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RACE AND SELECTIVE PROSECUTION: DISCOVERING THE PITFALLS OF *ARMSTRONG*

RICHARD H. McADAMS*

Successful claims of equal protection violations are few and far between. Because nearly all the statutes legislatures enact are facially race neutral, the only means of establishing a race-based violation is to prove that the government acted with the purpose to discriminate on that ground.¹ Today, most discriminators strive to conceal their intent in order to avoid legal, social, and economic sanctions. Equal protection claims thus rise or fall on whether one proves a motive known only to actors who wish to conceal it. Mostly, they fall. Selective prosecution claims are typical. Criminal defendants in this country almost never win on claims that prosecutors acted with racially discriminatory purpose in bringing a charge.² No wonder, given that prosecutors control almost all the information relevant to determining their motive. Commentators have noted the dilemma: the defendant “cannot obtain discovery unless she first makes a threshold showing . . . of selective prosecution Yet making a sufficient preliminary showing of discriminatory intent may be impossible without some discovery.”³

In *United States v. Armstrong*,⁴ the Supreme Court decided to stay the course. The defendants there—Black men charged in federal court with selling crack cocaine—had convinced the district court to order the government to provide certain information relevant to the defendants’ claim of selective prosecution. The district court found the defendants’ evidence disturbing—a sample of twenty-four recent crack prosecutions in which all defendants were Black—and opined that discovery was necessary to determine the true explanation for this pattern. The Supreme Court ruled eight to one that the district court was not permitted to order such discovery unless the defendants

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1. See *infra* note 14.

2. See *infra* note 55.

3. Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1373-74 (1987) (calling this “a Catch-22 type bind”).

4. 116 S. Ct. 1480 (1996).

first provided more and better evidence: namely, evidence that the government failed to prosecute “similarly situated” members of other races.⁵ The Court rejected as “anecdotal” and “hearsay” the evidence of this sort that defendants had offered.⁶

Eight-to-one opinions speak with some authority. Nonetheless, I believe the *Armstrong* rule is a bad one. In this article, I assume the correctness of basic equal protection doctrine,⁷ but I contend that the Court was wrong to require, as an absolute condition for discovery, that defendants provide “some evidence” that similarly situated members of other races were not prosecuted.⁸ Any evidentiary standard makes a trade-off between two types of error—the easier the standard, the more instances when a meritless claim will be misidentified as a sound one, but the harder the standard, the more instances when a meritorious claim will be dismissed as baseless. The *Armstrong* ruling will prevent many defendants who were selectively prosecuted from gaining discovery, and thereby ensure that many meritorious claims will never be proven. Even if *Armstrong* forecloses proof of selective prosecution claims, the decision would still be a good one if the value of vindicating meritorious claims were sufficiently low and the harm of adjudicating, and sometimes even vindicating, meritless claims were sufficiently high. But the tradeoff implicit in *Armstrong*—once one fully understands the effect of its holding and reasoning—can be justified only by great hostility to the selective prosecution doctrine itself, by placing an extremely low, or negative, value on the vindication of meritorious claims.

I make these points in the following order. After describing *Armstrong* in the initial Part, Part II explains my assertion that the “similarly situated” requirement renders many meritorious claims impossible to prove. The Court states that the defendants before it could meet the requirement, if their selective prosecution claim were valid, without considering whether other defendants with valid claims

5. See *id.* at 1488.

6. See *id.* at 1489.

7. Thus, I forgo relying on the criticisms of Supreme Court precedent requiring, as an element of equal protection claims, proof that governmental officials act with a discriminatory purpose. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995).

8. Possibly the outcome in the case is correct for reasons other than the Court's holding. See *infra* note 108.

could meet the requirement. Although the *Armstrong* defendants could, in theory, find evidence to meet the similarly situated requirement in the records of Whites prosecuted in state court, no such records exist when defendants assert that members of other races go *unprosecuted*.

Part III makes a different but more fundamental criticism: the point of the numbers in *Armstrong* is to suggest that race and the decision to prosecute are statistically “related.” But the Supreme Court seems unaware of all the elements needed to establish a statistical relationship. Either the Court is giving special status to “similarly situated” evidence, which would be logically indefensible, or it means ultimately to require defendants to provide evidence of *all* the elements necessary to demonstrate such a relationship, which would be impossible in virtually all criminal cases. I conclude this Part by describing the standard *Armstrong* should have set: discovery is justified when it is likely that race and prosecutions are significantly correlated, given whatever evidence the defendant provides along with reasonable assumptions about the ranges of the uncertain elements of the relationship.

In Part IV, I respond to the only remaining argument that I believe could justify the *Armstrong* tradeoff: that there are no “meritorious” selective prosecution claims, either because there is no selective prosecution or because selectively prosecuted defendants should not be entitled to the relief they seek—dismissal of the charge. First, I contend that racially selective prosecution is at least as likely as race discrimination in employment markets, a problem the law takes seriously. Racist individuals will seek out prosecutor jobs just like any other, after which agency costs will often shield their discriminatory behavior from effective monitoring. Electoral pressures and other incentives are not likely to motivate chief prosecutors to bear the costs necessary to detect acts of selective prosecution.

Second, I respond to possible utilitarian and retributive criticisms of selective prosecution doctrine. I contend that dismissal of selectively prosecuted cases is justified on both grounds: (1) Selective prosecution undermines the moral credibility of the criminal law, which, according to many utilitarian theorists, will undermine general deterrence. Dismissals may thus preserve the credibility of law and enhance deterrence. (2) Because selective prosecution typically occurs for crimes for which discretionary nonenforcement is appropriate, dismissal also achieves the just outcome. The utilitarian discussion reveals two purposes to discovery other than to help de-

fendants obtain dismissal: to allow courts to threaten dismissal credibly and to allow courts to sanction selective prosecution without dismissal. Both effects can deter selective prosecution without incurring the costs of dismissal. Thus, by examining the possible basis for hostility to selective prosecution doctrine, I conclude that *Armstrong* is actually worse than it first appears.

I. THE DECISION IN *UNITED STATES V. ARMSTRONG*

In 1992, federal prosecutors in the Central District of California indicted Armstrong and four others for various offenses involving the distribution of cocaine base, or "crack."⁹ Because the quantity of crack exceeded fifty grams, the minimum federal penalty is ten years in prison; the maximum is life.¹⁰ By contrast, California law at the time punished the same offense with a three to five year prison term.¹¹ Federal law was also stricter in enhancing the sentence based on prior offenses and in reducing the sentence for good time served.¹² Thus, the penalties authorized by the state and federal schemes for these defendants' conduct were considerably different. One defendant, for example, had three prior felony drug convictions and faced a mandatory life term in federal court if convicted of all counts, but "could have served as little as six years under California law."¹³

All five defendants were Black. By motion, they contended that the federal prosecutors targeted them because of their race, violating their constitutional right to equal protection.¹⁴ The defendants' theory was not that their behavior would have gone *unprosecuted* had they been of a different race, but that the U.S. Attorneys for the Central District of California would have been content to allow state prosecution had the defendants been of a different race. Because the

9. See *Armstrong*, 116 S. Ct. at 1483; see also 21 U.S.C. §§ 841, 846 (1994). Some defendants were also charged with firearms offenses. See *Armstrong*, 116 S. Ct. at 1483.

10. See 21 U.S.C. § 841(b); *Armstrong*, 116 S. Ct. at 1483.

11. See *Armstrong*, 116 S. Ct. at 1493 n.5 (Stevens, J., dissenting).

12. See *id.* at 1493 n.2.

13. *Id.* at 1493 n.5.

14. See *id.* at 1483. Because this involved the actions of the federal government, the source of the equal protection right is the Due Process Clause of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). But the equal protection analysis is the same as under the Fourteenth Amendment. See *infra* note 63. Because the laws being enforced are facially race neutral, the defendant must show that the government acted with discriminatory purpose. See *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (stating that the defendant "must prove that the decisionmakers in *his* case acted with discriminatory purpose"); *Mobile v. Bolden*, 446 U.S. 55, 67 (1980) ("[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause."); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (noting that discriminatory impact "[s]tanding alone, . . . does not trigger the rule that racial classifications are to be subjected to" strict scrutiny).

punishment is substantially greater in federal court, the defendants claimed that the federal prosecution had both a discriminatory purpose and a discriminatory effect, the two essential elements of an equal protection claim.¹⁵

The defendants provided no direct evidence that the U.S. Attorney had decided to prosecute them on the basis of race. Instead, they sought to establish a pattern of prosecutions from which one could infer an illegitimate intent.¹⁶ They offered an affidavit from an employee of the Office of the Federal Public Defender for the Central District of California, which represented one of the defendants, stating that in every one of the twenty-four crack cocaine cases closed by that office in 1991, the defendant had been Black.¹⁷ On the basis of this evidence, the district court ordered discovery, requiring the government:

(1) to provide a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses, (2) to identify the race of the defendants in those cases, (3) to identify what levels of law enforcement were involved in the investigations of those cases, and (4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offenses.¹⁸

The government moved for reconsideration. In support, the government provided several documents, including an affidavit from an Assistant U.S. Attorney stating various race-neutral criteria for deciding to bring the case, such as the large quantity of drugs, the existence of firearms violations, the fact that the evidence was strong, and the criminal histories of the defendants.¹⁹ The government also submitted part of a 1989 Drug Enforcement Administration report stating that “[l]arge scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack.”²⁰ The defendants responded to this material with additional evidence. One defense attorney submitted an affidavit stat-

15. See *Armstrong*, 116 S. Ct. at 1487; *Wayte v. United States*, 470 U.S. 598, 608 (1985); *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

16. See *Armstrong*, 116 S. Ct. at 1483.

17. See *id.*

18. *Id.*

19. See *id.*

20. *Id.* In addition, the government submitted affidavits from two law enforcement agents who investigated the case denying any racial motivation, see *id.*; a list of several thousand names of defendants prosecuted in the district for violating § 841 or § 846 in the past three years (though without identifying their races), see *id.* at 1495 n.6 (Stevens, J., dissenting); and a list of eleven non-Black defendants prosecuted for crack offenses, apparently during this same time period, see *id.* All eleven defendants were members of other racial or ethnic minorities. See *id.*; see also Brief for the Respondents Shelton Auntwan Martin, Aaron Hampton, Christopher Lee Armstrong, and Freddie Mack, 1995 WL 17111, at *8-10, *United States v. Armstrong*, 116 S. Ct.

ing that "an intake coordinator at a drug treatment center had told her that there are 'an equal number of caucasian users and dealers to minority users and dealers.'"²¹ A second defense attorney stated in an affidavit that "in his experience many nonblacks are prosecuted in state court for crack offenses."²²

The district court denied the motion for reconsideration, expressing concern that the Government had not disclosed its criteria for prosecuting crack offenses in federal court and that, without such criteria, "the statistical data is evidence and does suggest that the decisions to prosecute in Federal court could be motivated by race."²³ The government refused to comply with the discovery order and the district court dismissed the indictments.²⁴ A panel of the Court of Appeals for the Ninth Circuit initially reversed,²⁵ but upon rehearing en banc, the court affirmed.²⁶

The Supreme Court reversed by a vote of eight to one. Chief Justice Rehnquist stated the issue as what "showing [was] necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race."²⁷ The Court held that the defendants "failed to satisfy the threshold showing: They failed to show that the Government declined to prosecute similarly situated suspects of other races."²⁸ The ruling thus rests on two propositions: (1) it is appropriate to require evidence that similarly situated suspects of other races were not prosecuted, and (2) the *Armstrong* defendants failed to provide "some evidence" of that claim.²⁹

1480 (1996) (No. 95-157) [hereinafter Respondent's *Armstrong* Brief] (noting that all eleven were of Asian or Hispanic origin).

21. *Armstrong*, 116 S. Ct. at 1484.

22. *Id.* Finally, the defense included "a newspaper article reporting that Federal 'crack criminals . . . are being punished far more severely than if they had been caught with powder cocaine, and almost every single one of them is Black.'" *Id.* (citing Jim Newton, *Harsher Crack Sentences Criticized as Racial Inequity*, L.A. TIMES, Nov. 23, 1992, at 1).

23. *United States v. Armstrong*, 48 F.3d 1508, 1512 (9th Cir. 1995) (en banc), *rev'd*, 116 S. Ct. 1480 (1996).

24. *See id.*

25. *United States v. Armstrong*, 21 F.3d 1431 (9th Cir. 1994), *aff'd on reh'g*, 48 F.3d 1508 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1480 (1996).

26. *Armstrong*, 48 F.3d at 1510.

27. *Armstrong*, 116 S. Ct. at 1483.

28. *Id.*

29. The Court also rejected an argument for discovery under Rule 16 of the Federal Rules of Criminal Procedure. *See id.* at 1485. This is the part of Chief Justice Rehnquist's opinion that prompted Justices Breyer, Ginsburg, and Souter to file separate concurring opinions. *See id.* at 1489-92 (Breyer, J., concurring), 1489 (Ginsburg, J., concurring), 1489 (Souter, J., concurring). If there is no statutory right to discovery, then the basis for discovery must derive from the constitutional right to equal protection. Yet Rehnquist states that the Court merely *assumes*, as it did

The Court's reasoning for the first proposition is straightforward. A low standard for discovery would be inconsistent with the high standard for prevailing on the merits, given that the former would impose on the prosecutorial function the costs that the latter was meant to avoid.³⁰ Rehnquist thus begins the analysis by reviewing the reasons the Court gave in *Wayte v. United States*³¹ for protecting prosecutorial discretion.³² Because discretion is essential, the Court's "cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one."³³ The Court thus presumes that prosecutors properly perform their duties absent "clear evidence to the contrary."³⁴ Clear evidence includes proof that similarly situated individuals of races other than the defendant's were not prosecuted.³⁵ Discovery, however,

imposes many of the costs present when the Government must respond to a *prima facie* case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for

in *Wade v. United States*, 504 U.S. 181 (1992), that "discovery would be available if the defendant could make the appropriate threshold showing" of selective prosecution. *Armstrong*, 116 S. Ct. at 1485. In other words, the Court in *Armstrong* appears to have decided the standard for gaining discovery without actually deciding that discovery is available at all. I assume throughout that the substantive right includes a discovery right, once the appropriate showing is made.

The Court might have reached the same outcome by assuming the existence of an equal protection violation and then rejecting the district court's remedy—dismissal—as appropriate. Rehnquist states that the Court has "never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race." *Id.* at 1484 n.2. But this issue was not presented in *Armstrong*, Rehnquist notes, because the government proposed dismissal of the indictments as a remedy so that it could appeal the district court's discovery order. *See id.*

30. *See id.* at 1488.

31. 470 U.S. 598 (1985).

32. *See Armstrong*, 116 S. Ct. at 1486. Rehnquist states that prosecutors are "the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" *Id.* (quoting U.S. CONST. art. II, §3). Rehnquist also quotes a comprehensive list of policy concerns discussed in *Wayte*:

Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. . . . Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.

Id. (quoting *Wayte*, 470 U.S. at 607).

33. *Id.* at 1486.

34. *Id.* at 1486 (quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

35. *See id.* at 1487-88 (citing *Ah Sin v. Wittman*, 198 U.S. 500 (1905), and cases from six federal circuits).

the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.³⁶

The Court concludes that the “correspondingly rigorous standard” includes requiring “some evidence” that similarly situated individuals of others races are not prosecuted.³⁷ By requiring “some evidence,” the Court rejects the Ninth Circuit’s attempt to rely on a presumption, unsupported by actual proof, that “people of *all* races commit *all* types of crimes.”³⁸ In particular, Rehnquist states that this presumption is “at war with” statistics showing that a very high percentage of those convicted of certain federal offenses are Black, though for other crimes, a very high percentage of offenders are White.³⁹

Having spent fourteen paragraphs establishing the above holding, Rehnquist devotes only one paragraph to the second proposition necessary to the decision—that the *Armstrong* defendants failed to provide “some evidence” that “similarly situated” non-Black offenders were not prosecuted.⁴⁰ He notes that the defendants’ initial showing—that twenty-four of the twenty-four defendants prosecuted in the past year for crack offenses were Black—does not address the “similarly situated” requirement.⁴¹ Rehnquist then rejects defendants’ supplemental evidence, which did concern unprosecuted White offenders, as follows:

[Defendants’] affidavits, which recounted one attorney’s conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence.⁴²

36. *Id.* at 1488.

37. *Id.* at 1488-89. Elsewhere the Court phrases the requirement as the need for “a credible showing” that similarly situated members of other races were not prosecuted. *Id.* at 1489. The Court notes there is one possible exception to its holding. The Solicitor General had suggested in its brief for the United States that direct admissions of racial intent represent the one case where a defendant need not prove that similarly situated members of other races were not prosecuted. See Brief for the Petitioner United States of America, 1995 WL 747459, at *15, *United States v. Armstrong*, 116 S. Ct. 1480 (1996) (No. 95-157) [hereinafter U.S. *Armstrong* Brief]. Rather than resolve this issue, Rehnquist “reserve[s] the question whether a defendant must satisfy the similarly situated requirement in a case ‘involving direct admissions by [prosecutors] of discriminatory purpose.’” *Armstrong*, 116 S. Ct. at 1488 n.3 (quoting U.S. *Armstrong* Brief, *supra*, at *15).

38. *Armstrong*, 116 S. Ct. at 1488.

39. “More than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black; 93.4% of convicted LSD dealers were white; and 91% of those convicted for pornography or prostitution were white.” *Id.* at 1489 (citations omitted) (citing UNITED STATES SENTENCING COMMISSION, 1994 ANNUAL REPORT 41, 107).

40. See *id.* at 1489.

41. See *id.*

42. *Id.*

Thus, the Court reversed the Ninth Circuit's decision and remanded.

Justice Stevens provided the only dissent. He agreed that the defendants' "showing was not strong enough to give them a *right* to discovery," but would have held that "the District Court Judge did not abuse her discretion" by ordering some governmental response.⁴³ Justice Stevens found the defendants' supplemental showing adequate, especially in light of three facts: (1) federal law punishes crack cocaine possession much more severely than powder cocaine offenses; (2) federal law punishes crack cocaine possession much more severely than state law; and (3) Blacks bear the "brunt of the elevated federal penalties," which is "a 'primary cause of the growing disparity between sentences for black and white federal defendants.'"⁴⁴ In subsequent sections, where I discuss certain aspects of the majority opinion and the dissent, I provide more detail about their reasoning.

II. THE DIFFICULTY OF GAINING DISCOVERY AFTER *ARMSTRONG*

In his opinion, Chief Justice Rehnquist correctly noted the parallel between the substantive standard for prevailing on a selective prosecution claim and the preliminary standard for obtaining discovery on such a claim.⁴⁵ Both cases present a tradeoff between what statisticians term Type I and Type II errors, or the problem of false positives and false negatives.⁴⁶ The easier it is to prove selective prosecution, the more occasions there will be when courts mistakenly find selective prosecution where none actually exists (a Type I error). The more difficult the standard of proof, on the other hand, the more occasions there will be when courts mistakenly find no selective prosecution when it does exist (a Type II error). The same is true of discovery: a lenient standard will cause more prosecutors to face the burdens of discovery in support of meritless claims; a rigorous standard will cause more cases of selective prosecution to go undetected.

43. *Id.* at 1492 (Stevens, J., dissenting).

44. *Id.* at 1492-93 (quoting UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 163 (Feb. 1995)).

45. *See id.* at 1488.

46. The risk of an erroneous rejection of the hypothesis that the disparity was caused by chance is considered a "Type I" error, i.e., rejecting the null hypothesis when it should have been accepted. An alternative form of error, known as a "Type II" error, is the erroneous acceptance of the chance hypothesis when it should have been rejected.

DAVID C. BALDUS & JAMES W.L. COLE, STATISTICAL PROOF OF DISCRIMINATION 291 n.5 (1980). The "null hypothesis" is the proposition that there is no relationship between the studied variables. Thus, Type I error is finding a relationship—for example, between race and decision to prosecute—when none actually exists. Type II error is finding no relationship when one does exist. "As the risk of Type I error rises the risk of Type II error declines and vice versa." *Id.*

If one could quantify the harm from either error, one could state the problem mathematically as selecting the discovery standard that minimizes the combined harm of the two errors. Of course, it would be difficult if not impossible to describe the harms of these two errors in the same terms or on the same scale. But even if we overcame this problem, disagreement may persist because different individuals may calculate the magnitude of each harm differently. Nonetheless, some sort of structured balancing remains essential. One frustrating aspect of *Armstrong*, though hardly unique to it, is the way the Court dutifully states both the importance of unfettered prosecutorial discretion and the importance of preventing racially discriminatory prosecutions without making any effort to quantify the social damage each produces, much less the marginal effect the decision will have on each. The Court does recognize the need to balance these effects—concluding that the standard it creates “adequately balances the Government’s interest in vigorous prosecution and the defendant’s interest in avoiding selective prosecution”⁴⁷—but this conclusion entirely conceals or truncates the actual analysis, which must begin with characterizing the harm each error causes.

I address this matter further in Part IV. For now, however, I wish to focus on the point addressed in the case: Does the *Armstrong* discovery rule resolve the conflict by choosing to bear an unlimited quantity of Type II errors (false negatives) in order to avoid *any* Type I errors (false positives)? In other words, does the *Armstrong* standard make it practically impossible to obtain discovery for meritorious selective prosecution claims? If so, to justify such a rule, one would have to imagine that the harm from burdening prosecutors is enormous and the harm from selective prosecution trivial.

The Supreme Court’s *Armstrong* opinion considers this issue in two places. When discussing the standard for prevailing on a selective prosecution claim, Chief Justice Rehnquist states that the “similarly situated requirement does not make [such claims] impossible to prove.”⁴⁸ He makes a similar comment regarding the discovery standard—that providing “some evidence” of similarly situated persons of other races should not prove “an insuperable task.”⁴⁹ In this Part, I criticize Rehnquist’s analysis, focusing on a class of cases it does not even address: where the similarly situated are not prosecuted at all.

47. *Armstrong*, 116 S. Ct. at 1489.

48. *Id.* at 1487.

49. *Id.* at 1489.

A. *Rehnquist's Modest Assurances*

One might reasonably worry about an evidentiary standard when the most the Supreme Court will say on its behalf is that it is *possible* to satisfy. The reasons the Court gives for its carefully worded assessments—"not impossible" and "not insuperable"—do not dispel this concern. To demonstrate that something is possible requires only one case, and to demonstrate the possibility of proving a selective prosecution claim Rehnquist provides only one: *Yick Wo v. Hopkins*.⁵⁰ *Yick Wo* is the pathbreaking nineteenth-century equal protection case in which the Court invalidated a San Francisco ordinance that prohibited the operation of laundries in wooden buildings. The plaintiff in error "successfully demonstrated," in Rehnquist's words, that "[t]he authorities had denied the applications of 200 Chinese subjects for permits to operate shops in wooden buildings, but granted the applications of 80 individuals who were not Chinese subjects to operate laundries in wooden buildings 'under similar conditions.'"⁵¹

This citation proves what Rehnquist sets out to prove, but no more. San Francisco did not even contest the facts *Yick Wo* alleged.⁵² What *Yick Wo* proves is that before the equal protection clause or norms of social equality created any incentive for governmental officials to conceal their racist intentions or actions, it was *possible* for someone to gather the evidence needed to prove selective prosecution. Surely, a reasonable response is: What about the last 110 years? Because societal norms and laws condemn overt racism today, racist decisions are much more likely to be shrouded in plausible non-racial rationalizations than they were in 1886. If the Court's standard of proof actually permits defendants to prove selective prosecution where it exists, then it seems certain we would find cases since *Yick Wo*, some involving African Americans, in which the defendants met the required standard.⁵³ But the Supreme Court has never since seen a case of selective prosecution;⁵⁴ at the state and federal level, there is

50. 118 U.S. 356 (1886).

51. *Armstrong*, 116 S. Ct. at 1487 (quoting *Yick Wo*, 118 U.S. at 374).

52. See *Yick Wo*, 118 U.S. at 359.

53. Whatever one thinks of the level of prosecutorial discrimination today—a matter addressed below—no reasonable person would deny that for much of this century racism pervaded society and the actions of its governmental officials, including prosecutors. For a recent historical review, see RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 29-75 (1997).

54. See James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 HARV. L. REV. 1521, 1539-40 (1981) ("It says something about the wide berth the judiciary has given prosecutorial power that the leading case invalidating an exercise of prosecutorial discretion is the nearly century-old decision in *Yick Wo*, . . . the first and last time the United States Supreme Court struck down a prosecution for the invalid selection of a target.").

apparently only one published case dismissing a criminal charge based on racially selective prosecution.⁵⁵ We can therefore understand why Rehnquist cites only *Yick Wo*.

However difficult it is to prove the ultimate standard for selective prosecution, discovery offers a hope for meeting it. Indeed, I suggest below that the merits standard the Court creates—requiring proof of similarly situated but unprosecuted members of other races—may be sensible if combined with a workable discovery standard. But here too we find Rehnquist asserting only that the discovery standard is not “insuperable.”

The reasons Rehnquist gives for this assessment are more persuasive, but, I contend, for reasons that apply only to the facts of the *Armstrong* case. Consider Rehnquist’s argument:

The Court of Appeals also expressed concern about the ‘evidentiary obstacles defendants face.’ . . . *In the present case*, if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than [defendants]. For instance, [defendants] could have investigated whether similarly situated persons of other races were prosecuted by the State of California, were known to

55. See *People v. Ochoa*, 212 Cal. Rptr. 4 (Cal. Ct. App. 1985). Professors David Cole and Julius Lobel cite this as the only example they could locate based on “a LEXIS search of all state cases using the key words ‘selective prosecution’ and ‘race.’” Brief *Amicus Curiae* of Former Law Enforcement Officials & Police Organizations et al., 1996 WL 17132, at *20, *United States v. Armstrong*, 116 S. Ct. 1480 (1996) (No. 95-157). Randall Kennedy points out that *Ochoa* dismissed the indictment only because the government refused to comply with the trial court’s discovery order. See KENNEDY, *supra* note 53, at 354 n.*. He also points out that *Yick Wo* did not actually hold that the prosecutor engaged in wrongful discrimination; rather, the officials who denied the Chinese residents permission to operate laundries acted to deny them equal protection. See *id.* Thus, Kennedy concludes that no American court has determined, after a full adjudication, and without being reversed, that a prosecutor has engaged in racially selective prosecution. See *id.*

Kennedy points to one case that comes close: in *Duncan v. Perez*, 445 F.2d 557 (5th Cir. 1971), the court enjoined the retrial of a Black man for simple assault after his first conviction was overturned (in *Duncan v. Louisiana*, 391 U.S. 145 (1968)) for lack of a jury. The Fifth Circuit held that the re prosecution for such a minor offense (Duncan slapped someone on the arm) was in bad faith, meant to punish the defendant for successfully asserting his federal rights. See *Perez*, 445 F.2d at 559-60. But this holding was no doubt affected by the racial component in the case: Duncan was breaking up an interracial fight, his “victim” was White, and the prosecutor was a well-known White supremacist. See KENNEDY, *supra* note 53, at 355.

There are also very few cases in which defendants have prevailed on any claim of selective prosecution, for any reason, against U.S. Attorneys. For the only cases I have located, see *United States v. Steele*, 461 F.2d 1148, 1152 (9th Cir. 1972) (reversing conviction for refusal to answer census questions because government prosecuted only those involved in public protest against census); *United States v. Crowthers*, 456 F.2d 1074, 1080-81 (4th Cir. 1972) (reversing conviction for making a disturbance on government property similar to those made by others who were not prosecuted; government’s motive was disagreement with the ideas defendants expressed on its property); *United States v. Robinson*, 311 F. Supp. 1063, 1065-66 (D. Mont. 1969) (dismissing prosecution of illegal wire tapping charge because federal agents had repeatedly violated the same statute and not been prosecuted).

federal law enforcement officers, but were not prosecuted in federal court.⁵⁶

In other words, Rehnquist focuses on the fact that these particular defendants claimed they would have been prosecuted in state court—not they would have been *unprosecuted*—had they been of some other race. If their claim is true, then the evidence needed to meet the similarly situated requirement could, in theory, be found in the records of state prosecutions. The Solicitor General had pointed out in his brief that these California court records are open to public inspection.⁵⁷ Moreover, a Justice suggested at oral argument that defendants might have gained the information from state public defenders who would have records of the race of their clients who were prosecuted in state court for crack offenses.⁵⁸ In my view, this is the government's strongest argument in *Armstrong*: these defendants may feasibly meet the similarly situated requirement, at least if the claim is meritorious.

In response, the defense and the amici arguing on their behalf focused on a narrow point: because state court records are widely dispersed and sometimes lack racial information, determining the number of White crack dealers prosecuted by California would be very difficult.⁵⁹ Whatever the proper resolution of this claim, the Court set a standard in no way limited to these defendants or these facts. The government's argument—that the standard is readily met by public records—is potentially convincing only in a narrow range of cases where the defendants assert that similarly situated Whites are prosecuted in state court, where they are punished less.⁶⁰ When in-

56. *Armstrong*, 116 S. Ct. at 1489 (quoting, in part, *United States v. Armstrong*, 48 F.3d 1508, 1514 (9th Cir. 1995)) (emphasis added).

57. See Reply Brief for the Petitioner United States of America, 1996 WL 67650, at *16-17, *United States v. Armstrong*, 116 S. Ct. 1480 (1996) (No. 95-157) (citing *Copley Press v. Superior Court*, 7 Cal. Rptr. 2d 841, 843-44 (Cal. Ct. App. 1992)).

58. See *United States Supreme Court Transcript*, 1996 WL 88550, at *35-38, *United States v. Armstrong*, 116 S. Ct. 1480 (1996) (No. 95-157).

59. See Respondent's *Armstrong* Brief, *supra* note 20, at *4; Brief of NAACP Legal Defense & Education Fund, Inc. and American Civil Liberties Union as Amici Curiae in Support of Respondents, 1996 WL 17149, at *13 & n.19, *United States v. Armstrong*, 116 S. Ct. 1480 (1996) (No. 95-157); see also Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 179, 188 (1996) ("Relevant state statistics are particularly hard to come by because the majority of states do not distinguish between crack and powder cocaine for penalty or record-keeping purposes.").

60. The defense and defense amici understandably emphasized the racial disparities regarding the particular crime at issue (crack cocaine) where federal defendants are overwhelmingly Black, as well as the much lower punishments for powder cocaine offenses, where those convicted are primarily White. But some of the defense-side briefs, while demonstrating these racial disparities, also demonstrated that it is possible to gather information about White crack dealers prosecuted in state rather than federal court, thus supporting the Court's conclusion that the

stead the defendants complain that similarly situated Whites are not arrested or prosecuted *at all*, there will be no records to find to meet the similarly situated requirement. Perhaps the strangest feature of *Armstrong* is this glaring logical gap: to demonstrate that it is reasonable to require *every* defendant seeking discovery to meet the similarly situated requirement, Rehnquist observes only that the defendants *in the case* had ways of gaining evidence to meet the standard. He makes no claim that defendants in other kinds of cases would face a comparably tolerable burden in finding evidence to meet the discovery standard.⁶¹ Indeed, in other contexts, addressed in the next section, the task will be insuperable.

B. *When the Discovery Standard Is "Insuperable"*

For certain offenses, even when prosecutors select defendants on the basis of race, the similarly situated requirement will be effectively impossible to meet. The proof problems arise when a crime is minor enough that, absent selective prosecution, it is not prosecuted at all. As one example, imagine that a federal official, motivated by racial animus, concentrates health and safety inspections on (the few) food distribution businesses owned by African Americans, Asian Americans, or Latinos. The official prosecutes a number of these minorities for criminal violations of the Food, Drug, and Cosmetic Act but prosecutes no White owners. At the time, suppose the relevant state, relying on federal efforts, brings no criminal prosecutions for these kind of

discovery requirement was attainable. *See, e.g.*, Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent, 1996 WL 17133, at *16-18, *United States v. Armstrong*, 116 S. Ct. 1480 (1996) (No. 95-157) (noting that the number of Whites prosecuted in state court in Spokane County, Washington was 82, or 28.9%, of all crack prosecutions and that the number prosecuted in state court in the Southern District of Florida was 552 or 19.6%); Respondent's *Armstrong* Brief, *supra* note 20, at *12-13 (discussing Richard Berk & Alec Campbell, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, FED. SENT. RPT'R., July/Aug. 1993, at 36, a study finding that non-Blacks accounted for a significant number of crack cocaine arrests in Los Angeles).

61. For the skeptical reader who thinks I may have overstated this point, see the paragraph quoted in the text above. Rehnquist first points to the Ninth Circuit's expressed concern for the "evidentiary obstacles defendants face." *Armstrong*, 116 S. Ct. at 1489 (quoting *United States v. Armstrong*, 48 F.3d 1508, 1514 (9th Cir. 1995) (en banc), *rev'd*, 116 S. Ct. 1480 (1996)). In the second sentence, omitted in my text, he notes that all of the other circuits nonetheless require the similarly situated showing. *See id.* Next, Rehnquist says, "*In the present case*, if the claim of selective prosecution were well founded, it should not have been an insuperable task to" meet the similarly situated requirement. *Id.* (emphasis added). He then explains why that is true in a federal drug case: because defendants could investigate whether the state was prosecuting "similarly situated persons of other races." *Id.* He concludes, in a sentence also omitted above, that the similarly situated requirement "adequately balances the Government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution." *Id.* Thus, the only reason the Court gives for rejecting the Ninth Circuit's concern is one that applies only to the case at hand.

violations. Under *Armstrong*, this startling racial gap would not be sufficient to permit a district court to order discovery unless the defendants can first show that similarly situated but unprosecuted Whites also violated the statute. But given the difficulty of detecting such violations in private facilities—that is, after all, the whole reason for authorizing agents to conduct surprise inspections—how can a Black defendant, acting without such power, prove that his White counterparts are also violating the law? Realistically, he can't.⁶²

We should not limit our concern to federal prosecutors. A focus on the federal crack penalties in *Armstrong* obscures another crucial issue: the standard the case sets applies to state prosecutions as well. Although the source of the *Armstrong* defendants' equal protection rights is the Due Process Clause of the Fifth Amendment, the Court makes it clear in *Armstrong*, as it has in earlier opinions, that the same standard applies to states under the Fourteenth Amendment's Equal Protection Clause.⁶³ State codes include a large number of minor

62. The only possible solution is for the defendant to pay for a survey that asks White food-related business owners about their compliance with federal regulations. But this solution is wholly impractical. First, even in an anonymous survey, many businesspersons might be extremely reluctant to admit to violations. If those Whites violating the law fail to admit to it, then the survey will appear to disprove selective prosecution. Second, many federal regulatory crimes impose strict liability. See, e.g., *United States v. Park*, 421 U.S. 658 (1975) (interpreting the criminal enforcement provision of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 333 (1994)). Quite possibly, businesspersons in violation of such statutes are not aware of their violations unless and until federal inspectors locate the noncompliance. If so, many Whites might truthfully respond to the survey that they were in compliance when they actually were not. Given these risks, it is wholly implausible to imagine any defendant bearing the considerable expense of a survey merely for the possibility of gaining discovery on a claim that is so difficult to prove.

63. "It is now well-settled that the requirements of equal protection are the same whether the challenge is to the federal government under the Fifth Amendment or to state and local actions under the Fourteenth Amendment." ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 527 (1997); see *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.") (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)). *Armstrong* confirms this result by discussing equal protection cases decided under both clauses without distinguishing between them. See *Armstrong*, 116 S. Ct. at 1486-88 (discussing the Fourteenth Amendment decisions in *Batson v. Kentucky*, 476 U.S. 79 (1986); *Hunter v. Underwood*, 471 U.S. 222 (1985); *Oyler v. Boles*, 368 U.S. 448 (1962); and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). In particular, the Court traces the origin of the similarly situated requirement to *Ah Sin v. Wittman*, 198 U.S. 500 (1905), and states that, although the case "involved federal review of a state conviction, we think a similar rule applies where the power of a federal court is invoked to challenge" a federal prosecution. *Armstrong*, 116 S. Ct. at 1487.

Armstrong might be read to create doubt on this issue because it asserts one argument for prosecutorial discretion that is uniquely federal. Rehnquist states that the "Attorney General and United States Attorneys" enjoy "broad discretion," *id.* at 1486 (citing *Wayte v. United States*, 470 U.S. 598, 607 (1985)), because "they are designated by statute as the President's delegates to help him . . . 'to take Care that the Laws be faithfully executed.'" *Id.* at 1486 (citing U.S. CONST. art. II, § 3 and 28 U.S.C. §§ 516, 547 (1994)). In theory then, one could argue for less deference to state prosecutors, but in all likelihood the Court would then cite federalism concerns as providing a reason parallel to the "take Care" clause.

prohibitions, such as loitering, defacing property with graffiti, gaming, public drunkenness, disorderly conduct, marijuana possession, and riding a bicycle at night without a light.⁶⁴ For minor crimes, the state prosecutes some offenders and chooses to ignore the rest. If state enforcers intentionally focus on Latinos for crimes like these,⁶⁵ the defendants will have great difficulty meeting the similarly situated requirement unless courts permit rather informal proof. If courts accept as sufficient an affidavit from a defense employee (for example, a paralegal) stating that he observed Anglos committing such crimes during a few hours observation of a public road, sidewalk, or building, then the cost of meeting the similarly situated requirement seems reasonably low. But if, as seems likely, courts read *Armstrong's* rejection of "personal conclusions based on anecdotal evidence" to apply to such proof, defendants will need to bear the expense of a formal survey.⁶⁶ Certainly for the indigent and probably for anyone charged with such a minor crime, this cost will effectively bar selective prosecution claims.

The proof is even more difficult for crimes committed in private. Suppose a state prosecutor who accepts some of the basest sexual stereotypes of Black men charges a large number of them with statutory rape—for having consensual sex with underage girls—while bringing no such charges against White men. To make the example even clearer, suppose all of the underage girls involved in these cases are

64. Perhaps the last example seems fanciful. It is not. See *United States v. Bell*, 54 F.3d 502 (8th Cir.), *appeal after remand*, 86 F.3d 820 (8th Cir.), *cert. denied*, 117 S. Ct. 372 (1996) (holding that even if police were enforcing bicycle headlamp law only against African Americans in a jurisdiction where most bicycle owners were White, defendants were not entitled to discovery because they failed to show that Whites rode their bicycles in violation of the statute).

65. Prosecutors may "focus" enforcement on a racial group either by selecting to prosecute, among those the police arrest, only members of that group or by directing the police to arrest members of the group. Either behavior is subject to equal protection analysis.

In addition, equal protection standards govern decisions made without prosecutorial supervision. In *Whren v. United States*, 116 S. Ct. 1769 (1996), decided three weeks after *Armstrong*, the Supreme Court unanimously held that the constitutionality of a traffic stop under the Fourth Amendment depends on the objective facts determining whether the stop is reasonable and not on the subjective motivations of the government agents. See *id.* at 1774. Thus, defendants may challenge the racial motivation of police action only under an equal protection theory. The rule in *Armstrong* should *not* apply to police without further analysis because the reasons *Armstrong* gives for the standard it creates are linked to the policies behind prosecutorial discretion. See *supra* note 32. Nonetheless, some courts have already applied the *Armstrong* reasoning to claims of police discrimination. See, e.g., *United States v. Bullock*, 94 F.3d 896, 899 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 966 (1997); *United States v. Bell*, 86 F.3d 820, 823 (8th Cir.), *cert. denied*, 117 S. Ct. 372 (1996). This article criticizes the *Armstrong* holding even for prosecutors, so it also argues against extending *Armstrong* to claims against the police.

66. See JAROL B. MANHEIM & RICHARD C. RICH, *EMPIRICAL POLITICAL ANALYSIS: RESEARCH METHODS IN POLITICAL SCIENCE* 130 (4th ed. 1995) (concluding that surveys are "a very expensive and time-consuming method" of research).

White, so that the prosecutor is using his discretion to punish Black men for interracial sex. Under *Armstrong*, these defendants cannot even gain discovery for their selective prosecution claim unless they first provide “some evidence” that White (or other non-Black) males have sex with underage girls. If the defendants are lucky, they may find a pre-existing survey of females *in the jurisdiction* indicating that they had sex, while under the *requisite* age, with White (or other non-Black) males. But for many towns in the United States, there will be no survey containing all these essential elements.⁶⁷ Defendants who are not wealthy enough to produce their own survey cannot meet the similarly situated standard. Thus, even where other evidence powerfully suggests racially motivated prosecutions, *Armstrong* can impose an insuperable burden.

Finally, consider the kind of crime that requires clever police work to uncover. Suppose state actors, motivated by racial animus, target only bars in Latino neighborhoods for sting operations to detect bar employees serving alcohol to minors. As a result, the state prosecutes many more Latinos than Whites for such offenses. Proving the existence of unprosecuted violations occurring in bars in White neighborhoods requires that Latino defendants conduct their own undercover operations in such places—an implausible result. Or suppose that racist prosecutors bring charges against Chinese Americans for violating gambling laws in their homes.⁶⁸ Proving that other races are committing such violations in private will be impossible.

Ironically, the latter example states facts similar to *Ah Sin v. Wittman*,⁶⁹ the case *Armstrong* cites as the origin of the similarly situated requirement.⁷⁰ There, a San Francisco County ordinance prohibited individuals from exhibiting gambling tables or implements in rooms

67. There is no crime unless the female was below a particular age. If the survey, for example, asks about sexual experience under the age of 18 and the jurisdiction defines the age for statutory rape as below 16, then the survey does not demonstrate the commission of any crimes. There is no evidence of “similarly situated” non-Black men unless the survey asks the females for the race of their sex partners, not as a general matter, but for the occasions when they were underage. The very offensiveness of this question reduces the odds that a survey asks this question. Finally, it does no good to prove “similarly situated” members of other races exist in other jurisdictions, beyond the reach of the prosecutor whose actions are challenged.

68. *Cf.* *People v. Winters*, 342 P.2d 538, 546 (Cal. App. Ct. 1959) (reversing trial court’s dismissal of gambling charges against Blacks based on trial court’s finding that Los Angeles County selectively enforced its gambling laws).

69. 198 U.S. 500 (1905).

70. *See* *United States v. Armstrong*, 116 S. Ct. 1480, 1487 (1996).

barricaded from police.⁷¹ Ah Sin alleged that the statute was enforced solely against Chinese residents.⁷² The Court rejected his selective prosecution claim because he "did not allege 'that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese.'"⁷³ However difficult the standard *Ah Sin* creates for prevailing on a selective prosecution claim, it leaves open the possibility of gaining discovery in order to make the necessary proof. *Armstrong*, however, now requires some similarly situated proof prior to discovery. Yet how would someone prove, without discovery, that members of other races have gambling tables *behind their barricaded doors*? The Whites behind these doors were not inviting in Chinese, nor were they going to provide information to Chinese defendants that proved their own guilt. The *Armstrong* rule applied to the *Ah Sin* facts thus leaves no chance of gaining discovery, unless perhaps the Chinese defendants break and enter barricaded White dwellings in search of gambling tables,⁷⁴ thus committing a second crime to prove a defense to the first. Yet the *Ah Sin* facts are the very ones Rehnquist recounts in *Armstrong*, right before saying that the similarly situated requirement is not impossible to prove because Yick Wo did twenty years before.⁷⁵ For Ah Sin and others like him, however, there is no hope of gaining discovery.

This does not necessarily mean that there will be no discovery at all. Defendants will sometimes be lucky and find access to the relevant data.⁷⁶ Indeed, one federal decision since *Armstrong* actually up-

71. See *Ah Sin*, 198 U.S. at 503. The ordinance was so drafted apparently because of the difficulty of proving which individuals had been gambling once police had taken the time to break through a barricade.

72. See *id.*

73. *Armstrong*, 116 S. Ct. at 1487 (quoting *Ah Sin*, 198 U.S. at 507-08).

74. Because San Francisco defined "barricaded" as barred by more than an ordinary lock, *Ah Sin*, 198 U.S. at 505, one cannot even detect that a room is barricaded, rather than locked, without the cooperation of the inhabitants or by breaking through.

75. See *Armstrong*, 116 S. Ct. at 1487.

76. For example, where crimes are very public affairs, defendants may be able to document unprosecuted offenders. See, e.g., *United States v. Hoover*, 727 F.2d 387, 389 (5th Cir. 1984) (involving defendant, prosecuted for participating in a strike while employed by the federal government, who was able to show that there were over 297 unprosecuted strikers in the jurisdiction), and cases cited *infra* note 167 (involving defendants in Sunday closing law prosecutions able to establish existence of unprosecuted offenders). Similarly, in other cases, defendants will know of violators who are co-conspirators or who share a common interest in violating a statute. See, e.g., *United States v. Hazel*, 696 F.2d 473, 475 (6th Cir. 1983) (involving defendants who headed "tax revolt" and were prosecuted for tax violations and who asserted that "34 other members of the Michigan tax revolt group committed tax violations but were not facing prosecution"); *United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972) (involving defendants, the only four people in Hawaii prosecuted for refusing to answer census questions, who had led public protests against the census and were able to assert that they knew six other persons who had completely refused to answer the questions but were not prosecuted). And, of course, there

holds a discovery order. But the government made a tactical error in the case—*United States v. Al Jibori*⁷⁷—that it is not likely to repeat. When Al Jibori entered the United States from Romania, customs officials detected that his Swedish passport was false.⁷⁸ The prosecution for such crimes is apparently rare and, in opposition to a motion to dismiss for selective prosecution, the government chose to explain why it brought the charge: because Al Jibori was, like the World Trade center bombers, a middle easterner travelling on an altered Swedish passport.⁷⁹ The Court of Appeals for the Second Circuit held that the prosecutor's admission that the decision was based partly on ethnicity or nationality justified discovery.⁸⁰ The court specifically stated that Al Jibori's initial showing was insufficient and that, had the government remained silent, the district court would not be entitled to grant discovery.⁸¹ The lesson for the government is simple: admit nothing and discovery will remain highly unlikely.⁸² In sum, for many crimes, *Armstrong* makes discovery impossible even where the defendant is a victim of selective prosecution.

will still be the *Armstrong* situation where the prosecution (or other legal action) by one government creates evidence of offenders not prosecuted by another level (or agency) of government.

77. 90 F.3d 22 (2d Cir. 1996).

78. *See id.* at 23.

79. *See id.*

80. *See id.* at 26. There was no evidence that similarly situated members of other nationalities were not prosecuted, but the Court noted that the Supreme Court had reserved the issue of whether such evidence was necessary when there is a "direct admission . . . [of] discriminatory purpose." *Id.* at 25. The court of appeals held that, given such evidence, discovery was proper. *See id.*

81. *See id.*

82. On the other hand, since *Armstrong*, Black sellers of crack cocaine have twice pointed to evidence that similarly situated Whites were not prosecuted, but the courts have found such evidence insufficient. In another case in the Central District of California, defendants presented evidence that the U.S. Attorney had, over three years, charged 47 African Americans, 5 Latinos, and no Whites with crack offenses. *See United States v. Turner*, 104 F.3d 1180, 1182 (9th Cir.), *cert. denied*, 117 S. Ct. 1566 (1997) and 117 S. Ct. 1722 (1997). The defendants also presented a study showing that some similarly situated White offenders were prosecuted by California. *See id.* at 1185; *see also Berk & Campbell, supra* note 60, at 37 tbl.4 (finding that from 1990 to 1992, Los Angeles County charged over 200 Whites with crack offenses, or three percent of total prosecutions). The court of appeals reversed the district court's discovery order, finding the percentage of White defendants at the state level unimpressive and finding that the evidence failed to show such Whites were "similarly situated." *Turner*, 104 F.3d at 1185.

In a Fourth Circuit case, defendants pointed out that the federal government prosecuted 25 of 80 members of a crack cocaine conspiracy, that all 25 selected were Black, but that of those not indicted, 5 were White and 50 were Black. *See United States v. Olvis*, 97 F.3d 739, 741 (4th Cir. 1996). The court of appeals reversed the discovery order, finding that the evidence did not show that the unprosecuted Whites were similarly situated. *See id.* at 746. Thus, another barrier that arises when one can locate unprosecuted White offenders is that courts may interpret "similarly situated" to mean something more like "identically situated," thus making discovery impossible even where public records document those the federal prosecutor choose not to charge.

III. THE *ARMSTRONG* ALTERNATIVE: A LITTLE STATISTICS GOES A LONG WAY

Armstrong will ensure that many defendants with meritorious selective prosecution claims never obtain discovery. One might concede that this result is unfortunate, but nevertheless defend the decision as being better than the alternatives. Or one might claim that pre-existing selective prosecution doctrine compelled the result in *Armstrong*, so that any fault is in the prior precedent, not the decision itself. These defenses might proceed as follows. First, the defendant bears the burden of proof for this defense. Like other government actors, prosecutors are accorded a presumption of legality. Second, there is no selective prosecution if there are no similarly situated members of other races who are not prosecuted. Prosecutors can hardly be faulted for failing to charge members of different races if they committed no such offense. Third, absent more direct evidence of discriminatory intent, the defendant cannot prove his selective prosecution claim unless he demonstrates the existence of similarly situated individuals. Given this background, what alternative is there to the Court's conclusion that to obtain *discovery*, the defendant must provide some evidence of *each element* of the claim, including the similarly situated requirement?⁸³ If there is an alternative, isn't it even worse than *Armstrong*, such as a rule granting trial courts unfettered discretion to compel discovery?

The answers are: yes, there are alternatives, and no, they are not all worse than the *Armstrong* rule. It does not logically follow that, because similarly situated evidence is needed to prevail on a selective prosecution claim, some such evidence must be a condition of discovery. A standard for discovery could consist merely of proof of a very large disparity in the racial composition of those convicted for an offense. Of course, in many such cases, discovery would fail to uncover any similarly situated and unprosecuted members of other races. Thus, the time and effort devoted to litigating the claim would often be wasted. Balanced against this cost, however, would be the fact that those asserting meritorious claims would often gain discovery and prove their claim. Given my views about the harm of selective prosecution, a matter discussed in Part IV, I believe this alternative rule would be preferable to *Armstrong*. But I concede that there are many

83. The Court reasoned that "a rigorous standard for the elements of a selective prosecution claim . . . require[s] a correspondingly rigorous standard for discovery in aid of such a claim." *United States v. Armstrong*, 116 S. Ct. 1480, 1488 (1996).

uncertainties about the quantity of costs and benefits, leaving the choice between these rules a close one about which reasonable people can differ.

There is, however, another alternative *Armstrong* might have embraced, one that is demonstrably better, I contend, than the Court's holding. The rule is roughly this: *a court may order discovery on a selective prosecution claim if it has a reasonable basis for finding that race and the decision to prosecute are correlated*, meaning that prosecutors charge a significantly higher proportion of violators of the defendant's race than of other races. Under such a rule, even if the defendant does not provide evidence of similarly situated and unprosecuted members of other races, the court may have a sound basis for making assumptions about the probable existence of such individuals. These assumptions, along with the evidence the defendant does provide, may demonstrate the requisite correlation.

This Part further defines and defends this rule. Section III.A provides some necessary background: a general explanation of why any of these numbers—of Black defendants, White defendants, unprosecuted White violators, etc.—matter. The Court should care about these facts because they may suggest a correlation between the defendant's race and the decision to prosecute. A statistical disparity is not sufficient to *prove* selective prosecution (because it does not prove discriminatory intent), but it can create enough support for the defendant's claim to justify discovery. The problem with *Armstrong* is that it misconceives the nature of correlation and thereby overstates the need for the defendant to provide similarly situated evidence. Given a better understanding of the elements of a correlation, Section III.B then describes in greater detail what *Armstrong* should have held.

A. *The Elements of Correlation*

To begin, consider why the numerical evidence in *Armstrong* matters at all. What is the significance of the kind of data the defendants presented—that 24 of 24 crack defendants in cases closed by the federal public defenders office in 1991 were Black? The numbers matter because they may demonstrate a discriminatory effect, a necessary element of an equal protection violation, as well as some evidence of the other necessary element, discriminatory intent.⁸⁴ A discrimina-

84. The defendant must prove the government acted with discriminatory purpose; a discriminatory effect by itself is insufficient. See *supra* note 14. If the discriminatory effect were

tory effect exists only if the government disproportionately burdens members of one race. Even the *Armstrong* defendants appear to agree that a prosecutor would not create a *disproportionate* burden if he prosecutes roughly the same percentage of violators of each race. If, for example, Blacks commit a particular crime more often than Whites, evenhanded enforcement would mean prosecuting an equal percentage of violators of each race, even though that would result in a higher percentage of all Blacks being charged than the percentage of all Whites charged.⁸⁵ The defense seems to claim that their numbers—all 24 defendants being Black—show that the federal prosecutor *is* charging a higher percentage of Black violators than White (or non-Black) violators. And both sides seem to agree that if this were true—if the decision to prosecute were statistically associated with the defendant's race—then that would prove a discriminatory effect that could justify discovery.

So far, the Supreme Court's holding seems reasonable. *Armstrong's* point is simply that one cannot infer a discriminatory effect in this circumstance merely by knowing how many Blacks and Whites are prosecuted. If there were no unprosecuted Whites, for example, the disparity in prosecution is consistent with evenhanded law enforcement. But let us consider the point more carefully, thinking about the issue in simple but explicitly statistical terms. The question underlying the issue of discriminatory effect is whether there is a relationship between two variables: race and the decision to prosecute. More specifically, the issue is whether the defendant's race is *positively* and *significantly* correlated with the decision to prosecute. If there were a negative association, that would mean that prosecutors charged disproportionately *fewer* violators of the defendant's race and

severe enough, that could provide sufficient evidence of discriminatory purpose, but the cases so holding are quite limited. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Thus, correlation or disparate impact must generally be used in combination with other evidence of discriminatory purpose. Here, the point of the correlation is to gain the right to discovery through which one might collect other evidence of discriminatory purpose.

85. For example, if Blacks commit a particular crime twice as often as Whites, evenhanded enforcement would mean prosecuting a percentage of all Blacks twice as high as the percentage of all Whites charged. Evenhanded enforcement would not, however, prevent a successful challenge to a legislative decision to prohibit conduct, or punish it more severely, *because* those who engaged in it were disproportionately members of a particular race. Many have challenged on this ground the congressional decision to punish crack cocaine offenses much more severely than powder cocaine offenses. See KENNEDY, *supra* note 53, at 364-80 (discussing cases and criticizing one that held the disparity violated a state constitution); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1320-22 (1995) (discussing cases and arguing for an equal protection doctrine that would condemn the disparity despite the absence of intentional discrimination). My focus, however, is on equal protection challenges to selective enforcement of a statute, so I set this issue aside.

there would be no discriminatory effect against the defendant's racial group. "Significantly" adds the pivotal fact that, among the sample of cases examined, some deviations from exactly proportional prosecutions are too small to permit any confidence that an association exists (between race and the decision to prosecute) in the total population of prosecutions for that crime.⁸⁶

The simplest statistical tool for examining the existence or absence of a relationship between two discrete variables, like race and the decision to prosecute, is a cross tabulation or joint contingency table.⁸⁷ To illustrate the use of such a table, consider first an unrelated example. Suppose we wanted to know whether individuals who graduate from high school are more likely to vote than individuals who do not graduate. To determine the correlation, if any, we must examine *all* possible combinations of the variables. Because the two variables are dichotomous—having two possible values—the joint contingency table consists of four cells: (a) the number of high school graduates who vote; (b) the number of high school graduates who do not vote; (c) the number of nongraduates who vote; and (d) the number of nongraduates who do not vote. If there were no relationship between the variables, we would expect that the probability of voting among a random sample of high school graduates ($a/a+b$) to equal (at least roughly) the probability of voting among a random sample of nongraduates ($c/c+d$). If the first probability is significantly higher than the second—under some statistical method for determining "significance"⁸⁸—we can say that high school graduation is associated or correlated with voting.

Note that we cannot determine whether a relationship exists without all four kinds of information. If we are missing information about cell *a* or cell *b*, we cannot determine the percentage of high school graduates who vote and if we are missing information about cell *c* or cell *d*, we cannot determine the percentage of nongraduates

86. The issue of significance is a critical matter in determining whether two variables are "related." For the most part, however, I ignore this issue in the discussion that follows because it is not important to the point I am making, which concerns the categories of evidence one must collect before applying a statistical test for significance.

87. See GEORGE W. BOHRNSTEDT & DAVID KNOKE, *STATISTICS FOR SOCIAL DATA ANALYSIS* 101-27 (2d ed. 1988); ERIC A. HANUSHEK & JOHN E. JACKSON, *STATISTICAL METHODS FOR SOCIAL SCIENTISTS* 16-19 (1977). The decision to prosecute is a "dichotomous" variable, meaning it can have only two values: a charge is or is not made. Race is generally understood as a discrete variable, having a finite number of values, and can be a dichotomous variable, as in "Black" and "non-Black."

88. A chi-square test is a simple means "for assessing the statistical significance of cross-tabulated variables." BOHRNSTEDT & KNOKE, *supra* note 87, at 114.

who vote. For example, if we knew for a particular election and region that (a) 300 high school graduates voted, (b) 100 high school graduates did not vote, and (c) 75 nongraduates voted, we would *not* know whether voting correlated with high school graduation. With this information, set out in Figure 1, we can state that graduates from high school are more likely to vote than to abstain. We can also observe that more graduates from high school vote than do nongraduates. But neither observation permits an inference that education is related to voting because we do not know how many nongraduates abstain. If, for example, the number in cell *d* were 25, then the same percentage of graduates and nongraduates voted—75%. If the number for cell *d* were significantly less than 25, then a higher percentage of nongraduates than graduates voted and the correlation would be negative. There is nothing special about cell *d*. The omission of information from any cell is equally fatal to an attempt to determine the correlation.

FIGURE 1

Voting Behavior	Vote	Not Vote
High School Education	<i>cell a</i>	<i>cell b</i>
Graduate	300	100
	<i>cell c</i>	<i>cell d</i>
Nongraduate	75	?

Now consider the relationship that matters for selective prosecution. The dichotomous variables are race (Black or non-Black, though Black or White may suffice for illustration) and prosecutorial decision (to prosecute or not to prosecute). Determining the correlation requires information about these four cells: (a) the number of times a Black commits crime X and is prosecuted; (b) the number of times a Black commits crime X and is not prosecuted; (c) the number of times a White commits crime X and is prosecuted; and (d) the number of times a White commits crime X and is not prosecuted. The *Armstrong* defendants had some evidence of the content of cells *a* and *c*, a sample in which 24 Blacks and 0 Whites were prosecuted. This permits us to infer that, in the general population, more Blacks than Whites are prosecuted. But this data does not tell us whether the percentage of Black violators prosecuted is higher than the percentage of White violators prosecuted; it does not show a statistical relationship between

race and the decision to prosecute.⁸⁹ Interestingly, psychologists find that people often infer a correlation on the basis of incomplete information and are particularly likely to overestimate the importance of information in cell *a*.⁹⁰ One might view *Armstrong* as a corrective, pointing out the logical relevance of cell *d*, similarly situated but unprosecuted Whites.

Of course, *Armstrong* does not merely state the relevance of cell *d*. It holds that the trial court cannot presume the existence of individuals in this cell by assuming, as the Ninth Circuit did, that “people of all races commit all types of crimes,”⁹¹ but instead relies on *Ah Sin*, which rejected the defendant’s claim because of the possibility that offenders might “exist exclusively among the Chinese.”⁹² Thus, a de-

89. Because the number of Whites prosecuted in the sample is zero, it may appear that the two numbers in the text (cells *a* and *c*) are sufficient to show a correlation. When no Whites are prosecuted, the percentage of Whites prosecuted is zero (regardless of the number of Whites committing the offense). Because the number of Blacks prosecuted is greater than zero, the percentage of Blacks prosecuted must also be greater than zero (regardless of the number of Blacks committing the offense). Thus, the absence of White prosecutions is especially informative. It appears to demonstrate that the percentage of Blacks prosecuted is higher than the percentage of Whites prosecuted.

But the textual statement is still correct. First, the number of unprosecuted White offenders—cell *d*—could be zero. If that were true—if prosecutors charged no Whites because no Whites in the sample committed the crime—then there would be no correlation between race and the decision to prosecute; there would simply be insufficient data in the sample to assess the relationship. Second, even if cell *d* were greater than zero, without knowing its actual content and the content of cell *b*, we cannot know whether the difference in the percentage of Blacks and Whites prosecuted is statistically significant. Because we have only a sample of the population of offenders, we cannot infer a correlation in the population unless the differences in the sample are statistically significant. See *supra* notes 86, 88.

90. See, e.g., THOMAS GILOVICH, *HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE* 30-37 (1991). In one experiment, researchers asked individuals either what kind of information they needed to determine whether practicing the day before a tennis match was related to winning the match or what kind of information they needed to determine whether practicing the day before a match was related to losing the match. See Jennifer Crocker, *Biased Questions in Judgment of Covariation Studies*, 8 PERS. & SOC. PSYCHOL. BULL. 214, 215-16 (1982). Because all matches result in a win for one player and a loss for the other, the same information from all four cells—(a) practice and win, (b) practice and lose, (c) not practice and win, (d) not practice and lose—is equally relevant to either prediction. See *id.* at 217. But those asked about the effect of practice on winning emphasized the need for knowing the number of times a person practiced and won; those asked about the effect of practice on losing placed relatively more weight on the need to know the number of times a person practiced and lost. See *id.* at 218. In other words, once people define a positive hypothesized correlation—between *X* and *Y*—they overvalue the cell representing the number of times *X* and *Y* happen together.

91. *United States v. Armstrong*, 116 S. Ct. 1480, 1488-89 (1996) (quoting and rejecting Ninth Circuit’s presumption).

92. *Id.* at 1487 (quoting *Ah Sin v. Whittman*, 198 U.S. 500, 507-08 (1905)). As *Armstrong* recounts, *Ah Sin* stated that “[n]o latitude of intention should be indulged in a case like this” and “no fact should be omitted to make it out completely.” *Ah Sin*, 198 U.S. at 508.

Rehnquist also suggests that “presumably reliable statistics” are “at war with” the Ninth Circuit’s presumption “that people of all races commit all types of crimes.” *Id.* at 1488-89. But the statistics to which he refers demonstrated only that people sentenced for committing certain

fendant seeking discovery must provide “some evidence” or “a credible showing” that the number is greater than zero. Although *Armstrong* does not have to go farther, note that the mere existence of unprosecuted White violators would not necessarily suggest a correlation. To show a correlation, and thereby a discriminatory effect, the number in cell *d* would have to be sufficiently high relative to the other three cells.⁹³

Once the matter is stated this way, however, something remarkable becomes evident. *Even if the Armstrong test is met, we do not know that race and prosecutions are related.* That is, even knowing (a) that some number of Blacks are prosecuted, (c) that a lesser number of Whites are prosecuted, and (d) that a high number of similarly situated Whites are not prosecuted, we still lack enough information to determine a correlation.⁹⁴ The reason is that we lack any information

crimes are often primarily of a single race. His statement that over 90% of those sentenced for crack offenses are Black is entirely consistent with the fact that people of all races commit the offense and that prosecutors then select on the basis of race. Quite possibly his real point comes from the other two statistics he cites: that 93.4% of convicted LSD dealers and 91% of those convicted for pornography or prostitution are *White*. *See id.* Because those arguing selective prosecution would not claim that these disparities are the product of selective prosecution, Rehnquist is suggesting the *possibility* that the same is true of crack offenses.

93. In *Armstrong* itself, conceivably the proof of *any* similarly situated unprosecuted Whites might have sufficed to show a significant association, but only because the defendants' numbers—24 of 24 defendants were Black—suggest a 0% federal prosecution rate for White offenders. Perhaps this is why Justice Stevens notes in dissent the practical certainty that there are *some* White crack dealers in Los Angeles, a point the government had never denied. *See Armstrong*, 116 S. Ct. at 1494 (Stevens, J., dissenting). But Stevens' point would be less persuasive if the defendants had proved, for example, the following numbers: 24 Black defendants, 12 White defendants, and 2 unprosecuted Whites. Although this shows that there are *some* similarly situated unprosecuted members of other races, it does not suggest a correlation. As I explain in the text, if there were a sufficient number of unprosecuted *Blacks*, these numbers would be consistent with perfectly evenhanded law enforcement. It would be odd (even if desirable) to read the decision as saying that a court could order discovery whenever the defendant provided evidence of *any* similarly situated yet unprosecuted members of other races, even if such proof raised no inference of unequal enforcement. Thus, *Armstrong* may ultimately require not just some similarly situated evidence, but proof of enough such individuals to support a correlation.

This reasoning is a far better explanation of *United States v. Olvis*, 97 F.3d 739 (4th Cir. 1996) than the one the court gave. There, the government prosecuted 25 members of a crack cocaine conspiracy, all Black, but none of the five White members. *See id.* at 741. The court reversed an order of discovery because it said the evidence failed to show that the five Whites were “similarly situated.” *Id.* at 746. Because no two defendants are ever identical, this sort of move may effectively terminate any chance of discovery even where the defendant can find evidence of offenders of another race. The better and more limited reason is that the government also failed to prosecute 50 Black members of the conspiracy. Thus, the federal government prosecuted one-third of the Black offenders. Had it prosecuted one-third of the White offenders, that would have been (rounding up) two prosecutions, which is not very different from the zero White prosecutions we observed. A chi-square test for these four cells reveals that the relationship between race and prosecution is not statistically significant.

94. I assume away another concern—that the *Armstrong* test does not seem to require complete information about cells (a), (c), and (d). One could be reasonably confident about a correlation if one has randomly sampled the relevant categories.

about cell *b*, the number of Blacks who commit the crime and are *not* prosecuted. Absent this information, we cannot determine whether the percentage of Black offenders prosecuted is higher than the percentage of White offenders prosecuted.

As a concrete example, suppose the defendant shows that a federal prosecutors' office has in the last year prosecuted 25 persons for crack offenses, 24 of whom were Black and 1 of whom was White, while state authorities in the same area prosecuted 9 persons for crack offense, all of whom were White. To ensure that this latter fact satisfies the *Armstrong* test, assume that all 34 defendants were "similarly situated" and that the U.S. Attorney had the opportunity to prosecute all 34, but declined in the 9 cases that were brought in state court. Notwithstanding these very strong assumptions, the evidence still does not demonstrate that race is correlated with the prosecutorial decision, or if it is, that the racial correlation disfavors Black defendants. Here is a summary of the data:

FIGURE 2

U.S. Attorney Decision	prosecute	not prosecute
Race of crack dealer		
Black	<i>cell a</i> 24	<i>cell b</i> ?
White	<i>cell c</i> 1	<i>cell d</i> 9 (at least)

Why does it matter that we lack the number for cell *b*, Blacks who sell crack and are not prosecuted? If the number is very large relative to the other numbers, there will be no correlation or possibly one that *favours* Blacks. Suppose that the total number of Blacks committing this offense in this place and time is 240 while the total number of White crack dealers is 10. That would mean the U.S. Attorney prosecuted 10% of Black crack dealers and 10% of White crack dealers. Thus, race and the decision to prosecute are not correlated. Instead, the combination of a very unequal number of prosecutions of Blacks and Whites (24 to 1) along with proof of several (9) similarly situated White offenders who are not prosecuted can be entirely consistent with perfectly proportional prosecutions. Indeed, if the number of Blacks committing this offense were larger than 240, then the U.S. Attorney would be prosecuting proportionately more

White offenders than Black offenders.⁹⁵ Thus, what appear at first to be powerful facts may be entirely insufficient to demonstrate the supposed relationship.

Perhaps my point is now apparent. *All of the four cells in a joint contingency table are equally relevant and equally necessary to determining a correlation.* If *Armstrong* is right to hold that the defendant must, as an absolute condition of discovery, provide evidence of cell *d* (the existence of unprosecuted Whites), then the logical conclusion is that defendants must also provide some evidence of cell *b* (unprosecuted Blacks). There is no statistical basis for treating cell *d* as more probative than cell *b*. Yet if one requires defendants to provide evidence for cell *b*, then the argument of Part II, that *Armstrong* makes discovery impossible for *many* crimes, is a vast understatement. If defendants must provide evidence that the number of unprosecuted offenders of the same race is sufficiently low to support a correlation, then *Armstrong* simply ends the issue of discovery (except perhaps in cases where the government admits to a racial motive).

To see why this is true, consider again the hypothetical crack defendant who presents the data in Figure 2. Assume that a defendant must provide evidence of the number, or at least the upper limit, of unprosecuted Black crack dealers. This means a defendant must provide evidence that the number of unprosecuted Black crack dealers is (significantly) *less than 240*. In comparison, proving the existence of cell *d* individuals (similarly situated White offenders) is easy because it involves proving a positive. But to provide "some evidence" of cell *b* (the upper limit of the number of unprosecuted Blacks), one must prove a negative: that a very large number of Blacks *do not* commit the offense.⁹⁶ How would one hope to offer evidence of such a proposition? There are no public records documenting the *nonexistence* of criminal offenses by Blacks. All of the difficulties discussed in Part II—regarding the use of surveys to prove the racial make-up of undetected criminal offenders—apply to this cell as well.⁹⁷ Certainly the defendant cannot ask the court to assume that the only Blacks com-

95. For example, if the number in cell *b* were 480, the state would be prosecuting 10% of White violators but only 5% of Black violators.

96. Thus, it will not suffice to demonstrate that a handful of Blacks did not commit the offense. To show that less than 240 Blacks commit the offense means showing that the rest of the Black population does not commit it.

97. Perhaps some "experts" would speculate about the total number of individuals, by race, committing a given offense. Given that *Armstrong* rejected the affidavit of an attorney with experience in state and federal drug cases as being merely a "personal conclusion[] based on anecdotal evidence," *Armstrong*, 116 S. Ct. at 1489, there seems to be no room for such speculation.

mitting the offense are the ones prosecuted or arrested, a proposition far less credible than the Ninth Circuit presumption the Supreme Court rejected.⁹⁸ Nor can a defendant ask the court to make other helpful presumptions, for example, that the police apprehend an equal percentage of violators of each race.⁹⁹ In short, if defendants were required to provide evidence of this cell of a joint contingency table, for most crimes, the task would be truly hopeless.¹⁰⁰ If this is what *Armstrong* means, a more candid opinion would simply state there is no discovery for selective prosecution claims.

Perhaps I read *Armstrong* too expansively. Perhaps the Court literally means that discovery is available if the defendant provides

98. Given the difficulty of detecting criminal violations, and particularly the difficulty of fighting the "war on drugs," the assumption that all Black offenders are prosecuted is ridiculous.

99. Even if the police are not targeting on the basis of race, they could easily wind up detecting proportionately more or less violators of a given race for various reasons.

100. One might seek to avoid the force of this analysis by suggesting that defendants show an alternative correlation. I have assumed that the relevant relationship is one between prosecutions and the race of those who commit the offense, ignoring the question of whether the prosecutor knew of all these offenders. Although that question is undoubtedly crucial to the ultimate merits of the claim—how can the prosecutor be intentionally discriminating if he did not know of the existence of the Whites he did not prosecute?—it seems less than dispositive in the context of discovery. If the defendant shows that the prosecutor is charging a higher percentage of offenders of one race, that would seem to raise enough suspicion to justify discovery. Nonetheless, a defendant might instead seek to show a correlation between prosecutions and race of those whose offenses *come to the attention of law enforcement*. In determining this correlation, cell *b* is now the number of Blacks whose crimes came to the attention of law enforcement but are *not* prosecuted. If we assume that prosecutors charge whenever they (directly or through the police) detect a crime, then the number for cell *b* must be zero. If we can determine cell *b* in this manner, then it appears that my argument fails, that we can determine the relationship prior to discovery, and that the discovery standard is possible to satisfy.

But *Armstrong* does not permit us to make the crucial *assumption* that prosecutors charge whenever they detect a crime. The assumption is not *necessarily* true. Prosecutors do not prosecute every criminal they discover, nor, when prosecuting an individual, charge every offense they could prove. The very idea of prosecutorial discretion is to the contrary, for there are many valid reasons for declining to prosecute a crime. Perhaps prosecution of all crack dealers is probable, but *Armstrong* manifests no patience for allowing the defendant to meet his obligations via assumptions, probable or not. See *supra* notes 73, 92 and accompanying text. If courts similarly indulge the government on the issue of unprosecuted Black offenders (cell *b*), they will require actual proof that the number is not sufficiently high to eliminate any unfavorable correlation with race. If the defendant claims that the prosecutor charged every Black offender he apprehended (so that cell *b* is zero), that will require actual evidence. But, prior to discovery, defendants will not have access to such evidence.

Even if I overstate the hostility *Armstrong* suggests for probable assumptions, the assumption that prosecutors charge every offender they know of is, for many offenses, *not* probable. If the assumption is plausible, it is only because the context is crack cocaine—a crime society regards as very serious. But it is not plausible that American prosecutors charge everyone who comes to their attention for violating statutes prohibiting prostitution, marijuana possession, gambling, statutory rape, underage drinking, or speeding. In these cases—the situations in which selective prosecution seems most plausible anyway—the state often declines to prosecute. So a defendant requires evidence to estimate the size of cell *b*. But there is no reason to expect defendants will, prior to discovery, be able to get such evidence. In sum, the difficulty of quantifying the number of unprosecuted members of the same race presents an insuperable barrier to proving any relevant relationship between race and the decision to prosecute.

evidence of *any* number of similarly situated members of other races. And perhaps the Court will never hold that a defendant must provide some cell *b* evidence of the upper limit of unprosecuted members of the same race. Certainly, I hope both of these predictions are true, given the danger of extending *Armstrong*. But such limitations would necessarily imply that the *Armstrong* reasoning is unsound. First, if the Court means that evidence of *any* similarly situated but unprosecuted members of other races (cell *d*) is sufficient for discovery, then the question is, why require such evidence at all? Logically, the data matters only to the extent it supports a correlation, which certainly cannot exist if cell *d* is zero, but also is not suggested unless the numbers in the cell are sufficiently large relative to the other three cells. Second, if it is appropriate to excuse defendants from providing some evidence of (the upper limit of) cell *b*, then it is equally appropriate to excuse defendants from providing some evidence of cell *d*. There is no basis for distinguishing between the cells, each of which is equally relevant and equally necessary to determining a correlation.¹⁰¹ In the next section, I describe more specifically where *Armstrong* went wrong.

B. *What Armstrong Should Have Said*

Much of the last section actually supports the concern *Armstrong* expresses about evidence of similarly situated but unprosecuted members of other races. Indeed, the Supreme Court would clarify matters if it went further and stated that a discriminatory effect inquiry requires consideration of all the cells logically a part of the cross tabulation between race and the decisional variable. Addressing the matter with statistical rigor does not, however, require embracing an impossible standard of proof. The flaw in *Armstrong* is in thinking we have

101. Conceivably, one might attempt to defend *Armstrong* as a practical "compromise" between requiring evidence of all four cells and requiring evidence of the two cells the defendants there addressed. Any intuitive appeal this reasoning has depends on a misunderstanding of correlation. Knowing three of the four cells is not three-quarters of the way to knowing whether a correlation exists. If one is completely ignorant about any *one* of the four cells, then there is no basis for determining whether the variables are correlated, regardless of the contents of the other three cells. Being ignorant about one cell is therefore no better than being ignorant about two (except that enlightenment is two steps rather than one step away). Moreover, even if it were a practical compromise to require evidence of three but not four cells, it makes no sense to specify *which* three elements the defendant must prove. Each element is equally important, yet *Armstrong* suggests that in the (admittedly improbable) case where a defendant could show the three elements other than the similarly situated requirement, that he would be entitled to no discovery. Yet if he supplies that evidence and omits evidence capping the number of same-race-but-unprosecuted offenders, he presents no better case for correlation but he is then entitled to discovery.

“no evidence” for a cell unless the defendant provides us some. It is one thing for courts to presume the good faith of prosecutors and to place the burden of proving a correlation on the defendant, but it is another to presume that the content of *each* of the joint contingency cells is whatever extreme value the government needs it to be to avoid a suspicious correlation. We often have a reasonable basis for believing certain facts about these cells, and sometimes the best assumption is one that, in combination with facts the defendant shows, tends to establish a correlation. Thus, *Armstrong* should have pointed out the logical relevance of all four cells and required trial courts to *think about* each of these cells. But the doctrine should permit discovery whenever the trial court finds that the defendant’s evidence, combined with probable assumptions about the range of the remaining cells, makes it more likely than not that race and the decision to prosecute are correlated.

Let me illustrate this point in the following manner. First, I will show an example where it makes sense not to burden the defendant with the obligation of providing evidence of cell *b* (the number of unprosecuted offenders of the same race). If so, the same kind of inferences that justify dispensing with the need for evidence of this sort also justify dispensing with the need for the similarly situated evidence *Armstrong* requires (cell *d*). My second point, then, will be to show an example where one can correctly think a correlation is probable before the defendant has provided similarly situated evidence.

First, imagine a crime for which a large number of Blacks and a low number of Whites are prosecuted, and that a large number of similarly situated White offenders are not prosecuted. But suppose we do not have evidence of cell *b*: the upper limit of unprosecuted Black offenders. For concreteness, assume the crime is crack dealing, that state and federal law enforcement cooperate in investigations of all crack offenses, that the U.S. Attorney has charged 250 Blacks and 10 Whites, and that the defendant shows that the state prosecuted 90 similarly situated Whites who were known to the U.S. Attorney and no Blacks. From this data, we know that the federal prosecutor charged no more than 10% of all White offenders. Possibly he has charged even a lower percentage, but the defendant only finds similarly situated offenders by looking at state records, so we do not know about White dealers unprosecuted at either level. In any event, because of our ignorance about cell *b*, we do not know the percentage of Black offenders that 250 represents and that seems to defeat any effort to determine a correlation. These numbers are presented in Figure 3.

FIGURE 3

U.S. Attorney Decision	prosecute	not prosecute
Race of crack dealer		
Black	cell a 250	cell b ?
White	cell c 10	cell d 90

But let us set aside the disdain *Armstrong* shows for making unevicenced assumptions that benefit the defendant. A two-step inference suggests the likelihood that race and the decision to prosecute are associated: First, one relevant population is not all offenders, but those whose crimes come to the attention of a prosecutor. Second—and here is the factual assumption—prosecutors rarely decline to bring a crack cocaine charge unless they know another prosecutor is bringing the same charge.

The first point is a legal argument: that the prosecutor would violate the Equal Protection Clause either by seeking to find Black offenders because of their race (but prosecuting everyone whose violation is detected) or by using race as a factor for determining which *known* offenders will be prosecuted. The second point is a factual claim that is not necessarily true, but is very probably true; certainly, it is the kind of fact that we might expect an experienced trial judge would know even without the defendant having provided *any* evidence of its validity. The assumption implies that cell *b* is close to zero because the nonfederal prosecutions are zero. Or, stated conversely, the odds that cell *b* is as large as 2,500—meaning that state and federal prosecutors knew of but declined to prosecute 2,500 Black crack dealers—is vanishingly small.¹⁰² Thus, a well-founded assumption gives the court a strong basis for estimating the upper range of cell *b*, an estimate that makes it highly likely that race and the federal decision to prosecute are correlated.¹⁰³

102. Or more broadly, if the prosecutor has declined to bring charges against a number of Black offenders, it is highly likely that the prosecutor has also declined a proportionate share of charges against Whites. Thus, any missing numbers to cell *b* are matched by proportionate missing numbers to cell *d*, and we can ignore both.

103. Figure 3 posits some striking numbers, but we could imagine the same reasoning process leading to the same conclusion—a probable correlation—based on less impressive numbers. For example, if the state had prosecuted 250 Black crack dealers, using *Armstrong* logic, we could not conclude that race and the federal decision to prosecute were correlated. Even though the U.S. Attorney prosecuted 50% of known Black offenders and only 10% of known White offenders, the number in cell *b* could be much larger than the number the state actually prosecutes,

Thus, the numbers in Figure 3 prove no relationship between race and the decision to prosecute *only if* we are completely ignorant about the content of cell *b*. Being completely ignorant means that we would have no basis for assessing the likelihood that cell *b* contains the kind of numbers—2,500 or 25,000—that would result in there being no correlation or one favoring Blacks. But even without the defendant providing “some evidence” of cell *b*, we are *not* completely ignorant; we can have a reason for thinking certain numbers are *unlikely*, given their implications. The implications of cell *b* having very large numbers is that the state and federal officials decline to prosecute a great many of these offenses. This outcome is certainly possible, but there is no reason to count it *as likely as* the contrary possibility. Thus, there are reasons to reject some of the *possible* values of an unknown cell, even though the defendant has offered no evidence of their content. The values rejected may make a correlation likely.

Here’s the rub: the same reasoning will sometimes justify discovery even with no “similarly situated” evidence. Suppose the defendant shows only that the U.S. Attorney has prosecuted a very lopsided number of Whites and Blacks (cells *a* and *c*), but provides no evidence about similarly situated unprosecuted Whites or Blacks (cells *b* and *d*). To take an extreme example, imagine that the crime is littering or speeding and that a Black defendant demonstrates that, in a jurisdiction that is 10% Black, prosecutors charged 10,000 individuals for the crime in the past five years and that *all* 10,000 were Black. If the defendant fails to offer some “evidence” that non-Blacks committed the offense in the past five years and were not prosecuted, does logic command that the defendant’s request for discovery be denied? If the *Armstrong* reasoning is sound, the answer should be yes. And yet this result is absurd. The defendants’ evidence, limited to the number of Blacks and non-Blacks charged with an offense, is entirely sufficient to support the inference that prosecutors are charging a much higher percentage of Black violators than of non-Black violators. Without the defendant providing evidence, we are quite reasonable in *assuming* that some non-Blacks litter and speed. Even if Blacks commit these crimes more frequently than others, the likelihood that race-

meaning that the percentages could be equal. (Of course, the size of cell *d* could also be larger than the number of Whites the state prosecutes, but this is the very assumption *Armstrong* excludes: absent “evidence” to the contrary, we must assume there are no similarly situated offenders of a different race.) But, again, a trial judge might reasonably conclude that prosecutors rarely decline such charges and therefore that a correlation is highly probable.

neutral prosecutions would produce this kind of disparity is exceedingly remote.

Let us return to crack cocaine offenses. Assume that the defendant shows only that the U.S. Attorney has charged 98 Blacks and 2 Whites. (See Figure 4.) Thus, 98% of federal crack prosecutions are against Black defendants. There would still be no correlation between race and the decision to prosecute if 98% of all crack dealers (and therefore 98% of all unprosecuted crack dealers) were Black, something we cannot rule out if we are completely ignorant about cells *b* and *d*. But there could be good reasons for us to reject this 98% possibility *other than* the defendant pointing to similarly situated but unprosecuted Whites.

FIGURE 4

U.S. Attorney Decision	prosecute	not prosecute
Race of crack dealer		
Black	<i>cell a</i> 98	<i>cell b</i> ?
White	<i>cell c</i> 2	<i>cell d</i> ?

For example, suppose the defendant points to evidence that half or more of crack *users* are White.¹⁰⁴ As a purely logical matter, this fact has no bearing on the information we seek. But from this evidence, a court could reasonably refuse to presume—absent contrary evidence from the government—that anything near 98% of crack dealers are Black. Instead, because many of those who use an addictive drug find it necessary to sell it, at least occasionally, to support their habit,¹⁰⁵ the fact that more than 50% of crack consumers are White makes it unlikely that less than 2% of dealers are White.

104. In his *Armstrong* opinion, Justice Stevens cited a government report finding that 65% of persons who have used crack cocaine are White. See *United States v. Armstrong*, 116 S. Ct. 1480, 1493 (1996) (Stevens, J., dissenting) (citing UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 39 (Feb. 1995)); see also Dorothy Lockwood et al., *Crack Use, Crime by Crack Users, and Ethnicity*, in ETHNICITY, RACE, AND CRIME 212, 231 (Darnell F. Hawkins ed., 1995) (noting that National Institute on Drug Abuse data implies that, while the percentage of Blacks using crack is three times as high as the percentage of Whites using crack, the percentage of crack users who are White is 49.9%).

105. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-149286, FACT SHEET: DRUG-RELATED CRIME 3 (Sept. 1994) (stating that surveys show that 25% of state and local prisoners incarcerated for drug trafficking committed the offense for money to buy drugs).

Knowing more facts about the structure of crack distribution would affect how unlikely this disparity is.¹⁰⁶ If it were only slightly unlikely, then we might have no confidence in there being a correlation between race and the decision to prosecute. What matters, however, is that without actually identifying unprosecuted Whites, there *could* be cases where the evidence in cells *a* and *c*, combined with reasonable background assumptions, makes a correlation likely. If so, then *Armstrong* is wrong to require similarly situated evidence as a matter of law.

In Part II, I identified what I called a glaring gap in the logic of *Armstrong*.¹⁰⁷ This Part has revealed a less obvious gap: on factual grounds, the Supreme Court rejects the Ninth Circuit's particular presumption that "people of *all* races commit *all* types of crimes" and then creates a standard that excludes the use of any presumption in any case. Even if it were true that the Ninth Circuit's assumption was factually unwarranted, and even if it were true that there were no alternative assumptions that, combined with the *Armstrong* defendant's evidence, made a correlation likely in *that* case, there was still no basis for excluding, in *all* cases, the use of assumptions. Yet by holding that a defendant must provide, as a condition of discovery, "some evidence" and a "credible showing" of similarly situated but unprosecuted members of other races, the Court did just that. Even where race and the decision to prosecute are probably correlated, given reasonable assumptions, a trial court cannot permit discovery if the defendant has not provided this specific evidence, though it will often be unavailable even when the selective prosecution claim is meritorious.

The *Armstrong* Court should have set a discovery standard (1) placing the burden of proof on defendants, (2) requiring a trial court to reach its decision by thinking through the likely quantity of all relevant cells in the joint contingency table, but (3) permitting the court to make reasonable assumptions about the outer limits of the cells. Most importantly, because a practical standard would be aimed at minimizing the combined harm of Type I and Type II errors, the standard should be more demanding of defendants to provide information they could be expected to find (the failure to get it is then itself evidence that the defendant does not expect the evidence to be helpful) than to provide information available only at great expense (the failure to get

106. See, e.g., *Days*, *supra* note 59, at 187 (noting that there is "empirical data to support the belief that . . . the percentages of persons of a particular race who use a drug and who sell the drug may be very different").

107. See *supra* text accompanying notes 60-61.

it creating no such inference). Possibly, under this standard, the *Armstrong* defendants deserved to lose; perhaps the district court even abused its discretion in ruling otherwise.¹⁰⁸ But the standard I recommend would avoid the harm identified in Parts II and III: that many defendants have no chance of gaining discovery for their meritorious claim.

In sum, the problem in *Armstrong* is not merely that it requires defendants to acquire evidence that is sometimes impossible to obtain, the point of Part II. One might dismiss this fault as the lesser of two evils, where unfettered discovery was the only other option. *Armstrong* also requires defendants to acquire this evidence even when its absence would not prevent a court from reasonably inferring that prosecutors are charging members of one race proportionately more than another. The better alternative is to permit discovery whenever this inference is reasonable.

IV. THE HIDDEN ISSUE: HOSTILITY TO SELECTIVE PROSECUTION DOCTRINE

The *Armstrong* holding and the implications of its reasoning create a barrier to discovery that, for the great majority of criminal cases, is insuperable. Thus, the standard succeeds in minimizing Type I er-

108. Relatively unnoticed in the court decisions and subsequent commentary was the general weakness of the defendants' basic evidence—24 of the 24 crack defendants represented by the Federal Public Defenders Office and whose cases closed in 1991 were Black. First, we do not know the size of the population of crack cocaine cases prosecuted by the U.S. Attorney in 1991 and therefore we do not know whether 24 is a substantial or trivial percentage of it. Second, defendants represented by public defenders are not a random sample of the population of offenders; indeed, because the public defenders office represents the indigent, we might expect them to represent a disproportionate share of racial minorities, who are disproportionately poor. Third, the federal public defenders could have provided a sample based on their cases *opened* in a given year, or their cases opened and closed in a given year, rather than just cases *closed*; they could have provided a sample year other than 1991, or provided a sample from multiple years.

Given their duty to represent their clients zealously, one should expect that from all the possibilities, the public defenders selected the most racially lopsided sample available. Thus, from a set of samples, none random and each an indeterminate and possibly trivial percentage of the whole, we have one sample selected for the purpose of proving racial selectivity, that is, for being a statistical "outlier." Professors Gastwirth and Nayak ignore this problem in their recent analysis, where they treat the 24 defendants in the *Armstrong* "study" as a valid "sample" of all drug prosecutions in the relevant time period. See Joseph L. Gastwirth & Tapan K. Nayak, *Statistical Aspects of Cases Concerning Racial Discrimination in Drug Sentencing: Stephens v. State and United States v. Armstrong*, 87 J. CRIM. L. & CRIMINOLOGY 583, 598-601 (1997). Given the sampling problem, perhaps the district court should have required the federal public defenders to provide a more general accounting of the information in its files in order to determine whether cells *a* and *c* were really as lopsided as the proffered evidence made them appear. Otherwise, this weakness, and the defendants' (theoretical) ability to document the existence of similarly situated unprosecuted Whites through public records of state prosecutions, may have justified denying these defendants discovery. (Subsequent data corrects some of these weaknesses, see *supra* note 60, but this data was not part of the record in *Armstrong*.)

rors—awarding discovery for baseless claims—only by accepting the risk of a very high number of Type II errors—denying discovery for meritorious claims. One could concede this argument and still defend *Armstrong* in two ways. First, one might contend that there are virtually no Type II errors because there are virtually no cases of selective prosecution. If selective prosecution is extremely rare, then a generous discovery standard will adjudicate almost exclusively meritless claims. Second, one could defend *Armstrong* by claiming that the harm of Type I errors greatly exceeds the harm of Type II errors. The most plausible explanation for weighing the harms this way is hostility to the apparent remedy to selective prosecution: dismissal of the criminal charges.¹⁰⁹ Given this remedy, we might view *Armstrong* as parallel to decisions in other areas of criminal procedure where the painful costs of the exclusionary rule cause courts to narrow the rights the remedy protects. At a time when scholars increasingly question the wisdom of that rule,¹¹⁰ one can perhaps understand the reluctance to invigorate a doctrine that causes courts to dismiss criminal charges outright.

Some critics of *Armstrong* might counter these points with nothing but the principle of nondiscrimination. For moral as well as constitutional reasons, the state should not select individuals to prosecute on the basis of their race (or religion or other arbitrary ground). But

109. The harm of Type I errors is not trivial. Professor Days, who as Solicitor General argued the *Armstrong* case, states that “discovery on these issues is extremely burdensome and time-consuming, and may require the government to disclose internal information typically thought to fall within the wide discretionary berth afforded to prosecutors . . .” Days, *supra* note 59, at 185. He cites as an example the defendants’ discovery motion in *United States v. Henry*, No. CR 94-628-CBM (C.D. Cal. 1995), for which “roughly 1000 attorney-hours were required to produce the government’s response.” Days, *supra* note 59, at 185-86. The motion was denied. *See id.*

Nonetheless, I do not think it plausible to defend *Armstrong* by claiming that the harm of unnecessary discovery greatly exceeds the harm of undetected racially selective prosecution, unless one raises the objection to dismissal noted in the text. First, defendants will not usually be able to prove even an apparent racial disparity in prosecutions. When they do, the investment the government makes in response will be transferrable to defeat other defendants who raise the same claim. Second, many constitutional rights impose significant costs on society, as do statutory prohibitions on race discrimination. Yet very few deprivations of equal protection or instances of race discrimination have as much practical significance as imprisonment. *See* Sklansky, *supra* note 7, at 1315 (“When a law imposes long periods of incarceration—instead of, say, allocating employment opportunities—inequalities attributable to race are especially intolerable. Locking someone up in cage for a period of years is singularly serious business.”).

110. *See, e.g.,* Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 HARV. J.L. & PUB. POL’Y 457 (1997); Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996); Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996).

that general proposition does not prescribe the details of the selective prosecution doctrine, including discovery rules, unless one thinks it means that society should not consider at all the costs of detecting and deterring such prosecutions. I will not argue against the latter proposition, but I note that many people reject it. In this Part, I contend that, even considering the costs, selective prosecution doctrine should include a discovery rule that provides real assistance to the proof of meritorious claims. My comments are certainly not exhaustive, but I offer a preliminary assessment of the relevant issues, claiming that the harms of selective prosecution are severe, the practice is not rare, and that discovery offers a way to address the problem at a reasonable cost.

A. The Frequency of Selective Prosecution: Are Prosecutors Above Discriminating?

Significant data suggests the possibility of racially selective prosecution in some jurisdictions. Judicial discussions of the subject, however, pay scant attention to these studies nor even acknowledge the empirical nature of the question. Justice Stevens, for example, the lone dissenter in *Armstrong*, begins his opinion by paying homage: "Federal prosecutors are respected members of a respected profession. Despite an occasional misstep, the excellence of their work abundantly justifies the presumption that 'they have properly discharged their official duties.'"¹¹¹ This passage brings several thoughts to mind, but I will focus on only two.¹¹²

First, courts must and do accord all government agents some presumption of legality. The Supreme Court, for example, requires courts to defer to the statutory interpretations of federal agency personnel, at least when the statute is silent or ambiguous on the point and the interpretation is reasonable.¹¹³ Yet Supreme Court Justices do not often feel the need to reassure federal bureaucrats subject to

111. *United States v. Armstrong*, 116 S. Ct. 1480, 1492 (1996) (Stevens, J., dissenting) (quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

112. Other questions include: Why is it important to mention that prosecutors are "respected"? Is he signaling to them that he does not, by his dissent, generally question their motives? If so, would Stevens make the same observation in a case alleging misbehavior by, say, a doctor or architect? I cannot help but read his veneration as a perk for those who belong to the same club as Supreme Court Justices. Also, even if it is true that society respects U.S. Attorneys more than school teachers, bus drivers, or claims adjusters, many of whom also do an "excellent" job, why accept this status hierarchy uncritically as justifying greater latitude for the highly respected?

113. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

the Court's rulings that they are held in respect. I sense that Justices and even some academics feel freer to talk about the human weaknesses and failings of federal and state "regulators" than they do of prosecutors. Almost thirty years ago, Professor (now Judge) Posner attempted to clear the air for a frank discussion of the behavior of the Federal Trade Commission and its employees. Whether appointed or elected, I propose that we apply what he said to prosecutors:

Let us adopt the plausible assumption that people who work for an administrative agency, whether as members of the agency or as its staff, are not a race apart; that the differences between them and people in private life in respect of probity, high-mindedness, freedom from material concerns, self-abnegation, and the like are on the whole unimportant. We assume, and rightly so, that businessmen are primarily motivated by hope of private gain, and I am suggesting only that a similar assumption be indulged of civil servants. . . . [W]e must not be misled by the rhetoric of public service to suppose that the personnel of the FTC differ fundamentally as to motivation and incentives from those of Procter and Gamble.¹¹⁴

By "private gain," Posner includes not just money but "leisure, security, prestige, [and] power."¹¹⁵

Second, how does Justice Stevens know that the work of U.S. Attorneys is generally excellent? If he means that federal prosecutors work hard, try cases with great skill, and win a great many of them, then I concede that he has a sound basis for his claim and that he is probably correct. But if he means—as would be most relevant to *Armstrong*—that they rarely if ever prosecute on the basis of race, then I am perplexed by his level of confidence. U.S. Attorney offices include some very ethical, brave, good-hearted people.¹¹⁶ But, as Posner would note, so does Procter and Gamble. Considerable evidence indicates that American society is still pervaded by racial stereotypes and hatred.¹¹⁷ American businesses discriminate, *even* Procter and

114. Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 84 (1969).

115. *Id.*

116. See, e.g., Days, *supra* note 59, at 182 ("During these years of service in the Justice Department, I have had an opportunity to work with hundreds of dedicated prosecutors . . . who are committed to ensuring that all Americans are afforded the protection of the federal laws and Constitution, and that violators of those laws are subjected to even-handed justice in our courts.").

117. For survey results showing discriminatory attitudes among Whites, see Lawrence D. Bobo, *The Color Line, the Dilemma, and the Dream*, in CIVIL RIGHTS AND SOCIAL WRONGS (John Hingham ed., 1997); DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR* 12-34 (1996); HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA* 71-138 (1985). For social psychology evidence that these attitudes translate into discriminatory behavior, see Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546 (1980); John Duckitt, *Prejudice and Behavior: A*

Gamble.¹¹⁸ As long as law takes seriously the discrimination threat in employment and other markets, is there any reason not to take seriously the threat in prosecutorial decisionmaking? Is there some reason to believe that prosecutors are less likely to be inappropriately influenced by race than other individuals?

This is the question I will address. It is ultimately an empirical question: others have collected data tending to show that prosecutors discriminate on the basis of race some of the time.¹¹⁹ Much of the data concerns the effect of race on the prosecutor's decision to seek the death penalty,¹²⁰ but a reasonable amount focuses on more mun-

Review, 11 CURRENT PSYCHOL.: RES. & REV. 291 (Winter 1992-1993); Joe R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 AM. SOC. REV. 101 (1991).

One recent study by political scientists provides an interesting insight into the problem of racial stereotyping in the context of crime. Researchers had subjects recruited from West Los Angeles observe a highly realistic mock newscast that included a crime story. See Franklin Gilliam Jr. & Shanto Iyengar, *Prime Suspects: Script-Based Reasoning About Race and Crime* (1997) (unpublished manuscript on file with author). In 42% of the cases where the story failed to provide a photo of the alleged perpetrator, the subjects nonetheless recalled having seen the perpetrator in the story. See *id.* at 14. In 90% of those cases, the subjects remembered the perpetrator as being either Hispanic or African American. See *id.* In addition, when the subjects observed a crime story that did show a photo of the alleged perpetrator, they were more likely to recall the perpetrator's race when he was Black than when he was White. See *id.* at 14-15.

118. See, e.g., *Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527, 535 n.7, 546 (5th Cir. 1980) (upholding finding of discrimination against Black workers in assigning them disproportionately to least desirable "slide handler" position, in Texas warehouse with no drinking fountain and inadequate ventilation); *EEOC v. Procter & Gamble Mfg. Co.*, 20 Fair Empl. Prac. Cas. (BNA) 170 (D. Md. 1979) (reporting that the EEOC brought class action after it "found reasonable cause to believe that defendant discriminated on the basis of race and sex").

For more general evidence of discrimination in competitive markets, see MARGERY A. TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING 37-59 (1991); Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109 (1995); Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in a Bail Setting*, 46 STAN. L. REV. 987 (1994); Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites From Blacks During the 1980s: Small Steps Towards a More Integrated Society*, 59 AM. SOC. REV. 23, 33 (1994); Alicia H. Munnell et al., *Mortgage Lending in Boston: Interpreting HMDA Data*, 86 AM. ECON. REV. 25 (1996); John Yinger, *Measuring Racial Discrimination with Fair Housing Audits: Caught in the Act*, 76 AM. ECON. REV. 881 (1986). For criticisms of some of these studies, see RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS* 47-58 (1992).

119. For a review of a number of recent studies, see *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1525-31 (1988).

120. See, e.g., David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 709 n.131 (1983) (finding a race of victim effect; noting that the "leading source of the race-of-victim disparities in Georgia's death-sentencing system for defendants convicted of murder at trial is clearly the decision to advance the case to a penalty trial"); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 L. & SOC'Y REV. 437 (1984) (finding race of victim mattered in South Carolina). See generally GENERAL ACCOUNTING OFFICE, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES*, GGD-90-57 (1990) (reporting review of 28 studies and finding that the "evidence for the race of victim influence was stronger for the earlier stages of the judicial process (e.g.,

dane prosecutions and finds that minority defendants receive harsher treatment.¹²¹ My aim is to demonstrate that the motivation and incentives affecting prosecutors render the results of these studies unsurprising. If public choice theory predicts that governmental actors might racially discriminate, empirical studies suggesting that they do should be greeted with less skepticism. If so, perhaps one day the studies will find their way into a Supreme Court opinion, if only a dissent, in place of reverential statements about the honorable intentions of prosecutors.

Two preliminary points are in order. First, as previously explained, *Armstrong* sets a standard that applies to state as well as federal prosecutors.¹²² Second, we might follow the doctrine of Title VII and distinguish between disparate treatment (intentional discrimination) and disparate impact (in which an insufficiently justified policy causes disproportionate harm to a racial group). Because the Equal Protection Clause only prohibits the former, I focus on intentional discrimination even though the greater problem is probably the latter.¹²³ With this in mind, there are two reasons to expect that some prosecutors will intentionally discriminate on the basis of race. First, like people in every other sector of society, some prosecutors will be—and respect for prosecutors as a general matter should not cause one to shy away from the term—racists. Second, some unprejudiced prose-

prosecutorial discretion to charge defendant with a capital offense, decisions to proceed to trial rather than plea bargain) than in later stages”).

121. See, e.g., William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563 (1980) (finding that the race of victims and defendants mattered in Florida); Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. 842 (1980) (finding that the race of victims and defendants mattered in a large midwestern city); Martha A. Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439 (1979) (finding that the race of victims mattered in Indianapolis); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC'Y REV. 587 (1985) (finding that the race of victims and defendants mattered in Florida); Cassia Spohn et al., *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175 (1987) (finding that the race of defendants mattered in Los Angeles).

122. Thus, the appropriate question is whether prosecutors—not just U.S. Attorneys—discriminate. Some might express concern only for state prosecutors and agree with Justice Stevens' remarks about federal prosecutors. We are conditioned to think this way, I believe, because federal law enforcement agents sometimes bring charges against state law enforcement agents while the reverse is not true. But rather than assume the likelihood of federal but not state “excellence,” I will follow Posner in initially assuming that state and federal personnel, like that of Procter and Gamble, do “not differ fundamentally as to motivation and incentives.”

123. See, e.g., Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Lawrence, *supra* note 7, at 329-32, 343. I will not repeat this caveat below, but my nearly exclusive focus on intentional discrimination is not meant to deny the importance of unconscious discrimination.

cutors will find that they can increase their win rate by targeting racial minorities. I present these observations in turn.

Some individuals intentionally discriminate on the basis of race.¹²⁴ According to some social science evidence, prejudice declines with education,¹²⁵ but there is no reason to believe that juris doctors, as a class, are free from racism. Some discriminatory lawyers undoubtedly seek to become prosecutors. Given various legal rules and social norms that punish discrimination, most racists conceal their preference to discriminate most of the time, particularly when seeking new employment. It is difficult, therefore, for employers to detect racism at the time of hiring. The issue becomes whether racist employees will *retain* their positions after they make discriminatory decisions. Thus, whether prosecutor's offices include racist individuals depends on whether someone with supervisory authority will *detect* acts of racially selective prosecution and then terminate the employment of discriminatory prosecutors.

In some contexts, the government (like other employers) may be quite effective at detecting employee discrimination. But governmental agencies often rely on certain employees to make complex decisions in circumstances where monitoring—in the sense of fully understanding the decisionmaking process—is prohibitively costly. Public employers, like private entities, face what economists call a *principal-agent problem*, where imperfect information prevents the employer (principal) from creating a contract that motivates the employee (agent) to act in the employer's interest.¹²⁶ The principal-agent problem allows an employee to exploit the employer's ignorance of the local situation to make decisions that benefit the employee at the expense of the employer. A racist employee, for example, would privately gain from using his power as an employee to discriminate against members of other races.¹²⁷ Where the principal-agent problem exists, it will be difficult to determine when an employee is discriminating.

124. See *supra* notes 117-18.

125. See, e.g., PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 46-48, 81-83 (1993).

126. See Joseph E. Stiglitz, *Principal and Agent*, in *THE NEW PALGRAVE: ALLOCATION, INFORMATION, AND MARKETS* 241 (1989); Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, 63 *AM. ECON. REV.* 134, 138 (1973).

127. More typical concerns: employees may use the job to maximize leisure—by “shirking”—or maximize their fame and prestige—by spending excessive amounts of the principal's capital on self-promotion activities.

A prosecutor's discretionary decisionmaking presents a paradigmatic example of the principal-agent problem.¹²⁸ Because many prosecutorial decisions are "judgment calls" that require the weighing of very particular facts, monitoring is costly. The Supreme Court noted the complexity of prosecutorial decisions as a justification for its usual deference to those decisions.¹²⁹ This complexity, however, provides a prosecutor the means of concealing, at least from casual observation, his real motive for bringing a charge. When a prosecutor intentionally charges according to race, there will be a disproportionate number of defendants from one race. But the prosecutor will frequently be able to select, among a large number of legitimate factors, some plausible nonracial explanation for that result. Admittedly, there are some criminal charges for which a racial motive would be difficult to conceal; but a clever prosecutor bent on discriminating will avoid using these particular charges as a means of satisfying his desire. Thus, if racist prosecutors exercise some caution and judgment, it will be difficult to detect their racially selective prosecution.

Even if detection is expensive, the principal might be willing to bear the expense. Unfortunately, when we examine the prosecutor's office more closely, there is little cause for optimism. Professor Schulhofer has observed that the agency problem arises for prosecutors in two ways: first, the chief prosecutor for a jurisdiction is the agent of the populace in that jurisdiction; second, the assistant prosecutors for a jurisdiction are agents of the chief prosecutor.¹³⁰ In my view, although the political system provides a strong incentive for the chief prosecutor *not* to direct his assistants to discriminate, it provides little incentive to expend resources to prevent these assistants from discriminating. Absent this incentive, there is no reason to be confident that chief prosecutors will detect and remove discriminators.

Most chief prosecutors are elected.¹³¹ Those that are appointed are probably subject indirectly to the political pressures that face their appointers. In either case, there are no market incentives pressuring

128. Professor (now Judge) Easterbrook may have been the first to note the principal-agent problem applicable to prosecutors. See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 300-01 (1983).

129. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607-08 (1985).

130. See Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 49-51 (1988). At each level, Schulhofer contends that monitoring costs ensure that agents can pursue ends incompatible with the ends of their principals. See *id.*

131. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-151656, PROSECUTORS IN STATE COURTS, 1994, at 1 (Oct. 1996).

government actors to eliminate difficult-to-detect discrimination.¹³² It is unlikely that electoral pressures will provide the motivation. The most obvious reason for this is more of a “principal” problem than an agent problem. The principals in this case are voters and many voters do not care that minority members are selected for prosecution on the basis of race.¹³³ In jurisdictions where racial minorities have little political clout, they may exert only trivial electoral pressure on chief prosecutors to root out discrimination. Even where a substantial bloc of voters do care about discrimination, they also care about other things, primarily the ability of prosecutors to rid their community of criminals. Realistically, these principals cannot monitor individual decisions of prosecutors, so they can determine in only the most limited way how well a prosecutors’ office succeeds at what the voter wants done. Given these very high agency costs, what voters are likely to use—besides the prosecutors’ behavior in the rare cases that attract significant media attention—are simple items like quantity of prosecutions or convictions, or the percentage of trials won.¹³⁴ The prosecutor who wishes to be re-elected (or to maintain his appointment) will

132. For this reason, we might generally expect that government agencies are worse than private firms at detecting the discriminatory acts of their agents. This is an important benchmark for comparison because many people believe that the government is justified in acting to prevent racial discrimination in private markets.

Market competition does not eliminate the principal-agent problem, but competition does reward firms that minimize agency costs, whether by tireless application of existing techniques or by innovative solutions. Those firms whose employees engage in more of these costly behaviors will lose market share to firms whose employees engage in less. Race discrimination is, to the firm, a costly behavior because it means turning away customers or refusing to hire the most qualified employees. For this reason, economists have argued that competitive markets raise the costs of firms who (through agents) racially discriminate. See GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 35-37 (2d ed. 1971); Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161, 1163 (1984). Some economic theorists argue that markets will still not eliminate discrimination. See, e.g., John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2591-2601 (1994); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Competition and Race Discrimination*, 108 HARV. L. REV. 1003 (1995); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996). For present purposes, however, the point is that market competition creates pressures that *limit* discrimination but that these pressures do not exist in government entities. See *infra* note 136, 138.

133. See *supra* note 117. In addition, although prosecutors probably wish to avoid the appearance of discrimination in well-publicized trials, they may also expect greater electoral returns from taking high profile cases involving the kind of crimes the majority of citizens fear most. In predominantly White jurisdictions, that will often mean violent crimes committed against Whites. See *supra* note 120-21 (citing studies finding race-of-victim effect).

134. See Schulhofer, *supra* note 130, at 50 (asserting that chief prosecutor will desire “to enhance his office’s batting average, to avoid the risk of an embarrassing trial loss, to gain credit for a dramatic trial victory”).

seek to satisfy the public on these matters.¹³⁵ With a high win rate, and absent embarrassing media cases, a chief who wishes to discriminate covertly has little to fear from the public.

Realistically, however, a chief who encouraged discrimination would have an enormous amount to fear from his assistants. Any direction to discriminate, however subtle, could provide an ambitious assistant a means of launching a political career by challenging the incumbent chief (or a means of blackmailing the chief for a promotion). But the significance of the agency problem for chief prosecutors is the effect on discriminatory assistants. A racist chief will obviously not attempt to detect or sanction discrimination by his assistants. More importantly, agency costs mean that a chief prosecutor who harbors no racial animus will nonetheless have little incentive to expend scarce resources or political capital to detect and prevent discrimination by his assistants.¹³⁶ Absent these expenditures, in a large office, the chief prosecutor is likely to detect only the most blatantly discriminatory prosecutions.¹³⁷

135. The evidence suggests that prosecutors do focus on winning a high percentage of their trials. See Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 414-15 (1976) (noting the "competitive emphasis on *winning*" and the "lack of any other good indicators of measures of the effectiveness of the prosecutor"); George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 119 (1975).

136. Consider again the comparison to market actors. See *supra* note 132. Although there is a plausible negative connection between discrimination and corporate profits, which gives firm executives an incentive to detect and remove discriminators, there is no obvious negative connection between prosecutorial discrimination and the items voters consider (except in the few highly publicized cases where prosecutors must avoid appearing racist). Given limited resources, targeting guilty Blacks or other minorities for prosecution of certain offenses can be entirely consistent with maximizing the overall number of convictions. To prosecute by race means giving up some winnable cases against another race, but that will not lower one's trial win rate as long as there are a sufficient number of equally winnable cases against members of the targeted race. Thus, a prosecutor motivated by racial animus could easily reconcile his desire to discriminate with his desire to win cases. Indeed, below I argue that targeting minorities could *increase* the prosecutorial win rate. See *infra* text accompanying notes 142-43. In short, business executives and managers focus on financial results that are frequently impeded by discrimination. Prosecutors focus on a win-percentage that is not impeded (and is possibly enhanced) by discrimination.

137. In theory, even where misbehavior is infrequently detected, one can still deter it if the punishment is a sufficiently large multiple of the private gain. Given the low probability of detection, however, job loss is probably not a sufficiently severe punishment. Nor are existing legal sanctions likely to make up the difference. The Supreme Court has held prosecutors absolutely immune from damages claims brought under civil rights statutes for their actions "in initiating a prosecution and in presenting the State's case." See *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). Similarly, many commentators have noted that courts and bar associations rarely sanction prosecutors for misbehavior, even when they are found guilty of overcharging, improper jury argument, Brady violations, etc. See, e.g., Tracey Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 862-73, 890-902 (1995); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for 'Brady' Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987).

None of this analysis denies that a chief who is personally motivated to prevent discrimination may do so. The chief prosecutor has considerably more information about his assistants than the average citizen has about the chief. If he focuses his time and energy on internal reviews aimed at detecting selective prosecution, he will probably succeed.¹³⁸ Undoubtedly some chief prosecutors behave in exactly this way.¹³⁹ My point is simply that there is no obvious feature of the electoral or appointment process that makes such people especially *likely* to become chief prosecutors. And when they do, the electoral process tends to reward those who focus on gaining the narrow indicia of success, such as their win rate. Those who focus intensely on other matters, such as detecting racial selectivity, are less likely to gain reelection (or reappointment). I do not wish to be misunderstood as implying that prosecutors' offices are therefore rife with racists. My point is merely that the personnel in prosecutors' offices will reflect the virtues and prejudices of the rest of society. As long as a nontrivial proportion of society harbors racial animus and/or stereotypes, a nontrivial proportion of prosecutors will as well. As Posner said of FTC personnel, prosecutors will not differ "fundamentally as to motivation and incentives from those" in other parts of society.¹⁴⁰

138. Indeed, where the chief is personally motivated to fight racism, the governmental unit may outperform market actors in limiting discrimination, contrary to the general prediction I made earlier. See *supra* notes 132, 136. The fact that a government agency is not limited by the pursuit of profit means that its administrators are less limited in the time and resources they can devote to detecting and punishing discriminators. On the other hand, we would expect the market to discipline a firm executive who incurs more costs fighting internal discrimination than he saves the firm in preventing such discrimination. Thus, the personal values of the chief executive make a greater difference to discrimination in government than in business. If government executives are highly committed to detecting discrimination, they may exert more effort on such matters than firm actors.

Nonetheless, the fact that some governmental units will do better than private firms is consistent with government also doing worse. Because the actions of a governmental unit depend more on the personal values of its chief administrator, government agencies will be more variable in their tendency to discriminate than are firms. Perhaps it is the visibility of "model" agencies, headed by individuals highly committed to fighting discrimination, that convinces some people that government is more free of discrimination than private firms. But the predicted variability means that, absent such committed people, and absent market pressure against discrimination, the worst discriminators will also be government agencies. At best, prosecutors' offices will be highly variable like all government agencies. At worst, they may fail to attract their share of those personally committed to fighting discrimination because voters judge prosecutors almost exclusively by other qualities.

139. See, e.g., Days, *supra* note 59, at 184 (claiming that "the Attorney General and other top Justice Department officials have gone to great lengths to evaluate these [selective prosecution] claims [by crack defendants] and have found no basis for believing that they accurately describe the way in which federal prosecutorial decisions are made.").

140. Posner, *supra* note 114, at 84. The same might be said of judges, in which case the question arises whether judicial scrutiny of prosecutorial decisions is likely to uncover and deter racially selective prosecution. Moreover, as the Court has pointed out, see *Wayte v. United States*, 470 U.S. 598, 607-08 (1985), judges know less about the prosecutorial function than do

There is one further reason to expect that prosecutors will discriminate, a reason that applies even when they harbor no racial animus or stereotypes. Prosecutors will sometimes improve their trial win rate or plea bargaining record by targeting minorities. Admittedly, some of the reasons a prosecutor may win more cases against minorities may provide what counts as a "race-neutral" justification for prosecution.¹⁴¹ But there is at least one instance in which the focus on win rate would violate equal protection doctrine. Numerous

prosecutors, so one may wonder how judges will succeed where chief prosecutors fail. A complete answer to these objections would require a full theory of judicial motivation, which is beyond the scope of this article. See, e.g., Richard L. Hasen, "High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act, 75 N.C. L. REV. 1305, 1309-35 (1997). In brief, however, there are several reasons that judicial review is valuable. First, judges do not have to be motivated to investigate selective prosecution; they merely have to be motivated to evaluate impartially the evidence offered by defense lawyers, whose motivation is strong. The social norms influencing judges make impartial evaluation entirely possible. Even those judges concerned with re-election are usually not as single-mindedly focused on the state's win rate as chief prosecutors are. One reason is an even more severe agency problem: a jurisdiction will have more judges than chief prosecutors; thus, voters tend to know so little about any particular judge that he enjoys substantial independence. See *id.* at 1335.

Second, as to competence, despite the Court's general concern, judges already evaluate a wide array of race discrimination claims and judges (many of whom were former prosecutors; all of whom are lawyers) are likely to know far more about the "business" of prosecuting criminals than they know about the business of, say, manufacturing laundry detergent. And surely courts would not deny their competence to hear a claim that prosecutors are discriminating in hiring. Third, that some judges are racist is hardly a reason to avoid judicial review, given that most judges (like most prosecutors) are not. A racist judge would not fairly evaluate claims of racially selective prosecution, but the rest would. Judicial review would be pointless only for those defendants unlucky enough to draw a prejudiced judge after having already drawn a prejudiced prosecutor, where each is a less-than-likely event. Finally, judicial review is valuable even if judges make mistakes in ascertaining prosecutorial motives. Judicial review, including preliminary orders of discovery, can motivate chief prosecutors to monitor their assistants in an effort to eliminate numerical disparities that invite judicial attention.

141. Consider two examples. Each demonstrates why a win-maximizing prosecutor would pursue strategies that burden racial minorities for questionable reasons. Probably neither violates current equal protection doctrine. If not, the examples demonstrate how much latitude is already given to prosecutors by the requirement of intentional discrimination. See *supra* note 14. On the other hand, if either scenario does violate equal protection, then it provides another reason why the motive to win would induce prosecutors to violate such rights.

First, imagine that a prosecutor accepts lower pleas or even drops certain charges against defendants who hire private attorneys. Targeting the poor in this way could increase the prosecutorial win rate. Public defenders generally have less experience and less time to spend on a given case than their private sector counterparts. See Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 389 (1995). Because Blacks in the United States are disproportionately poor, see HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY 1954-1992*, at 225-27 (rev. ed. 1993), targeting the poor would mean prosecuting proportionately more Blacks. See Rebecca Marcus, Note, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219 (1994). Yet this form of targeting would not necessarily violate equal protection doctrine. Presumably a prosecutor would choose the policy in order to win more cases, perhaps knowing that it would burden Blacks, but not because of that burden. See also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) ("[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny.").

studies suggest that juries in some jurisdictions are more easily persuaded, because of racial animus or unconscious stereotypes, to convict minorities.¹⁴² If a case of a given strength is easier to win against racial minorities, and prosecutors seek to maximize their conviction rate, then prosecutors who harbor neither racial animus nor stereotypes will nonetheless *intentionally* seek to charge members of racial minorities. In this instance, the targeting violates equal protection: minorities are easier to convict because of their race, not because their race correlates with some other factor.¹⁴³ Thus, the prospect of jury discrimination (conscious or unconscious) provides conviction-maximizing prosecutors a reason to selectively prosecute racial minorities.

In sum, prosecutors' offices will not be immune from the racism in society. Indeed, the primary constraint affecting prosecutors—the need to win cases and induce plea bargains—may even encourage unprejudiced prosecutors to target racial minorities.

Second, prosecutors find it easier to obtain convictions and stiff sentences against defendants with a history of prior offenses. (As to convictions, prior offenses can often be used to impeach a defendant, thus limiting the usefulness of defendant's testimony in cases where it might otherwise help secure an acquittal. See Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1 (1997)). Equal protection doctrine would certainly not condemn prosecutors who targeted prior offenders, even if that meant prosecuting a disproportionate number of Blacks. But suppose that in some jurisdictions, because of animus or stereotype, police are more likely to arrest Black suspects for certain low level offenses. Or suppose that the police are more likely to search or interrogate Black suspects in violation of their constitutional rights and that, for various reasons, the illegality of these investigative techniques does not always prevent them from yielding admissible evidence. See, e.g., David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983); Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151 (1994). In either case, police discrimination would disproportionately increase the number of prior offenses among Blacks. The prosecutorial policy of targeting prior offenders would then disproportionately burden Blacks. But even if the prosecutor knows that his policy compounds the effect of past police discrimination, he probably does not violate equal protection doctrine. A court will likely reason that the prosecutor can use prior offenses as a factor as long as he does not do so *because* Blacks have proportionately more prior offenses.

142. For reviews of such studies, see Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1616-51 (1985); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 75-99 (1993); Cynthia K.Y. Lee, *Race and the Victim: An Examination of Capital Sentencing and Guilt Attribution Studies*, 73 CHI-KENT L. REV. 533 (1998).

143. A court would probably analogize the prosecutorial behavior in this circumstance to an employer or public accommodation owner who excluded Blacks in order to cater to the discriminatory preferences of his White employees or customers.

B. The Harm of Selective Prosecution: Is It Worth Letting the Guilty Go Free?

Perhaps the more fundamental basis for hostility to selective prosecution claims is that they are presented by the guilty. The conventional remedy for such claims is dismissal of the criminal charge,¹⁴⁴ an apparent windfall for the perpetrator. A few critics of selective prosecution claims have voiced this concern—that the “victim” still deserves criminal punishment whatever the motives of the prosecutors.¹⁴⁵ I sense that many share this concern. In particular, it is far easier to understand why Supreme Court Justices would be indifferent to the practical impossibility of using the doctrine if they have tacit reservations about the remedy. In this section, I try to state the objections fairly and then respond to them.

Outright dismissal of serious criminal charges is tough medicine. To illustrate, suppose there is a deadly riot between individuals of different races. With the purpose of discriminating, the local prosecutor brings charges only against members of one race and not against those of the other race who are also demonstrably guilty.¹⁴⁶ The question is whether it is better to prosecute no one than to allow the race-based prosecutions to proceed. In other words, is it better to release the defendants, each of whom is guilty of murder, because some other people guilty of murder and of a different race are not prosecuted? We might imagine two arguments for saying it is not better.

144. Those few cases at the state and federal level finding a violation have dismissed the indictment or conviction. See *supra* note 55. Chief Justice Rehnquist notes in *Armstrong* that the Supreme Court has never decided the remedy issue. Still, it is difficult to imagine the Supreme Court fashioning a remedy other than dismissal. The Court's desire to protect prosecutors from damages claims—illustrated by its holding prosecutors absolutely immune from civil rights claims for their actions “in initiating a prosecution and in presenting the State's case,” see *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (finding absolute immunity from damages claims brought under 42 U.S.C. § 1982)—makes monetary awards an unlikely alternative. In theory, a court might try to correct selective prosecution by ordering the state to prosecute the similarly situated members of other races who had so far escaped punishment. But the Court has emphasized the importance of prosecutorial discretion too frequently to imagine that they would endorse this approach. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Even if orders to prosecute were allowed, they would not work in some cases, as where the “similarly situated” cannot be located because the prosecutor's failure to act allowed them to flee the jurisdiction, where the statute of limitations had already run, or where the illegal selectivity was allowing the similarly situated to plead guilty to a lesser offense, so that the double jeopardy bar prevents further prosecution.

145. See, e.g., *People v. Tillman*, 282 N.E.2d 231 (1972).

146. I pose these dramatic facts in order to make the strongest objection to the remedy of dismissal. More realistic examples of selective prosecution in the above scenario include decisions (1) to charge members of the favored race with a lower grade of homicide (for example, manslaughter instead of murder) than members of the disfavored race, and (2) to charge both races with identical offenses but to offer less favorable plea bargains to members of one race, including less favorable sentencing recommendations.

First, a utilitarian might say it is obviously worse to dismiss the racially motivated charge because society gains incrementally from the punishment of each additional murderer. The harm of selective prosecution on this account is *underprosecution*, a harm exacerbated by dismissing charges. Second, a retributivist might agree that the problem of selective prosecution is underprosecution, though for the different reason that *each* murderer deserves punishment regardless of what happens to other murderers.¹⁴⁷ The claim for dismissal, on this view, asks for a multiplication of wrongs: because the state committed one wrong—failing to prosecute one who deserves punishment—it must be forced to commit a second wrong—failing to prosecute others who deserve punishment.¹⁴⁸ Instead, this view contends, the party aggrieved by the prosecutor's racist selection is the murder victim whose crime is unprosecuted, or possibly the victim's family or society as a whole. Only these parties—not the prosecuted murderers—have any ground to complain about the inequality. The remedy these aggrieved parties deserve, however costly to bring about, is the punishment of those who have so far escaped prosecution. I respond to these criticisms separately, beginning with the utilitarian claim.

1. A response to the utilitarian objection

The utilitarian may object to dismissing racially motivated criminal charges because less punishment will produce less deterrence. In response, I consider the effect of dismissal on two groups: the prosecutors who will decide whom to charge with crime and the general public whom we hope to deter from crime. Properly constructed, a rule requiring dismissal will desirably affect each group by *increasing* prosecutions and *enhancing* the deterrent value of a given prosecution. Moreover, discovery provides courts a crucial means of deterring selective prosecution without having to incur the costs of

147. Death penalty advocates respond to charges of arbitrariness in this way: executing some of those who deserve execution is better than not executing any of them. See, e.g., Ernest van den Haag, *Refuting Reiman and Nathanson*, in PUNISHMENT AND THE DEATH PENALTY 207, 214 (Robert M. Baird & Stuart E. Rosenbaum eds., 1995).

148. This criticism is merely one instance of a more fundamental attack some have made on equality as an independent value. The argument is that equality is suspect because (or where) it commands that "sometimes a person should be treated *wrongly* simply because another, identically situated person has been treated *wrongly*." Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210, 1212 (1997); see also PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF 'EQUALITY' IN MORAL AND LEGAL DISCOURSE 90 (1990); Larry Alexander, *Constrained by Precedent*, 63 CAL. L. REV. 1, 10 (1989). The defense of equality from this attack is complex and still ongoing. See, e.g., Kenneth W. Simons, *Equality?* (1997) (unpublished manuscript on file with author).

dismissals. In sum, a policy of occasional discovery and threatened dismissals would produce substantial net benefits.

First, a thick theory of deterrence reveals that selective enforcement can undermine law enforcement. One argument is that members of minority communities will not cooperate with law enforcement officials if they perceive their community to be unfairly targeted by such officials. But the harm of selective enforcement is not limited to the loss of potential witnesses to crime. A variety of deterrence theorists claim that criminal law prevents crime not only because people fear punishment, but because the law expresses condemnation of the behaviors it prohibits and thereby strengthens societal norms against those behaviors.¹⁴⁹ Societal norms are informally enforced by community disapproval—shaming—and by the individual's internal sense of guilt.

The idea that law has a moralizing or educative function is not new, but recent scholarship emphasizes its importance. Psychologist Tom Tyler, for example, has extensively studied the effects of legal and social factors on legal compliance.¹⁵⁰ He concludes that legal "legitimacy"—"the citizen's assessment of the fairness of the procedures used by the police and the courts"—is "the key to how the citizen will behave People who regard legal authorities as legitimate . . . comply with the law more frequently."¹⁵¹ Similarly, Paul Robinson and John Darley describe the "moral credibility" of law as a crucial determinant of its success in preventing crime.¹⁵² They review social psychology data supporting the view that people obey law largely because they accept its pronouncements about what is right and wrong.¹⁵³ This acceptance is not unlimited, however, and criminal law loses its moralizing power as its rules drift away from society's norms. They therefore recommend that, where possible, criminal law be made consistent with people's moral intuitions.¹⁵⁴

149. See JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989); Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. . REV. 349 (1997); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

150. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 42-45 (1990) (noting that factors studied included legal sanctions, peer disapproval, and personal morality).

151. *Id.* at 63-64. Tyler also reviews a large body of empirical work reaching the same result: finding that "those who view authority as legitimate are more likely to comply with legal authority." *Id.* at 31.

152. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. . REV. 453 (1996).

153. See *id.* at 471-77.

154. See *id.*

There are probably few things more effective at undermining the moral credibility of criminal law—and the deterrence that goes with it—than the state intentionally enforcing such statutes according to race.¹⁵⁵ One does not perceive the criminal law as expressing societal condemnation of an act if society intentionally allows many of those who commit the act to go unprosecuted, and especially if the state selects individuals for prosecution on some invidious basis. Particularly within communities that bear the brunt of selective enforcement, the law is likely to lose any power other than the expected cost of punishment. And if the community has suffered in the past from morally bankrupt laws, such as slavery law and Jim Crow, then the risk of disillusionment is all the greater. Robinson and Darley focus their concern on matters like the use of strict liability in defining crime. Blurring the civil-criminal line, they claim, will undermine the criminal law's special moral force.¹⁵⁶ These doctrinal concerns pale, in my opinion, compared to Americans' sense of the importance of equal treatment under the law. No doubt the number of political protests over inequalities in application of criminal law vastly exceeds the protests, if any, over strict liability.

Although an occasional dismissal would lower slightly the expected punishment for a crime, there is a very plausible argument that the net effect on deterrence would be positive. This analysis, however, meets with one obvious objection. Setting the guilty free without punishment *also* violates widely held moral intuitions. Robinson and Darley specifically warn that defenses unrelated to moral desert threaten the law's moral credibility.¹⁵⁷ They do not mention selective prosecution, but one can easily imagine that Americans would not understand or accept a rule that dismisses prosecutions brought against individuals fully deserving punishment. But this observation does not mean my prior analysis was wrong. The problem is that the concern for the moralizing influence of law produces an impasse: both racially selective application of law and the remedy for the same undermine the law's moral credibility.

155. Professor Meares makes a similar argument to criticize the "law and order" approach to crime. See Tracey L. Meares, *Place and Crime*, CHI.-KENT L. REV. 669, 677-84 (1998). She claims that increasing the severity of criminal punishments will not increase deterrence, at least within communities of racial minorities, if minorities disproportionately bear the brunt of those sanctions. See *id.* at [text accompanying footnotes 19-40]; see also Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137 (1997); Kathryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L.J. 594 (1996).

156. See Robinson & Darley, *supra* note 152, at 479-82.

157. See *id.* at 478.

There is a way out of this impasse.¹⁵⁸ The initial step is to focus, as I suggested at the outset, on the effect the rule and remedy have on prosecutors. If the defendants can use discovery to prove the discriminatory motive and the remedy is dismissal, the prosecutor faces three choices: prosecute none, prosecute all, or prosecute some intermediate number without regard to race. Any of these choices is likely to be an improvement. Consider again the deadly riot hypothetical. For such serious crimes, it is likely that the dismissal rule, combined with public pressure, will cause prosecutors to charge *all* violators. If so, this is a remarkable advantage—rather than produce less prosecution, the *threat* of dismissal may produce more. The rule exploits the very weakness that produces racial selectivity: some voters do not care about such selectivity; most voters know very little about their prosecutor and therefore focus entirely on a few salient facts. A prosecutor losing the right to charge one murderer because he failed to charge another is the kind of salient fact most prosecutors will seek to avoid creating. Thus, by threatening to publicize the prosecutor's decision not to charge a guilty man and to inflict a salient "loss" in the case he did bring, the rule creates an incentive for him to prosecute members of both races. If the rule effectively deters selective prosecution, then we escape the impasse. We avoid actually dismissing cases against the guilty *and* we enjoy evenhanded enforcement of the law.¹⁵⁹

Of course, if courts never dismiss cases, then the threat of dismissal may not be credible. Credibility is a concern because a prosecutor knows that most judges (and particularly elected judges) will prefer not to dismiss charges against those guilty of a serious crime. If we are lucky, then a few dismissals, especially for minor crimes, may deter racial selectivity without seriously damaging the law's moral credibility with those who object to letting the guilty go free. But there is a

158. Actually, there are two ways. In this section, I focus on how discovery offers a means of deterring selective prosecution without having to use the ultimate sanction of dismissal. The next section argues that some victims of selective prosecution "deserve" dismissal. The sanction is just where the prosecutor exercises legitimate discretion over enforcement but takes more serious action because of the defendant's race. If my argument succeeds, then the moral credibility of law is enhanced by dismissals in this context, which I also claim, represents the typical case of selective prosecution.

159. Given the utilitarian objection to which I am responding, I focus in the text on the advantage of decisions to prosecute all offenders, which will tend to occur for serious crimes. However, sometimes a prosecutor, fearing that selective prosecutions will result in dismissals, will choose to prosecute no one for an offense. Where this occurs, we should probably also count it as an advantage. Where the prosecutor prefers uniform *non*enforcement to racially selective enforcement, we should seriously question the utility of the criminal prohibition at issue. If the majority will not tolerate enforcement against its own members, the statute probably does not serve the public interest.

more reliable solution: *discovery*. Discovery is not merely the means by which a defendant can prove the defense and have the charge dismissed. On that view, discovery is entirely wasted when it fails to produce sufficient evidence to prove selective prosecution. But discovery serves two other purposes: (1) *discovery is itself a sanction*, and (2) *discovery is a means by which a court maintains the credibility of its threat to impose the greater sanction of dismissal*. First, as the government complains when it opposes discovery, orders compelling disclosure are costly. But that is why discovery is useful as a *sanction*: it provides an incentive to the chief prosecutor to monitor his front line attorneys for selective prosecution.¹⁶⁰ Second, by showing its willingness to impose some costs, a court signals its resolve to impose, if necessary, the greater cost of dismissal. By occasionally issuing discovery orders and imposing their attendant costs, the court may be able to maintain a credible threat to dismiss *without having to dismiss any charges*.

In these two ways, discovery orders allow the best of both worlds: deterring selective prosecution enhances the moral credibility of law—and the deterrence it represents—without damaging that credibility by dismissing charges against the guilty. The citizen for whom dismissal is salient and disturbing is not likely to know or care nearly so much about discovery.¹⁶¹ The danger of *Armstrong* therefore is not merely that it makes selective prosecution claims impossible to win. After all, selective prosecution was rather difficult to prove before *Armstrong*. The danger is that the Supreme Court has eliminated the only sanction for deterring selective prosecution *other than* dismissal.

160. Professor Poulin makes this point, that discovery orders provide one form of “soft enforcement” of the rule against selective prosecution. See Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1073-74, 1092-93 (1997).

161. Some might object that if chief prosecutors were afraid of discovery or dismissals, they would not only police intentional discrimination among their assistants, they would seek to avoid statistical disparities that do not violate equal protection doctrine. In other words, they would be “overdeterred.” This objection is a bit like saying that punishing parental child abuse might make parents try to avoid accidents that injure their children in ways that could be mistaken for child abuse. Many statistical disparities are the product of unintentional race discrimination, which is a bad even if it does not violate the Equal Protection Clause. Thus, discovery could produce a collateral benefit if it caused prosecutors to worry a bit about the causes of statistical disparities. For example, it would be desirable if this concern prodded prosecutors to restrain police discrimination that produces racial disparities. See *supra* note 141. On the other hand, some statistical disparities may be benign, at least in the sense of not being the product of intentional or unintentional discrimination. But there is no evidence that prosecutors would have a difficult time convincing courts when the disparities were benign. Certainly, prior to *Armstrong*, there were few discovery orders, virtually no successful selective prosecution claims, and little reason to fear that prosecutors were being overdeterred by the threat of such claims.

Consequently, the only means of deterring selective prosecution is to dismiss cases and thereby damage the law's moralizing effect. In theory, this could produce more dismissals, as courts find that they cannot credibly threaten to dismiss without occasionally following through. Obviously, the more likely outcome is that the low rate of dismissals drops even further, given the greater difficulty defendants face in meeting the standard without discovery, thereby removing any cost to the chief prosecutor from allowing, or failing to detect, well-concealed selective prosecution.

2. A response to the retributivist objection

Now consider the retributivist criticism. This view contends, in the deadly riot hypothetical, that dismissing charges against selectively prosecuted murderers only "multiplies the wrong" of the decision not to prosecute members of one race. Initially, note a complication to this objection. The multiply-the-wrong argument works only if non-prosecution of the guilty is a "wrong." That proposition is not intuitive in a world that endorses discretionary nonenforcement. Consider speeding: Is it a "wrong" if the official enforcement policy is to issue citations only to a fraction of observed violators? Is it a wrong for a prosecutor to decline to prosecute someone known to have violated a law forbidding loitering, gambling, or marijuana smoking, or to have committed a minor theft or trivial assault? The conventional answer is no. Limited enforcement resources make universal prosecution impractical, at least without radically restructuring our system of criminal adjudication and punishment. Moreover, legislatures intentionally enact many overbroad prohibitions with the idea that prosecutors (and police) will enforce the law in less than all cases. If so, non-prosecution is not necessarily a wrong. Thus, a retributivist will need to supply additional arguments in order to demonstrate that *court ordered* nonprosecution is wrong (and thereby multiplies the wrong).¹⁶²

What else is needed? I will not attempt to offer anything like a full account. Merely to demonstrate that the retributivist objection does not (even indirectly) justify the *Armstrong* decision, I will roughly sketch the necessary additional analysis. Recall that, with selective prosecution, the defendant complains that the prosecutor

162. I have not examined the conventional reasons for discretionary enforcement to determine if they fully justify that practice. Perhaps some retributivists would contend that they do not. But my point here is merely to reveal the burden the retributivist critic must discharge to demonstrate the wrongfulness of dismissing charges against victims of selective prosecution. He must argue against a pervasive and possibly indispensable discretion.

treats offenders of another race more leniently. A retributivist may claim that dismissal is unjust for a given crime if (1) a moral principle or (2) the prosecutor's own enforcement policies condemn the leniency awarded to the other race. In other words, if the appropriate standard—set by independent moral principle or general prosecutorial policy—demands the level of enforcement the defendant received, then any leniency is wrong and dismissal would compound the wrong. In these two cases, the only legitimate sanction is an order to prosecute the members of the other race as strictly as the defendant is prosecuted.

The race riot hypothetical illustrates the first case. Arguably, a prosecutor cannot legitimately decide not to charge someone with murder if the prosecutor believes the individual committed the crime and that a jury will convict. On this view, murder is simply too serious an offense to be subject to discretionary nonenforcement. The only appropriate remedy for selective prosecution is an order to prosecute the remaining offenders.

The second case arises when discretionary nonenforcement is generally legitimate. Even if a prosecutor is not obligated to prosecute every offender, the retributivist may demand that he prosecute whenever the factors he normally consults favor prosecution. If so, the retributivist will disfavor dismissal when the leniency the defendant did not receive (for racial reasons) is unjustifiable under the general prosecutorial policies. Imagine then a prosecutorial policy to seek prison time for all those convicted of a second marijuana possession offense. The prosecutor has the discretion to request probation, but selects this strict policy after balancing all relevant factors. A retributivist might say that this policy sets the morally appropriate level of enforcement. On this view, downward deviations that benefit some offenders of one race would not justify dismissing charges against other races. For example, suppose a White prosecutor declines to charge second offenders who are children of people he knows and likes, but that, for racist reasons, all the beneficiaries are White. When a Latino defendant points out this selective prosecution, the retributivist may claim, given what level of enforcement is morally "right," that the only just remedy is an order to prosecute the unprosecuted White offenders.

Thus, there is a plausible retributive claim against dismissal in two cases, each being where the leniency denied to the defendant on racial grounds is, in any event, *improper*. Leniency is improper where prosecution is morally required because discretionary nonenforce-

ment is illegitimate in principle (the murder example) or the general prosecutorial policy recommends enforcement (the marijuana example). These retributive claims are subject to criticism, but assuming their basic validity, there are still two reasons that dismissals can be just.

First, a retributivist may recognize the need for some institutional restraints. For institutional reasons, existing courts generally refuse to order prosecutions.¹⁶³ Moreover, in many cases, by the time selective prosecution is proven, it may be too late to enforce the law against the defendants who initially received improper leniency.¹⁶⁴ A retributivist who recognizes the legitimacy of institutional restraints of this sort should embrace dismissal as a sanction. To see why, recall a point made in the prior section: for serious crimes, the *threat* of dismissal, backed by discovery as a sanction, will *deter* much selective prosecution. If so, the threat of dismissal does not "multiply the wrongs," but minimizes them because it encourages the prosecutor to institute all appropriate charges. Thus, the threat of dismissal orders can motivate prosecutors to act as if they were subject to orders to prosecute. The threat of dismissal works *ex ante* to do what orders to prosecute would do *ex post*.

A retributivist, however, might reject this argument, disputing the deterrent effect or rejecting as illegitimate the institutional restraints at issue. Consider, however, a second response to the retributivist criticism: there is one case where retributivism *requires* the remedy of dismissal. In the remainder of this section, I identify the situations where dismissal is just and then contend that selective prosecution is most likely to occur in exactly such situations. Finally, I return to *Armstrong* and explain why the retributive criticism cannot justify that decision.

The above analysis implies that dismissal is morally required when the defendant's complaint is that, for racial reasons, he has been denied *proper* prosecutorial leniency. Assuming that the considered prosecutorial policy sets the morally appropriate level of enforcement, *upward* deviations targeting offenders of one race are not legitimate. The argument is straightforward. Discretion is legitimate only if agents base their decisions on factors for which discretion is necessary, such as the strength of the evidence, the magnitude of the violation, the deterrence value of another prosecution, and the other demands

163. *See supra* note 144.

164. *See id.*

on available resources. Otherwise, prosecution is unjust. Suppose, for example, that a prosecutor contemplates two individuals, *A* and *B*, whom he believes are guilty of marijuana possession. They are alike in every respect except race. Based on the conventional discretionary factors, he believes that prosecution is not warranted. But for reasons of racial animus, the prosecutor nonetheless charges *A* with the offense. Thus, the prosecutor legitimately chose not to prosecute *B* and, but for the illegitimate reason, would not have prosecuted *A*. In this case, dismissing the charge against *A* does *not* multiply the wrong. To the contrary, dismissing the charge against *A* achieves the legitimate outcome. Thus, where discretion is legitimate and the general prosecutorial policy recommends nonenforcement, dismissals ensure that discretion is exercised legitimately.¹⁶⁵

In theory, this argument provides only a partial defense of dismissal as a remedy. But my final point is that, as a practical matter, it provides nearly a complete defense. Selective prosecution occurs almost exclusively in cases for which discretionary enforcement is customary and legitimate, not for serious crimes like murder. And selective prosecution claims are sufficiently difficult to prove that, where successful, the defendant's complaint is almost always that he was denied customary nonenforcement—proper leniency—not that he was denied leniency granted to other violators out of favoritism.

For example, the crime against which a selective prosecution claim (not limited to race-based claims¹⁶⁶) has been most successful is operating a business on Sunday in violation of closing laws. These cases invariably involve isolated enforcement against a background of nonenforcement.¹⁶⁷ The other state cases I located that dismissed

165. The same is true of lesser discretionary decisions: not just whether to prosecute an offense, but what grade of offense to charge, what plea bargain to offer, and what sentence to recommend. If the prosecutor legitimately exercises discretion on these subjects, then it is not wrong to forbid the prosecutor from taking more serious action because of race.

166. Virtually none of the successful cases involve claims of racial selectivity.

167. See *Simonetti v. City of Birmingham*, 314 So. 2d 83, 89-90, 92-93 (Ala. Crim. App. 1975) (reversing conviction on evidence of general nonenforcement of Sunday closing laws despite widespread violations known to city and police, including many violations by commercial tenants of city; only four arrests made in one year); *State v. Anonymous*, 364 A.2d 244, 245-46 (Conn. C.P. 1976) (dismissing charges of violating Sunday closing law where state knowingly tolerated such offenses and profited from taxing such violations); *City of Ashland v. Heck's, Inc.*, 407 S.W.2d 421, 422, 424 (Ky. 1966) (affirming injunction against enforcing Sunday closing laws against department store given widespread violations and no other prosecutions in 25 years); *People v. Acme Markets*, 334 N.E.2d 555, 556-57 (N.Y. 1975) (reversing conviction for violation of Sunday sales laws where prosecution "was pursued . . . against the backdrop, the history and the policy of nonenforcement" despite "massive and flagrant violations" of the law); *People v. Utica Daw's Drug Co.*, 225 N.Y.S.2d 128, 129-31 (App. Div. 1962) (reversing conviction and remanding on evidence that 21 other stores violated Sunday closing laws on date defendant and

charges also involved crimes for which discretionary nonenforcement is probably uncontroversial: riding a bicycle without a bell,¹⁶⁸ failing to file expense accounts of a political committee with a state agent,¹⁶⁹ violating a zoning ordinance,¹⁷⁰ soliciting a homosexual act,¹⁷¹ failing to send children to public school,¹⁷² and—the only serious crime—possession of a weapon in prison.¹⁷³ Again, these cases involve claims that the prosecutor treated the defendant more harshly than most violators.¹⁷⁴ The federal cases are similar. Besides *Yick Wo*, where the crime was operating a laundry in a wooden building without a license, the only crimes for which federal courts have dismissed charges (none because of racial selectivity) were refusal to answer census questions,¹⁷⁵ making a disturbance on government property,¹⁷⁶ and illegal

one other operator arrested, apparently because they operated discount stores); *People v. Fay's Drug Co.*, 326 N.Y.S.2d 311, 316 (N.Y. Crim. Ct. 1971) (dismissing charge of violating Sunday closing laws on evidence of "widespread violation . . . with the knowledge and acquiescence of the enforcement agencies"); *People v. Tornatore*, 261 N.Y.S.2d 474, 477-78 (N.Y. Crim. Ct. 1965) (dismissing indictment charging violation of Sunday closing laws on evidence that no arrests were made for significant violations of such laws in past 14 years and defendant's arrest was motivated by labor union dispute).

168. See *People v. Kail*, 501 N.E.2d 979, 982 (Ill. App. Ct. 1986).

169. See *Associated Indus. of Ala., Inc. v. State*, 314 So. 2d 879, 897 (Ala. Crim. App. 1975).

170. See *State v. Vadnais*, 202 N.W.2d 657, 660 (Minn. 1972) (parking a home trailer on one's land); *People v. Walker*, 271 N.Y.S.2d 447, 449 (N.Y. App. Term. 1966) (failing to obtain rooming house permit).

171. See *Baluyut v. Superior Court*, 37 Cal. Rptr. 2d 741 (Cal. Ct. App. 1995) (granting writ of mandate and ordering lower court to dismiss charge of disorderly conduct), *rev'd on other grounds*, 911 P.2d 1 (Cal. 1996).

172. See *People v. Serna*, 139 Cal. Rptr. 426 (Cal. App. Ct. 1977).

173. See *People v. Ochoa*, 212 Cal. Rptr. 4 (Cal. App. Ct. 1985) (affirming lower court's dismissal because the government refused to comply with a discovery request).

174. See, e.g., *Associated Indus.*, 314 So. 2d at 886-90 (finding that defendants were the first ever convicted under the statute despite the fact that over 40 other political committees openly violated the statute and were not prosecuted); *Serna*, 139 Cal. Rptr. at 234 (original evidence that state did not prosecute parents of 26 of 28 students with same level of absences justified further discovery and required reversal of convictions); *Kail*, 501 N.E.2d at 981-82 (noting evidence that there are "hundreds, if not thousands of bicycles without bells around the Champaign university campus" but few if any other arrests); *Vadnais*, 202 N.W.2d at 660 (noting that, except as to defendant, zoning ordinance banning parking of mobile structures was not enforced unless the structure was used as a dwelling).

Even the prison firearm case contained evidence suggesting that the minority defendants were singled out for harsher treatment because most prisoners found with weapons were not criminally prosecuted. See *Ochoa*, 165 Cal. Rptr. at 6-7 (reporting that over an 18 month period, the district attorney charged only 21 prisoners with weapons offenses (a disproportionate number of which were minorities) despite data implying that in that same time period, the associate warden referred about 423 such cases to the district attorney).

175. See *United States v. Steele*, 461 F.2d 1148, 1552 (9th Cir. 1972) (reversing conviction for refusal to answer census questions because government prosecuted only those involved in public protest against census).

176. See *United States v. Crowthers*, 456 F.2d 1074, 1078-79 (4th Cir. 1972) (finding that government prosecuted defendants for creating a disturbance on government property, and did not prosecute participants in 16 equally noisy political and religious ceremonies, because government disagreed with the ideas defendants expressed).

wire-tapping.¹⁷⁷ Thus, selective prosecution claims typically arise for the kind of crimes where discretionary nonenforcement is common and probably indispensable. The dismissal of racially motivated charges in cases like these would justifiably put the defendant in the same position as others who were legitimately not prosecuted.

Maybe it is sheer coincidence that the cases finding selective prosecution have involved fairly minor crimes and assertions that the prosecutor deviated upward from his normal enforcement policy. To the contrary, however, selective prosecution is more likely to exist, and the defendant is more likely to be able to prove it exists, when it arises in this manner. First, law enforcement will find selective prosecution for minor crimes vastly more tempting than for serious ones. The more serious the crime, the more public pressure there is for its prosecution.¹⁷⁸ Today, most prosecutors will want to prosecute nearly every murderer, child molester, or terrorist, even if the criminal is White and the victim is Black. Conversely, if law enforcement officials wish to harass an individual or racial group with arrests and prosecutions, it is always easier to target someone for a crime they committed than to frame them for a crime they did not commit. Most state codes contain a large number of minor, *malum prohibita* offenses that large numbers of "law-abiding" people violate regularly.¹⁷⁹ This is where selective prosecution will chiefly occur.¹⁸⁰

177. See *United States v. Robinson*, 311 F. Supp. 1063, 1064 (D. Mont. 1969) (finding that federal agents had repeatedly violated the same statute and not been prosecuted). Of course, at the state and federal level, defendants commonly *assert* selective prosecution claims for serious crimes, at times winning discovery orders, but except for the prison firearm case, without winning dismissal. Losing claims also include some very minor crimes. See, e.g., *United States v. Bell*, 86 F.3d 820 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 372 (1996) (rejecting selective prosecution claim for arrests of Blacks only for operating a bicycle without a light after sunset); *Butler v. Cooper*, 554 F.2d 645, 648 (4th Cir. 1977) (rejecting selective prosecution claim for arrest of a Black "fifty-year-old widow, for selling two cans of beer in her home").

178. See Vorenberg, *supra* note 54, at 1526 ("Prosecutors exercise the least discretion over those crimes that most frighten, outrage, or intrigue the public, such as murder, rape, arson, armed robbery, kidnapping, and large-scale trafficking in hard drugs. . .").

179. Traffic offenses are one example. Considerable evidence suggests that police use such offenses as a reason to stop Black motorists they suspect of other crimes for no other reason than their race. See Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431-32 (1997); David A. Harris, "Driving While Black" and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. CRIMINOLOGY 544 (1997) (discussing evidence that police use minor traffic offenses as pretext to stop Black motorists in hopes of finding evidence of more serious crimes that police have no reasonable suspicion that motorist has committed); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. (forthcoming 1998) (same); see also *Ford v. Wilson*, 90 F.3d 245 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1110 (1997) (affirming summary judgment against § 1983 plaintiff who alleged his traffic stop was racially motivated).

180. See Vorenberg, *supra* note 54, at 1531 ("Prosecutors exercise the greatest charging discretion when dealing with minor offenses, such as consensual crimes, petty thefts, and assaults without serious injury."). Selective prosecution might still occur for serious crimes, not in the

Second, defendants are far more likely to meet the difficult burden of proof for selective prosecution when charged with minor offenses that are rarely or never prosecuted. These are the facts that have a chance of persuading a court that the government official had a racially discriminatory purpose. On the other hand, if a prosecutor is strictly enforcing a certain statute against most members of all races, but occasionally deviates downward for a few members of his own race (the “good kids” scenario), it will be far easier for the prosecutor to find race-neutral factors to distinguish the cases and plausibly rebut the charge of selective prosecution. This latter case is still a violation of equal protection, but the point is that the violation is not very provable except for the cases where retributive theory justifies dismissal.

Of course, even if I am right in claiming that dismissal is the appropriate remedy for most cases in which selective prosecution will occur, there will be *some* cases of selective prosecution where, under retributive theory, dismissal is wrong. However few, a retributivist will object that dismissal in these cases multiplies the wrong. Yet if this is the crucial concern,¹⁸¹ surely it does not justify *Armstrong*. What it might justify is limiting the remedy of dismissal to the cases where the defendant proves that the leniency he was denied on racial grounds was proper. Where leniency was otherwise improper, perhaps the only appropriate response is to abandon existing institutional arrangements and have courts order prosecutors to charge and try those who have so far received undue leniency. This bifurcation of remedy—requiring dismissal where just and prosecution of other offenders where just—is preferable to a discovery rule that effectively bars dismissal even in cases where it is appropriate. Indeed, courts cannot provide either remedy unless the defendant can first prove the violation, which will often require discovery.¹⁸² Because dismissal is

decision whether to charge at all, but in lesser decisions such as what grade of offense to charge, what plea bargain to offer, and what sentence to recommend. Here too, the defendant is most likely to prove an equal protection violation where the prosecutor has acted more harshly against him than against members of the majority race. And again, if the prosecutor exercises legitimate discretion on these matters, then it is just to forbid him from taking more serious action because of race. For example, if the prosecutor in the race riot hypothetical would normally accept a manslaughter plea for the behavior involved, and does accept such pleas from White defendants, then it would be just to compel the prosecutor to offer the more lenient deal to the Black defendants, which the court might accomplish by threatening to dismiss the more serious charge (once the Black defendants had agreed to accept the manslaughter charge).

181. And, recall that I am assuming *arguendo* that my initial point—that dismissals produce more prosecutions of serious crimes—is not sufficient.

182. Suppose the selective prosecution doctrine were revised to permit, in accord with retributive theory, a victim or his representative to compel prosecution when non-prosecution was based on racial grounds. *Armstrong* would effectively bar the victim or victim’s representative

justified in most cases, and the Court says it has never decided the remedy for selective prosecution, the fear of inappropriate dismissals cannot justify *Armstrong*.

In sum, where discretionary enforcement exists, the opportunities for illegitimate selection are great. For crimes that are conventionally thought to merit punishment in every case, there are political constraints on prosecutors preventing selective prosecution. Thus, the retributivist concern is largely illusory. As a practical matter, selective prosecution doctrine will not require courts to dismiss charges against those who *deserve* to be punished. Instead, the doctrine addresses a problem that arises for crimes where discretionary enforcement—nonprosecution of some offenders—is legitimate. In these cases, when a defendant shows that the state would not have prosecuted him but for the illegitimate factor of race, he is entitled to be free from prosecution, just as the similarly situated persons of other races were legitimately free from prosecution. If there are cases where dismissal is inappropriate, the solution is to say so, rather than to deny discovery as a means of preventing proof of *any* selective prosecution claims, including the majority where dismissal is justified.

IV. CONCLUSION

In *Armstrong*, the Supreme Court failed to consider how the rule it announced would operate in settings other than the one immediately before it. First, the Court said the defendants before it could have acquired evidence of the standard it set—a showing of similarly situated but unprosecuted members of other races. Yet the Court did not limit its holding to cases where the standard was possible to meet and there are a great many contexts where the standard will prove to be “insuperable.” Second, the Court said that the Ninth Circuit’s factual presumption—that people of all races commit all crimes—was erroneous, but its holding does not permit even well-supported presumptions. Indeed, similarly situated evidence is relevant only to suggest that race and the decision to prosecute are correlated, a fact which can then justify discovery. But without the use of assumptions about the range of variables not subject to exact proof, the correlation will almost always be impossible to prove. Thus, instead of requiring, as a condition of discovery, some evidence of certain elements of the correlation, the Court should have identified all the relevant elements,

from gaining the evidence he needed to prove a discriminatory intent and thereby compel the retributively just prosecution.

required trial courts to consider each, but permitted discovery when the evidence, combined with reasonable assumptions, made the suspicious correlation highly likely.

My criticism of *Armstrong* includes a defense of selective prosecution doctrine from two objections: that selective prosecution is rare or nonexistent and that the remedy for selective prosecution—dismissals—is worse than the disease. First, there is no reason to expect government actors, including prosecutors, to be immune from racism. Instead, given the principal-agent problems that exist in the supervision of prosecutors and the tendency of the public to value prosecutors for their aggressiveness, there is every reason to expect that prosecutors' offices will be as discriminatory as other parts of society. Second, there is ample justification for dismissing racially selective prosecutions. Judicial threats to dismiss racially selective prosecutions may induce prosecutors to bring charges against all serious offenders, regardless of race. This is a desirable state of affairs for utilitarians and retributivists. In particular, utilitarians should be concerned with the effect that unequal law enforcement has on general deterrence, given that this function depends upon the moral credibility of the criminal law. Orders of discovery are a means by which courts maintain the credibility of their threats to dismiss and a means of actually sanctioning prosecutors for racially discriminating without dismissal. Finally, retributivists should embrace dismissal in those cases where the prosecutor has acted more strictly than can be justified under current enforcement policy, which turns out to describe almost all the cases where defendants have proved selective prosecution. Thus, consideration of latent objections to selective prosecution doctrine only strengthens the case against *Armstrong*.

