grounds, and allow them to discover clandestine crimes.

Pretextual traffic stops are problematic because of their low visibility nature.²⁰² Police interactions that do not result in fines, arrests, or criminal charges may never be reviewed by courts or human rights tribunals.²⁰³ Officers may stop a driver who commits a regulatory offence.²⁰⁴ They may search the vehicle and find nothing.²⁰⁵ So, they issue a verbal warning and drive away.²⁰⁶ Courts rarely assess the lawfulness of such interactions.²⁰⁷ A criminal court will not evaluate whether the officer's conduct was lawful in contexts where the driver was not charged with an offence. However, only a minority of unlawful traffic stops result in a civil suit or a human rights tribunal complaint.²⁰⁸

Various barriers can dissuade individuals from bringing civil claims and human rights complaints.²⁰⁹ The cost to hire a lawyer and bring a civil suit can be relatively high.²¹⁰ Some individuals may be required to miss work — and lose employment income — to appear in court and contest officers' conduct.²¹¹ The threat of adverse cost awards may also deter

²⁰⁰ David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006) at 130.

²⁰¹ Skolnik, "Erosion of Constitutional Rights," *supra* note 15 at 47–48; Skolnik, "Shadow of Legality," *supra* note 1 at 532.

²⁰² James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31:1 *Queen's LJ* 1 at 49; Joseph Goldstein, "Police Discretion Not to Invoke the Criminal Process; Low-Visibility Decisions in the Administration of Justice" (1960) 69:4 *Yale LJ* 543 at 554, 558.

²⁰³ Skolnik, "Shadow of Legality," *supra* note 1 at 517–18, 525; Skolnik, "Two Criminal Justice Systems," *supra* note 64 at 298.

²⁰⁴ This example is provided in Skolnik, "Shadow of Legality," *ibid* at 521.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*; Terry Skolnik, "Criminal Justice Reform: A Transformative Agenda" (2022) 59:3 *Alta L Rev* 631 at 643; Skolnik, "Two Criminal Justice Systems," *supra* note 64 at 298.

²⁰⁸ Terry Skolnik, "Rééquilibrer le rôle de la Cour suprême du Canada en procédure criminelle" (2022) 67:3 *RD McGill* 259 at 278 [Skolnik, "Rééquilibrer"].

²⁰⁹ This argument was first advanced in: Skolnik, "Rééquilibrer," *ibid* at 281–82; Skolnik, "Shadow of Legality," *supra* note 1 at 522–23; Kent Roach, "Models of Civilian Police Review: The Objectives and Mechanisms of Legal and Political Regulation of the Police" (2014) 61:1 *Crim LQ* 29 at 34–35.

²¹⁰ Skolnik, "Rééquilibrer," *ibid*; Skolnik, "Shadow of Legality," *ibid*; Kent Roach, "Remedies for Discriminatory Profiling" in Kent Roach & Robert J Sharpe, eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2009) 392 at 403–404.

²¹¹ Skolnik, "Rééquilibrer," *ibid*; Skolnik, "Shadow of Legality," *ibid*; K Babe Howell, "Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing" (2009) 33:3 *NYU Rev L & Soc Change* 271 at 323 (noting how defendants may miss work to attend court).

individuals from bringing a civil suit.²¹² Individuals who conduct a cost-benefit analysis may believe that the disadvantages of such suits outweigh their advantages.²¹³ Other individuals may not challenge the lawfulness of police action because they distrust police officers or the justice system more generally, or because they do not know whether officers acted unlawfully.²¹⁴

Yet even when pretextual traffic stops *do* result in fines, arrests, or criminal charges, courts rarely scrutinize whether officers' actions were lawful. Most criminal and regulatory charges are resolved informally through guilty pleas and plea bargains.²¹⁵ Individuals who plead guilty waive their constitutional rights that could otherwise detect police wrongdoing, such as the right to cross-examine witnesses, produce evidence, and testify at trial.²¹⁶ This explains why many pretextual criminal investigations — and the investigation cascades they produce — evade judicial review.²¹⁷

Pretextual police interventions are also objectionable because they can result in racial profiling.²¹⁸ Due to the breadth and depth of traffic codes, officers enjoy significant discretion to enforce regulatory offences as a pretext to investigate crimes.²¹⁹ And discretion tends to foster discrimination, especially in driving-related contexts.²²⁰ Racial disparities in traffic stop data illustrate this point. Various studies demonstrate that racialized persons are disproportionately pulled over by the police.²²¹ Studies conducted in Ottawa and Halifax show that racialized drivers are stopped by the police more frequently than white ones.²²² Black persons in Halifax are also more likely to be pulled over numerous times.²²³ An empirical study conducted in North Carolina indicated that racialized persons are disproportionately pulled over by the police for investigative traffic stops.²²⁴ Insofar as officers hold prejudiced beliefs about which individuals are involved in criminal activity,

²¹² Skolnik, "Rééquilibrer," *ibid*; Ranjan Agarwal & Joseph Marcus, "Where There is No Remedy, There is No Right: Using Charter Damages to Compensate Victims of Racial Profiling" (2015) 34:1 NJCL 75 at 96.

²¹³ Skolnik, "Rééquilibrer," *ibid*; Agarwal & Marcus, *ibid* at 94, 96; Skolnik, "Shadow of Legality," *supra* note 1 at 522–23.

²¹⁴ Skolnik, "Shadow of Legality," *ibid* at 522; Kate Levine, "Police Suspects" (2016) 116:5 Colum L Rev 1197 at 1232–33.

²¹⁵ Skolnik, "Rééquilibrer," *supra* note 208 at 278; Libman, *Modernization*, *supra* note 9 at 1.

²¹⁶ See e.g. John DR Craig, "Guilty Plea Revocation, Constitutional Waiver, and the Charter: 'A Guilty Plea Is Not a Trap'" (1997) 20:1 Dal LJ 161 at 162–63; *R v Wong*, 2018 SCC 25 at para 62; Terry Skolnik, "The Tragedy of the Criminal Justice Commons" UC Davis L Rev [forthcoming in 2024] (draft on file with author).

²¹⁷ See e.g. Skolnik, "Rééquilibrer," *supra* note 208 at 278; Joseph H Tieger, "Police Discretion and Discriminatory Enforcement" (1971) 1971:4 Duke LJ 717 at 717–18.

²¹⁸ David M Tanovich, "E-Racing Racial Profiling" (2004) 41:4 Alta L Rev 905 at 928.

²¹⁹ Skolnik, "Shadow of Legality," *supra* note 1 at 514; Jordan Blair Woods, "Traffic Without the Police" (2021) 73:6 Stan L Rev 1471 at 1480–81 [Woods, "Traffic Without the Police"].

²²⁰ David Cole, "Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship," 87:5 Geo LJ 1059 at 1062; Stuntz, "Politics of Criminal Law," *supra* note 10 at 822 ("[i]n criminal justice as elsewhere, discretion and discrimination travel together").

²²¹ Skolnik, "Racial Profiling," *supra* note 154 at 436–39. See also *Luamba c Procureur général du Québec*, 2022 QCCS 3866 at paras 407–408; Terry Skolnik & Fernando Belton, "Luamba et la fin des interceptions routières aléatoires" (2023) 101:3 Can Bar Rev 671 at 682–85.

²²² Lorne Foster, Les Jacobs & Bobby Siu, *Race Data and Traffic Stops in Ottawa, 2013-2015: A Report on Ottawa and the Police Districts* (Ottawa: Ottawa Police Services Board, 2016) at 3–5; Scot Wortley, *Halifax, Nova Scotia: Street Checks Report*, (Halifax: Nova Scotia Human Rights Commission, 2019) at 40 [Wortley, *Halifax Street Checks Report*].

²²³ Wortley, *Halifax Street Checks Report*, *ibid* at 40.

²²⁴ Baumgartner, Epp & Shoub, *supra* note 161 at 54.

officers may enforce regulatory offences discriminatorily as a pretext to uncover such crimes.²²⁵

Traffic stop disparities produce other downstream consequences. Research conducted by the Ontario Human Rights Commission shows that Black persons in Toronto are disproportionately subject to the use of force during traffic stops and during other proactive police encounters.²²⁶ The North Carolina study mentioned above shows that racialized persons are also more likely to be arrested following a traffic stop.²²⁷

Pretext is particularly pernicious because it is difficult to prove.²²⁸ Both pretext and racial profiling are rarely established through direct evidence.²²⁹ Officers do not generally admit that their actions were based on improper motives — such as racial profiling — given the obvious impropriety of such actions and the reputational harm they would suffer.²³⁰ Furthermore, prejudice and biases can be subconscious.²³¹ Officers may not realize that they are using race or ethnicity as a reason why they stopped a particular driver.²³² Racial profiling and pretext are generally proven through inferential reasoning that examines the totality of the circumstances.²³³ Yet a particular set of objectively discernible facts may fail to establish pretext. Furthermore, due to unconscious biases or improper reasoning, judges or juries may convict racialized persons and those with a criminal history at higher rates than white persons or first-time offenders.²³⁴ Even when officers enforced regulatory offences as a pretext to investigate crimes, individuals may not be able to prove it.

VI. REGULATORY OFFENCES AND REVENUE GENERATION

Third, officers may sometimes enforce regulatory offences to raise revenue. Cities and police forces value these offences to generate revenue for various reasons. First, the combined amount of the initial fine, obligatory fees, and mandatory surcharges can be high. The minimum quantum of a fine may be hundreds of dollars.²³⁵ Mandatory fees and surcharges — which help fund the criminal justice system and certain governmental

²²⁵ David A Harris, “‘Driving While Black’ and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops” (1997) 87:2 J Crim L & Criminology 544 at 569–70; Nathan JS Gorham, “Police Discretion, Racial Profiling and Articulate Cause” (2004) 49:1 Crim LQ 50 at 52.

²²⁶ Ontario Human Rights Commission, *A Disparate Impact: Second Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service* (Toronto: OHRC, 2020) at 10–11 [OHRC, “Second Interim Report”].

²²⁷ Baumgartner, Epp & Shoub, *supra* note 161 at 57.

²²⁸ Skolnik, “Shadow of Legality,” *supra* note 1 at 523; Skolnik, “Rééquilibrer,” *supra* note 208 at 283–84; Skolnik, “Two Criminal Justice Systems,” *supra* note 64 at 304.

²²⁹ Skolnik, “Shadow of Legality,” *ibid* at 523; *R v Brown*, 64 OR (3d) 161 (CA) at para 44.

²³⁰ Skolnik, “Shadow of Legality,” *ibid*; Lu-in Wang, “Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes” (2004) 53:3 DePaul L Rev 1013 at 1046–47.

²³¹ Skolnik, “Rééquilibrer,” *supra* note 208 at 284; Gorham, *supra* note 225 at 53.

²³² Skolnik, “Rééquilibrer,” *ibid*; Gorham, *ibid* at 53–54.

²³³ Skolnik, “Shadow of Legality,” *supra* note 1 at 518; David M Tanovich, “Applying the Racial Profiling Correspondence Test” (2017) 64:3/4 Crim LQ 359 at 374–75.

²³⁴ Jerry Kang et al, “Implicit Bias in the Courtroom” (2012) 59:5 UCLA L Rev 1124 at 1142–48; Jeffrey J Rachlinski et al, “Does Unconscious Racial Bias Affect Trial Judges?” (2009) 84:3 Notre Dame L Rev 1195 at 1221–22; Bellin, *supra* note 76 at 401–406.

²³⁵ In Ontario, driving while holding a cellphone is punishable by a minimum fine of \$500 prior to applicable fees and surcharges: *Highway Traffic Act*, *supra* note 101, s 78.1 (6.1). In Quebec, driving without a seatbelt is punishable by a mandatory fine of \$200: *Highway Safety Code*, *supra* note 59 ss 395, 510.

initiatives — are also incorporated into the total amount of the fine.²³⁶ Unpaid fines, in turn, generate more fees and penalties.²³⁷ And most court-related interactions result in fees, too.²³⁸

Second, regulatory offences are an efficient tool to raise revenue because the total quantum of the fine can exceed enforcement costs.²³⁹ Unlike crimes, regulatory offences can be enforced relatively quickly and require minimal investigation by officers.²⁴⁰ A brief traffic stop may result in a financial penalty that totals hundreds of dollars.²⁴¹ And officers may issue many fines during their shifts.²⁴² The outcome of many regulatory prosecutions further drives down enforcement costs and maximizes revenue. Guilty pleas are much cheaper than trials.²⁴³ The fact that many regulatory offence accusations result in guilty pleas decreases downstream costs and increases governmental revenue.²⁴⁴

Third, in contrast to taxation, regulatory offences may generate revenue with fewer political costs for lawmakers.²⁴⁵ Although individuals disagree on many things, they tend to dislike taxes.²⁴⁶ Certain types of taxes may result in strong public opposition or political backlash.²⁴⁷ Regulatory offences can circumvent this problem. In contrast to taxation, individuals may more strongly support the use of fines, fees, or surcharges to help fund the criminal justice system.²⁴⁸ Furthermore, the enforcement of regulatory offences as a revenue generation tool may be less visible and emotionally salient than taxation.²⁴⁹ Whereas taxes are levied more broadly against the public, regulatory offences concentrate revenue generation amongst offenders.

Quotas exemplify how regulatory offences can be enforced to raise revenue. Various examples illustrate this point. A leaked 2015 memo confirmed that the York Regional Police

²³⁶ See e.g. *Tariff of Court Costs in Penal Matters*, CQLR c C-25.1, r 6, s 1(7); *Victim Fine Surcharges*, O Reg 161/00.

²³⁷ Ben-Ishai & Nayerahmadi, *supra* note 82 at 213.

²³⁸ *Ibid.*, at 211.

²³⁹ See e.g. Keith N Hylton, “Economics of Criminal Procedure” in Francesco Parisi, ed, *The Oxford Handbook of Law and Economics: Public Law and Legal Institutions*, vol 3 (Oxford: Oxford University Press, 2017) 325 at 329–30 (discussing the economic considerations related to enforcement costs).

²⁴⁰ See e.g. William J Stuntz, “Race, Class, and Drugs” (1998) 98:7 Colum L Rev 1795 at 1820 (discussing how street stops are cheap investigative tools). These same considerations apply to traffic stops that do not require prior investigations and are resolved quickly.

²⁴¹ See e.g. *Highway Safety Code*, *supra* note 59, ss 395, 510 (providing a \$200–\$300 fine for not wearing a seatbelt in a motor vehicle); *Highway Traffic Act*, *supra* note 101, s 78.1 (6.1) (providing a minimum fine of \$500 for driving while holding a cellphone).

²⁴² See e.g. Ram Subramanian et al, *Revenue Over Public Safety: How Perverse Financial Incentives Warp the Criminal Justice System* (New York: Brennan Center for Justice, 2022) at 27 (describing how various police forces alleged imposed quotas that required officers to issue a dozen or more tickets per shift).

²⁴³ Stuntz, “Politics of Criminal Law,” *supra* note 10 at 520.

²⁴⁴ Libman, *Modernization*, *supra* note 9 at 1.

²⁴⁵ Ariel Jurow Kleiman, “Nonmarket Criminal Justice Fees” (2021) 72:2 Hastings LJ 517 at 526 (discussing how taxation may not be possible due to legal or political constraints); Wayne A Logan & Ronald F Wright, “Mercenary Criminal Justice” (2014) 2014:4 U Ill L Rev 1175 at 1185, 1218 (discussing how criminal justices fines and fees may evade public scrutiny).

²⁴⁶ Abigail B Sussman & Christopher Y Olivola, “Axe the Tax: Taxes are Disliked More Than Equivalent Costs” (2011) 48 J Marketing Research S91 at S91.

²⁴⁷ See e.g. Kathryn Harrison, “A Tale of Two Taxes: The Fate of Environmental Tax Reform in Canada” (2012) 29:3 Rev Policy Research 383 at 391–92; Dalton Conley, “Tax Revolts, Pregnancy Envy, Race, and the ‘Death Tax’” (2009) 63:1 Tax L Rev 261 at 261 (describing public opposition to certain taxes).

²⁴⁸ Traci R Burch, “Fixing the Broken System of Financial Sanctions” (2011) 10:3 Criminology & Public Policy 539 at 539–40.

²⁴⁹ See e.g. Edward J McCaffery, “Cognitive Theory and Tax” (1994) 41:7 UCLA L Rev 1861 at 1876 (describing the advantages of “hidden taxes”).

employed traffic ticket quotas.²⁵⁰ Similarly, a leaked 2012 memo from the Toronto Police Service showed that the quota for traffic enforcement officers was 25 tickets per day.²⁵¹ The Montreal Police Service also used a quota system for its traffic enforcement unit.²⁵² The force first admitted using a quota system in 2011.²⁵³ The force's police directors received bonuses — which could be as high as 8 percent of their annual salary — when lower-level officers met their quotas.²⁵⁴ In 2014, the director of the City's police union explained that motorcycle unit officers had a quota of 18 tickets per day, while traffic unit officers had a quota of 16 tickets per day.²⁵⁵ The Montreal Police Service abolished the quota system in 2018.²⁵⁶

The desire to raise revenue can lead to abusive enforcement tactics. Following the 2014 police shooting of Michael Brown in Ferguson, Missouri, the United States Justice Department initiated a federal investigation into the City's police force.²⁵⁷ The Department of Justice concluded that "Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs."²⁵⁸ In 2011, roughly one-tenth of Ferguson's revenue was generated through fines and fees.²⁵⁹ By 2015, the City projected that roughly one-quarter of its revenue would stem from fines and fees.²⁶⁰ The investigation revealed how officers abused their authority and issued harsh fines that entrenched individuals in poverty.²⁶¹

The enforcement of regulatory offences to raise revenue generates various concerns. Over enforcement may decrease public confidence in the police and in other public institutions.²⁶² Individuals who distrust police officers — or who feel targeted by them — may be reluctant to co-operate with law enforcement.²⁶³ However, the police require such collaboration to prevent and solve crimes.²⁶⁴ Individuals who distrust the police may be reluctant to report criminal wrongdoing, provide tips to officers, co-operate with law enforcement, and testify at trials.²⁶⁵

²⁵⁰ Jeremy Grimaldi, "Leaked York Regional Police Document Confirms Ticket Quotas," *York Region* (11 June 2015), online: [perma.cc/2DDZ-9ZA6].

²⁵¹ Marni Soupcoff, "Think Police Really Don't Have Ticket Quotas? Check out These Leaks," *National Post* (2 May 2012), online: [perma.cc/93F5-YLCQ].

²⁵² Giuseppe Valiante, "Montreal Abolishes Infamous Traffic and Parking Ticket Quotas, Bonuses Tied to Them," *National Post* (21 January 2018), online: [perma.cc/DG3G-28NW].

²⁵³ "Montreal Police Admit Ticket Quotas," *CBC News* (20 January 2011), online: [perma.cc/9BAF-HUZ5]. Valiante, *supra* note 252.

²⁵⁴ *Ibid* ("[i]n 2014, police union head Yves Francoeur told reporters that police bikers had a target of 18 tickets per day, while the traffic squad had 16").

²⁵⁵ *Ibid*.
²⁵⁷ United States Department of Justice Civil Rights Division, *Investigation of the Ferguson Police Department* (Washington: USDOJ, March 2015) [USDOJ].

²⁵⁸ *Ibid* at 2. See also Akheil Singla, Charlotte Kirschner & Samuel B Stone, "Race, Representation, and Revenue: Reliance on Fines and Forfeitures in City Governments" (2020) 56:4 *Urban Affairs Rev* 1132 at 1133.

²⁵⁹ USDOJ, *ibid* at 9.

²⁶⁰ *Ibid* at 10.

²⁶¹ *Ibid* at 52–58; Devon W Carbado, "Predatory Policing" (2017) 85:3 *UMKC L Rev* 545 at 557–58.

²⁶² Nathaniel Bronstein, "Police Management and Quotas: Governance in the CompStat Era" (2015) 48:4 *Colum JL & Soc Probs* 543 at 555 (discussing how individuals may believe that they were targeted to meet a quota); Min Su, "Taxation by Citation? Exploring Local Governments' Revenue Motive for Traffic Fines" (2020) 80:1 *Public Administration Rev* 36 at 43–44.

²⁶³ Skolnik, "Racial Profiling," *supra* note 154 at 431, 439; Tom R Tyler, Jonathan Jackson & Avital Mentovich, "The Consequences of Being an Object of Suspicion: Potential Pitfalls of Proactive Police Contact" (2015) 12:4 *J Empirical Leg Stud* 602 at 605, 617, 629–30.

²⁶⁴ Skolnik, "Racial Profiling," *ibid* at 439; Tom R Tyler, Phillip Atiba Goff & Robert J MacCoun, "The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement" (2015) 16:3 *Psychological Science in Public Interest* 75 at 85.

²⁶⁵ Skolnik, "Racial Profiling," *supra* note 154 at 439; Tyler, Goff & MacCoun, *ibid* at 85.

Revenue generation also exceeds law enforcement's institutional function and purpose. Statutes and Supreme Court of Canada decisions state that law enforcement's role is to prevent crime, maintain public order, and protect people and property from harm.²⁶⁶ Revenue generation resembles a taxation power that falls outside the mission and role of law enforcement.²⁶⁷

Furthermore, the enforcement of regulatory offences to raise revenue can disproportionately impact racialized or marginalized individuals.²⁶⁸ Black persons comprised roughly 67 percent of the general population of Ferguson, Missouri, between 2012–2014.²⁶⁹ Yet they received approximately 90 percent of all citations issued by the Ferguson Police Department during that period.²⁷⁰ Furthermore, compared to white persons, Black persons in Ferguson were more likely to receive multiple citations during a police encounter.²⁷¹ Similarly, research suggests that roughly 30 percent of the total number of municipal bylaws issued in Montreal in 2004 were given to unhoused persons.²⁷² Subsequent studies estimated that figure to be approximately 25 percent during the years 2007–2010.²⁷³ In such contexts, regulatory offence enforcement resembles a form of regressive taxation.²⁷⁴

Lastly, regulatory offence quotas and enforcement targets constrain police discretion.²⁷⁵ Such discretion is fundamental to conserving police resources, promoting enforcement flexibility, and allocating investigative efforts to more serious offences.²⁷⁶ Revenue generation and quotas can limit this discretion in important ways. Police forces are hierarchical institutions.²⁷⁷ Front line officers may risk informal sanctions, reprisals, or reputational harm if they fail to respect quotas or meet an enforcement target.²⁷⁸ Officers who disclosed enforcement quotas faced retaliation.²⁷⁹ But quotas may also result in other unintended consequences. Officers who must meet a quota may neglect more pressing law enforcement needs, especially in underserved communities that desire a greater law enforcement presence.²⁸⁰ Or, they may downplay or ignore the community's needs when they pursue revenue generation as their main objective.²⁸¹

²⁶⁶ *Fleming v Ontario*, 2019 SCC 45 at para 69; *Police Services Act*, RSO 1990, c P.15, ss 1, 4(2), 42(1) (note that although section 42(1) states that the police have a duty to enforce bylaws, such a duty is distinct from a duty to enforce the law specifically to generate revenue).

²⁶⁷ Shannon R Graham & Michael D Makowsky, "Local Government Dependence on Criminal Justice Revenue and Emerging Constraints" (2021) 4 Annual Rev Criminology 311 at 311, 326.

²⁶⁸ Bellot & Sylvestre, "La judiciarisation de l'itinérance à Montréal," *supra* note 79 at 31–34; OHRC, "Second Interim Report," *supra* note 226 at 2 (mentioning out-of-sight driving offences); USDOJ, *supra* note 257 at 60, 63.

²⁶⁹ USDOJ, *ibid* at 4, 62.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² Bellot & Sylvestre, "La judiciarisation de l'itinérance à Montréal," *supra* note 79 at 35–36, citing Christine Campbell & Paul Eid, *La judiciarisation des personnes itinérantes à Montréal: Un profilage social* (Montreal: Commission des droits de la personne et des droits de la jeunesse, 2009) at 41.

²⁷³ Bellot & Sylvestre, "La judiciarisation de l'itinérance à Montréal," *ibid* at 35–36.

²⁷⁴ Graham & Makowsky, *supra* note 267 at 326.

²⁷⁵ *Ibid.*

²⁷⁶ Herman Goldstein, "Police Discretion: The Ideal Versus the Real" (1963) 23:3 Public Administration Rev 140 at 140–41; Simon Bronitt & Philip Stenning, "Understanding Discretion in Modern Policing" (2011) 35:6 Crim LJ 319 at 320–21; *R v Beaudry*, 2007 SCC 5 at paras 3, 35, 37.

²⁷⁷ David Alan Sklansky, "Police and Democracy" (2005) 103:7 Mich L Rev 1699 at 1730 (describing the professionalization of police and the establishment of hierarchies).

²⁷⁸ Bronstein, *supra* note 262 at 551.

²⁷⁹ Shaun Ossei-Owusu, "Police Quotas" (2021) 96:2 NYL Rev 529 at 553.

²⁸⁰ *Ibid* at 583.

²⁸¹ USDOJ, *supra* note 257 at 2.

VII. REGULATORY OFFENCES AND CRIMINAL LAW LOCALISM

A. CRIMINAL LAW LOCALISM AND OVERLAPPING JURISDICTION

Fourth, regulatory offences can contribute to criminal law localism. The *Constitution Act, 1867* provides that the criminalization power falls within exclusive federal jurisdiction.²⁸² Only Parliament can enact crimes; provinces and cities cannot.²⁸³ However, the *Constitution Act, 1867* authorizes provinces and cities to enact regulatory offences regarding matters within their jurisdiction.²⁸⁴ Provinces have the jurisdiction to regulate all matters related to the administration of justice within the province.²⁸⁵ They also have the jurisdiction to impose fines and imprisonment as enforcement mechanisms.²⁸⁶

In some contexts, the Supreme Court of Canada has struck down a province's attempt to enact a crime. The *Morgentaler* decision offers a salient example.²⁸⁷ The province of Nova Scotia attempted to prohibit abortions performed in locations other than a hospital and imposed harsh sanctions as a punishment.²⁸⁸ The Supreme Court concluded that the province had attempted to enact the equivalent of a crime and struck down the legislation as ultra vires.²⁸⁹ Notably, the provision's pith, substance, and effects were criminal in nature.²⁹⁰ In other contexts, the Supreme Court has struck down provincial laws that are "virtually indistinguishable" from a federal criminal law or employ identical language.²⁹¹

Yet certain judicial doctrines — such as the double aspect doctrine — authorize Parliament and the provinces to regulate the same conduct in an overlapping fashion.²⁹² The term "double aspect" implies that federal and provincial statutes may lawfully control different facets of the same conduct that fall within their respective jurisdictions.²⁹³ The federal government can control the criminal aspect of an unlawful act or omission.²⁹⁴ A provincial government, for its part, can regulate facets of that same conduct which fall within

²⁸² *Constitution Act, 1867*, supra note 22, s 91(27); Julia Hughes, "Restraint and Proliferation in Criminal Law" (2010) 15:1 Rev Const Stud 117 at 139.

²⁸³ *Ibid*; Dennis Baker, "Criminal Justice and Criminal Law" in Herman Bakvis & Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 4th ed (Toronto: University of Toronto Press, 2020) 114 at 114.

²⁸⁴ *Constitution Act, 1867*, supra note 22, s 92 (14), 92(15). Note that municipalities have the power to enact regulatory offences through delegated authority: *R v Tsui*, 2017 ONCA 230 at para 74 [*Tsui*].

²⁸⁵ *Constitution Act, 1867*, *ibid*.

²⁸⁶ *Ibid*, s 92(15).

²⁸⁷ *R v Morgentaler*, [1993] 3 SCR 463 [*Morgentaler*]; Sarah Burningham, "Provincial Jurisdiction Over Abortion" (2019) 45:1 Queen's LJ 37 at 45–46.

²⁸⁸ *Morgentaler*, *ibid* at 470–71, citing *Medical Services Act*, RSNS 1989, c 281, ss 4, 6; *Morgentaler*, *ibid* at 471, citing *Medical Services Designation Regulation*, NS Reg 152/89, item (d).

²⁸⁹ *Morgentaler*, *ibid* at 512–16.

²⁹⁰ *Ibid*.

²⁹¹ See e.g. *Nova Scotia Board of Censors v McNeil*, [1978] 2 SCR 662 at 699 [*McNeil*]; *Rio Hotel Ltd v New Brunswick (Liquor Licensing Board)* [1987] 2 SCR 59 at 70–71, 80 [*Rio Hotel*]; *Starr v Houlden*, [1990] 1 SCR 1366 at 1402, 1405–406 (these decisions are cited in *Morgentaler*, *ibid*). See also *Westendorp v R*, [1983] 1 SCR 43.

²⁹² Jean Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003) 28:2 Queen's LJ 411 at 416–21; Peter Oliver, "Canadian Legal Federalism Since 1982" (2013) 1 Canadian Issues 7 at 8.

²⁹³ Eugénie Brouillet & Bruce Ryder, "Key Doctrines in Canadian Legal Federalism" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 415 at 422, citing *Reference Re Securities Act*, 2011 SCC 66 at para 66.

²⁹⁴ *Ibid*.

its jurisdiction, such as property, purely local matters, and commerce.²⁹⁵ In the spirit of cooperative federalism, the Supreme Court of Canada notes that it is preferable to accommodate provincial statutes for matters within its jurisdiction that are also regulated by the federal government or that have a federal aspect.²⁹⁶

The federal and provincial governments regulate various behaviours in an overlapping fashion. Both levels of government enforce laws that control motor vehicle safety.²⁹⁷ Federal and provincial laws prohibit dangerous driving, suspend driver's licences, and proscribe drunk driving.²⁹⁸ Courts have also recognized that provinces and municipalities can lawfully enact bylaws and ordinances that aim to prevent crime.²⁹⁹ For example, Parliament criminalizes assaults and other crimes against the person, while provincial legislatures and municipalities prohibit street fights and other forms of disorderly conduct.³⁰⁰

Both levels of government also enjoy the authority to regulate behaviours associated with vice, morality, and public health. Federal and provincial governments have the jurisdiction to control nudity and erotic dancing in licenced establishments.³⁰¹ Similarly, both levels of government have the authority to regulate gambling and the operation of massage parlours.³⁰² They can also regulate a litany of conduct associated with drugs.³⁰³

Municipal bylaws may also overlap with federal criminal law. The 2014 Alberta Court of Appeal decision *Smith v. St. Albert (City)* is an example.³⁰⁴ In *Smith*, the City enacted a bylaw that prohibited the sale and display of various items associated with marijuana

²⁹⁵ *Ibid*; Peter C Oliver, "The Busy Harbours of Canadian Federalism: The Division of Powers and its Doctrines in the McLachlin Court" in David A Wright & Adam M Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) 167 at 173.

²⁹⁶ *Reference Re Genetic Non-Discrimination Act*, 2020 SCC 17 at para 23 (the Supreme Court's exact quote is: "The courts' preference for accommodating co-operation and overlap between provincial and federal legislation has often played a role in upholding the validity or constitutional operability of provincial legislation, particularly when the legislature has acted in an area in which Parliament has also legislated or over which there is a federal aspect").

²⁹⁷ *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para 31 [*Goodwin*].

²⁹⁸ *Provincial Secretary of Prince Edward Island v Egan*, [1941] SCR 396 at 416 (upholding the constitutionality of a provincial law that suspended a driver's licence for driving while impaired); *Validity of Section 92(4) of The Vehicles Act, 1957 (Sask)*, [1958] SCR 608 (same); *Ross v Registrar of Motor Vehicles*, [1975] 1 SCR 5 (same); *Stephens v R*, [1960] SCR 823 (upholding the constitutionality of a provincial law that imposed a legal duty to stop at the scene of an accident that one caused and that resembled a *Criminal Code* provision); *O'Grady v Sparling*, [1960] SCR 804 (upholding the constitutionality of a provincial offence that prohibited negligent driving); *Goodwin, ibid* (upholding a provincial law that empowered officers to administer roadside screening devices and suspend the driver's licence for those who failed the screening test).

²⁹⁹ *Dupond v City of Montreal*, [1978] 2 SCR 770 at 793-94; *R v Keshane*, 2012 ABCA 330 [*Keshane*].

³⁰⁰ *Criminal Code*, *supra* note 51, s 265 (prohibiting assault); City of Edmonton, by-law No 14614, *Public Places Bylaw* (17 January 2022), s 7 (prohibiting street fights). The Alberta Court of Appeal decided that the municipal prohibition against street fighting was *intra vires* and fell within the municipality's jurisdiction (*Keshane, ibid*).

³⁰¹ *Rio Hotel*, *supra* note 291 at paras 6-7; *Re Sharlmark Hotels Ltd and Municipality of Metropolitan Toronto* (1981), 121 DLR (3d) 415 (Ont SC) [*Sharlmark*]; *McNeil, supra* note 291.

³⁰² *Sharlmark, ibid*, citing *Re Moffat and City of Edmonton* (1979), 99 DLR (3d) 101 (Alta SC (AD)) (upholding a municipal bylaw that regulated massage parlours); *Re Try-San International Ltd and City of Vancouver* (1978), 83 DLR (3d) 236 (BCCA) (same); *Cal Investments Ltd v City of Winnipeg* (1978), 84 DLR (3d) 699 (Man CA) (same).

³⁰³ *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19 at para 15; *Smith v St. Albert (City)*, 2014 ABCA 76 [*Smith*]. See also *Murray-Hall v Quebec (Attorney General)*, 2023 SCC 10.

³⁰⁴ *Smith, ibid*; Ola Malik & Theresa Yurkewich, "The Decision in *Smith v St. Albert (City)*: An Example of a Municipality's Expansive Powers to Regulate Just About... Everything?" (28 March 2014), online (blog): *ABlawg* [perma.cc/D4BT-WSWM].

consumption.³⁰⁵ The list of prohibited items included cannabis grinders, pipes, bongs, vaporizers, scales, and products that displayed a marijuana plant.³⁰⁶ The bylaw violations were punishable by a fine of up to \$1,500, or, by a summary conviction offence punishable by up to \$10,000 or one year imprisonment.³⁰⁷ The Court of Appeal upheld the bylaw and decided that it was a lawful exercise of municipal jurisdiction.³⁰⁸ The Court concluded that the bylaw aimed to regulate business licensing to combat illicit drugs, and to promote public safety by suppressing conditions that contribute to crime.³⁰⁹ Some courts of appeal observe that municipalities have the jurisdiction to enact bylaws that aim to counteract crime and nuisances provided they are linked to some aspect of provincial jurisdiction.³¹⁰

There are other emerging instances of criminal law localism. During the COVID-19 pandemic, provinces and municipalities imposed harsh fines for individuals who violated physical distancing laws.³¹¹ In Quebec, individuals who breached physical distancing rules could be punished by a fine between \$1,000–\$6,000.³¹² Some individuals who breached the province's curfew received fines of approximately \$1,500.³¹³ The province issued approximately 45 million dollars' worth of fines related to COVID-19 between 1 April 2020 and 13 December 2021.³¹⁴ Municipalities also imposed harsh fines on individuals who violated physical distancing requirements. For example, the City of Brampton enacted a physical distancing bylaw that was punishable by a fine ranging between \$500–\$100,000.³¹⁵

Emerging debates surrounding proposed city-wide handgun bans are another example of criminal law localism.³¹⁶ In 2021, Parliament introduced a bill that would permit cities to pass laws that prohibit handguns at the local level.³¹⁷ In response to the bill, provinces such as Alberta and Saskatchewan enacted laws that prohibited cities within their provinces from enforcing such local bans.³¹⁸ In contrast, the mayors of cities such as Surrey and Vancouver explained that they would support a local handgun ban.³¹⁹ Toronto also considered the proposal.³²⁰ Ultimately, the bill did not make it past the first reading. Yet the prospect of allowing cities to impose handgun bans offers another example of criminal law localism.

³⁰⁵ *Smith, ibid* at paras 2–8.

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid*; City of St. Albert, by-law No 43/2000, *Business Licence Bylaw* (18 December 2000), s 21, as amended by by-law No 29/2012.

³⁰⁸ *Smith, ibid* at paras 27, 32.

³⁰⁹ *Ibid.*

³¹⁰ *Tsui, supra* note 284; *Smith, ibid.*

³¹¹ See e.g. Terry Skolnik, “Criminal Law During (and After) COVID-19” (2020) 43:4 *Man LJ* 145 at 176 [Skolnik, “Criminal Law COVID-19”]; BC Public Safety and Solicitor General, News Release, “Province Hikes Fines to Further Enforce COVID-19 Public Safety,” (25 March 2021), online: *BC Gov News* [perma.cc/U4WA-XSKG] (providing a \$230 fine for violating certain COVID-19 restrictions).

³¹² *Public Health Act*, CQLR c S-2.2, r 1, s 139, cited in Skolnik, “Criminal Law COVID-19,” *ibid*, n 197. See also “Two Quebec Men Fined \$1,558 Each for Curfew Breaches, Driver Fined \$3,500 for Speeding and Other Offences,” *Ottawa Citizen* (4 January 2022), online: [perma.cc/Q3BG-EV72] [*Ottawa Citizen*].

³¹³ *Ottawa Citizen, ibid.*

³¹⁴ Joe Lofaro, “Quebec Has Issued \$45M in Fines During the Pandemic, but Only a Fraction of Them Have Been Paid,” *CTV News* (26 January 2022), online: [perma.cc/9A36-FBUY].

³¹⁵ City of Brampton, by-law MO 1-2020, *Brampton COVID-19 Emergency Measures By-law*, s 7.

³¹⁶ Jane Gerster, “Toronto Might Not be Able to Take Advantage of Federal Bill That Would Let Cities Ban Handguns,” *CBC News* (17 February 2021), online: [perma.cc/7B7V-29UT].

³¹⁷ *Ibid*; Bill C-21, *An Act to Amend Certain Acts and to Make Certain Consequential Amendments (Firearms)*, 1st Sess, 44th Parl, 2022 (first reading 30 May 2022).

³¹⁸ Gerster, *supra* note 316.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

B. LEGALIZATION, DECRIMINALIZATION, AND CRIMINAL LAW LOCALISM

Regulatory offences also fill voids that are left by the decriminalization or legalization of conduct. Two examples illustrate this point: the rise of municipal ordinances in the US following vagrancy law's unconstitutionality, and the regulation of cannabis in Canada following its legalization. Consider first how the number of municipal ordinances — a form of localized criminal law — exploded in the US when vagrancy laws were declared unconstitutional.³²¹ Historically, vagrancy statutes criminalized a broad range of behaviours associated with poverty, unemployment, homelessness, sex work, sexuality, and more.³²² These laws criminalized conduct such as wandering without being able to account for oneself, living without visible means of employment, panhandling, sleeping on public property, and more.³²³ Vagrancy statutes were catch-all laws that allowed officers to police incivilities, disorder, and perceived threats to social order.³²⁴

In the United States, vagrancy laws were struck down as unconstitutionally vague in the 1972 US Supreme Court decision *Papachristou v. City of Jacksonville*.³²⁵ The Court concluded that the relevant vagrancy statute fostered arbitrary enforcement because it conferred vast discretion to police officers.³²⁶ The Court also noted that the vagrancy legislation failed to provide fair notice to individuals regarding which conduct was lawful.³²⁷ Following the decision, police officers lost an enforcement tool that conferred sweeping discretion and that was perceived as important to maintain public order.³²⁸

Cities responded to the rise of void for vagueness doctrine by enacting a litany of regulatory offences that withstood constitutional scrutiny.³²⁹ Rather than prohibit vagrancy more broadly, US cities enacted narrowly tailored municipal ordinances that proscribe conduct such as urban camping, sitting on sidewalks, panhandling, excessive noise, loitering, littering, and more.³³⁰ Unlike vagrancy laws that could be struck down on void for vagueness grounds, the narrowly tailored nature of these regulatory offences insulated them against

³²¹ Stuntz, "Politics of Criminal Law," *supra* note 10 at 559–60; Risa L Goluboff, "Dispatch From the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights" (2010) 62:5 *Stan L Rev* 1361 at 1374.

³²² Terry Skolnik, *Homelessness, Liberty, and Property* (Cambridge: Cambridge University Press) at 31 [forthcoming in October 2024].

³²³ See e.g. Arthur H Sherry, "Vagrants, Rogues and Vagabonds: Old Concepts in Need of Revision" (1960) 48:4 *Cal L Rev* 557 at 559–60, 562 n 38; Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15:1 *JL & Equality* 69 at 79.

³²⁴ Jeffrey S Adler, "A Historical Analysis of the Law of Vagrancy" (1989) 27:2 *Criminology* 209 at 216; Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (Oxford: Oxford University Press, 2016) at 15–20.

³²⁵ 405 US 156 (1972) [*Papachristou*]; Michael J Zydney Mannheimer, "Vagueness as Impossibility" (2020) 98:6 *Tex L Rev* 1049 at 1087, 1108–109.

³²⁶ *Papachristou*, *ibid* at 162, 168, 170.

³²⁷ *Ibid*.

³²⁸ Debra Livingston, "Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing" (1997) 97:3 *Colum L Rev* 551 at 607.

³²⁹ Stuntz, "Politics of Criminal Law," *supra* note 10 at 559–60; Terry Skolnik, "Homelessness and the Impossibility to Obey the Law" (2016) 43:3 *Fordham Urb LJ* 741 at 767–68.

³³⁰ National Law Center on Homelessness & Poverty, "Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities" (Washington: NLCHP, 2019) at 10–11 [NLCHP]. Note that Canadian cities impose similar prohibitions: see e.g. Bellot & Sylvestre, "La judiciarisation de l'itinérance à Montréal," *supra* note 79 at 23–24; Sylvestre & Bellot, "Challenging Discriminatory and Punitive Responses," *supra* note 84 at 165–69; Skolnik, "Homeless Regulated Differently," *supra* note 2 at 304–305.

similar constitutional challenges.³³¹ Today, municipal codes and traffic codes prohibit an expansive array of conduct that vagrancy laws previously regulated, but with none of the constitutional defects that animated the US Supreme Court's decision in *Papachristou*.³³² As a form of localized criminal law, municipal regulatory offences filled the void left by vagrancy law's unconstitutionality. And as discussed in Part VII.A, municipal ordinances contribute to localized criminal law in Canada, too.³³³

The provincial and municipal regulation of marijuana is the second example where regulatory offences filled certain voids left by decriminalization. Following its legalization, federal and provincial governments enacted provisions that control driving while intoxicated by cannabis.³³⁴ Provinces and municipalities also enacted laws that relate to its sale, use, and public consumption.³³⁵ Certain provinces also expanded police officers' search powers. For instance, the Ontario government enacted a provision that governed the improper storage of marijuana in vehicles.³³⁶ The provision authorizes police officers to search a vehicle and its occupants when they have reasonable grounds to believe that the vehicle contains improperly stored cannabis.³³⁷ Despite legalization at the federal level, provincial laws and municipal ordinances continue to regulate cannabis in various ways.³³⁸

VIII. CONCLUSION

This article argued that regulatory offences fulfil an expansive role in the criminal justice system. It highlighted how police officers may enforce regulatory offences to gather information and generate intelligence. It explained how officers can enforce these offences as a pretext to investigate crimes and trigger investigation cascades — police interventions that can evade judicial review and circumvent constitutional safeguards. This article also elucidated how police forces have sometimes leveraged regulatory offences to generate revenue. And it set out how provincial and municipal regulatory offences contribute to criminal law localism. Moreover, the expansive role of regulatory offences can contribute to discriminatory enforcement patterns that disproportionately impact racialized and marginalized persons.

The core arguments of this article also offer a starting point for renewed scholarly and judicial attention to regulatory offences. Although scholars tend to focus on certain issues related to these offences — such as the presumption of innocence, burdens of proof, and the distinction between crimes and regulatory infractions — others are hiding in plain sight and require more scrutiny. The ways in which regulatory offences can be enforced to gather information, trigger investigation cascades, raise revenue, and localize the criminal law raise

³³¹ Livingston, *supra* note 328 at 635–36.

³³² Woods, “Traffic Without the Police,” *supra* note 219; NLCHP, *supra* note 330 at 10–11.

³³³ Part VII.A, above.

³³⁴ Tara Marie Watson et al, “Early-Stage Cannabis Regulatory Policy Planning Across Canada’s Four Largest Provinces: A Descriptive Overview” (2019) 54:10 Substance Use & Misuse 1691 at 1692–95.

³³⁵ *Ibid.*; François Gagnon et al, “Municipal Regulation of Cannabis and Public Health in Canada: A Comparison of Alberta, Ontario, and Québec” (2022) 40:2 Behavioral Sciences & L 271 at 278–84; Peter Bowal et al, “Regulating Cannabis: A Comparative Exploration of Canadian Legalization” (2020) 57:4 Am Bus LJ 677 at 699–711.

³³⁶ *Cannabis Control Act, 2017*, *supra* note 104.

³³⁷ *Ibid.*

³³⁸ See e.g. Marian Shanahan & Philippe Cyrenne, “Cannabis Policies in Canada: How Will We Know Which is Best?” (2021) 91 Intl J Drug Policy at 2–3.

distinct and overlapping concerns. The expansive function of regulatory offences highlights new problems related to police discretion, discriminatory enforcement, the institutional role of law enforcement, and constitutional criminal procedure's ability to protect rights.

Increased attention to regulatory offences may also catalyze important developments in criminal law, criminal procedure, and constitutional law. For instance, disparate enforcement patterns may result in constitutional class action lawsuits that challenge such practices.³³⁹ Like in the criminal context, courts may strike down mandatory fines, fees, and surcharges associated with regulatory offences that result in a cruel and unusual punishment.³⁴⁰ Courts may expand the right to equality's role within the criminal justice system to better protect individuals against the disparate enforcement of regulatory offences.³⁴¹

But there are other important features of regulatory offences. Part 2 of this two-part article examines a fundamental issue that scholars, courts, and civil society organizations rarely examine: the choice architecture that governs crimes versus regulatory offences. The concept of "choice architecture" refers to how the presentation of choices influences decision-making.³⁴² Whether we notice it or not, the choice architecture that applies to crimes and regulatory offences differ significantly — distinctions that influence the charging and plea phase, moral culpability, and punishments for these offences.

³³⁹ Terry Skolnik, "Three Stages of Criminal Justice Remedies" UBC L Rev [forthcoming in 2024] (Draft on file with author).

³⁴⁰ Terry Skolnik, "The Punitive Impact of Physical Distancing Laws on Homeless People" in Flood et al. eds, *Vulnerable: The Law, Policy, and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 287 at 291–93.

³⁴¹ Skolnik, "Rééquilibrer," *supra* note 208 at 290–93; Terry Skolnik, "Expanding Equality" (2024) 47:1 Dal LJ at 31.

³⁴² See e.g. Cass R Sunstein, *The Ethics of Influence: Government in the Age of Behavioral Science* (New York: Cambridge University Press, 2016) at 5; Richard H Thaler, Cass R Sunstein & John P Balz, "Choice Architecture" in Eldar Shafir, ed, *The Behavioral Foundations of Public Policy* (Princeton: Princeton University Press, 2013) 428 at 428–29.