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Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion - Knowing There Will Be Consequences for Crossing the Line

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In a free society governed by the rule of law and the constitution, there must always be a line between vigorous prosecution and official misconduct, between advocacy and unfairness, between justice and injustice.

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I. INTRODUCTION

Over the last few years, a number of cases have surfaced which allege abuse of prosecutorial discretion, perhaps none more notorious and disturbing than the

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matter of Rolando Cruz. On November 4, 1995, Rolando Cruz was released from prison after twice being convicted and sentenced to death.[1] Cruz served more than ten years on death row for a murder he did not commit. Prosecutors charged Cruz and co-defendant Alejandro Hernandez[2] for the brutal abduction, rape, and murder of 10-year-old Jeanine Nicarico based primarily upon a "vision statement" Cruz allegedly gave to detectives during the initial murder investigation.[3] In the vision statement police claim Cruz told them that he dreamed of the victim's murder and disclosed details only the killer could have known.[4] Prosecutors did not disclose the statement to the defense attorneys until four days before the first trial.[5]

Prosecutors ignored conclusions of the Illinois State Police that another man, Brian Dugan, committed the crime.[6] Instead, they chose to charge Cruz and Hernandez, Hispanic males, despite a confession from Dugan who admitted killing the victim and that he acted alone.[7] Dugan also provided disturbing details of the murder to solidify the credibility of his confession.[8] Prosecutors knew that Dugan was serving two life sentences for the abduction, rape, and murder of a 7-year-old girl as well as a nurse.[9] For years, prosecutors failed to disclose to defense attorneys notes of Dugan's oral statement and his offer to give a written confession if prosecutors did not seek the death penalty.[10]

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1. Dennis Conrad, *Court Oks 3rd Trial of Man in Killing Another Admitted*, St. Louis Post Dispatch, July 15, 1994, at C2. And for a detailed account of the events surrounding the matter of Rolando Cruz *see* Eric Herman, *Conspiracy Theory*, The American Lawyer, Mar. 1998, at 74-82.

2. David Heckelman, *Cruz' Death Sentence Upheld*, Chi. Daily L. Bull., Dec. 4, 1992, at 3 (A third co-defendant, Stephen Buckley, was also charged and tried for the murder of Jeanine Nicarico. However, the jury could not reach a verdict as to his charges, and prosecutors later dropped all charges against him.).

3. Gera-Lind Kolarik, *DNA, Changed Testimony Gain Acquital: Special Prosecutor, FBI Investigating Controversial Illinois Murder Prosecutor*, 82 A.B.A.J. 34 (1996).

4. Patricia Manson, *Cruz Told Grand Jurors About 'Vision' Panel Members Say*, Chi. Daily L. Bull., May 20, 1999, at 3. (A police officer testified that Cruz indicated he had a dream about the victim being struck on the head. He also testified that Cruz said he dreamed that the blows were so hard that the victim's head left an impression in the ground.) *Id. See also* Herman, *supra* note 1, at 79-80. (Special prosecutor William Kunkle believed that police officers and prosecutors fabricated the vision statement to support a weak circumstantial case. To support his conclusion, he pointed to the fact that there were no written notes about the vision; when Cruz gave tape-recorded confession, he made no mention of having a dream about the murder; officers who allegedly received the statement about the vision did not tell other officers working on the case.).

5. Patricia Manson, *Defense Builds Fence to Trap Cruz in His Field of 'Dreams,'* Chi. Daily L. Bull., May 19, 1999, at 3; Kolarik, *supra* note 3, at 34.

6. Allan H. Gray & Courtenay Edelhart, *Judge Rules Cruz Innocent; Finally, 'The Whole Case Just Fell Apart,'* Chi. Trib., Nov. 4, 1995, at 1; Herman, *supra* note 1, at 79.

7. Kolarik, *supra* note 3, at 34.

8. *See* Herman, *supra* note 1, at 79. (Edward Ciscowski, a commander with the Illinois State Police, interviewed Dugan about his involvement in the murder. In addition to providing impressive details of the murder, Dugan gave nine separate statements about killing Nicarico, including a lie detector test and a statement given under hypnosis. From this information Ciscowski concluded that Dugan acted alone in killing the victim. Prosecutors simply chose to ignore this evidence).

9. Kolarik, *supra* note 3, at 34.

10. Patricia Manson, *Cruz Lawyer: Never Got Notes on 'Other Suspect,'* Chi. Daily L. Bull., Apr. 23, 1999, at 1 (Lawyers for Rolando Cruz did not discover that there might be another suspect until a

An assistant attorney general assigned to defend the court's imposition of Cruz's second death sentence resigned, indicating that if jurors had heard the information pertaining to Dugan's criminal history and confession, they could not have concluded that anyone other than Brian Dugan committed the murder.[11] She indicated that she could not ethically continue to pursue the unjust prosecution and execution of Rolando Cruz.[12]

The appellate court ruled the trial judge improperly excluded Dugan's confession and past crimes and granted a third trial.[13] It was during this last trial that the case against Cruz began to unravel. DNA tests excluded Cruz and his co-defendant as having raped Jeanine Nicarico and nearly conclusively identified Dugan, a white male, as the perpetrator.[14] Several witnesses who had previously provided damaging testimony for the prosecution recanted.[15] Most unsettling, however, is that a sheriff's lieutenant who had previously confirmed that Cruz gave the vision statement also recanted, indicating that his colleagues had never told him of Cruz's dream about the murder.[16] These events lead the judge to acquit Cruz and call for a special prosecutor.[17]

In an extraordinary move, the special prosecutor initially indicted three prosecutors and four sheriff's deputies known as the "Dupage 7" for conspiracy to commit official misconduct and conspiracy to obstruct justice in the prosecution of Rolando Cruz.[18] While prosecuting law enforcement officials for alleged wrongdoing in the performance of their duties is an unusual occurrence, bringing criminal charges against prosecutors for official misconduct in performing their duties is virtually unknown.[19] In fact, this appears to be the first criminal trial in the nation involving allegations that prosecutors engaged in criminal acts to send a defendant to death row.[20]

An important question is how prosecutors, who are the gatekeepers for upholding justice as well as citizens' rights, were able to violate the rights of Rolando Cruz and his co-defendant for so long without effective scrutiny and with

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newspaper article suggested that another man claimed to be the killer. After an investigation, Cruz's lawyers received hundreds of documents related to Dugan as a result of discovery requests submitted to Dupage County prosecutors. However, prosecutors did not include a set of handwritten notes regarding a meeting with Dugan and his attorneys. Dugan gave a hypothetical confession because he wanted immunity from the death penalty.).

11. Mark Hensen, *A Prosecutor's Duty: Assistant A.G. Resigns Rather Than Defend Conviction She Feels is Wrong*, 78 A.B.A.J. 28 (1992).

12. *Id.*

13. Conrad, *supra* note 1, at C2.

14. Herman, *supra* note 1, at 78.

15. Kolarik, *supra* note 3, at 34.

16. Darryl Van Duch, *Ten Years Later, Officer Recants: Accused Killer, Once on Death Row, Freed in 3d Trial*, Nat'l. L.J., Nov. 20, 1995, at A6.

17. Herman, *supra* note 1, at 76-77.

18. *See* People v. Vosburge et al, Nos. 96 CF, 2586-2592.

19. Mark Hansen, *How a Vision Failed: Indictment Calls Prosecution a Conspiracy Against Suspect*, 83 A.B.A.J. 26 (1997).

20. Patricia Manson, *Cruz Case Rigged Not Bungled: Kunkle*, Chi. Daily L. Bull., May 28, 1999, at 1.

nearly tragic consequences. An obvious answer points to the almost complete autonomy both state and federal prosecutors possess, particularly as it relates to charging.

The prosecutor's decision as to whether or not to charge a suspect is virtually unchecked by formal constraints on regulatory mechanisms,[21] making it one of the broadest discretionary powers in criminal administration.[22] For federal prosecutors this expansive power began with the inception of the office, when the Judiciary Act of 1789 directed the president to appoint an attorney for each federal judicial district.[23] For more than forty years U.S. Attorneys functioned without supervision by an executive agency, laying the foundation for the U.S. Attorneys' present autonomy.[24]

For state prosecutors, power was a little more difficult to garner. American courts' attempt to implement the English system of private prosecution proved to be demanding and costly.[25] There was little need for criminal lawyers in court, since the American judicial system initially denied counsel to felons.[26] As a result, private prosecution was both time consuming and expensive for prosecutors who were required to hire a lawyer to conduct preliminary stages of the prosecution as well as the trial itself.[27] Once the colonies established the office of the Attorney General, however, public prosecution replaced private prosecution, primarily through county officials.[28] Under this system, it became clear that local prosecutors

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21. James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 4 Duke L.J. 651, 652, 679-681 (1976) [hereinafter *Narrowing Discretion*].

22. Robert L. Minser, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717, 741 (1996). (The prosecutor's office has become the most powerful office in the criminal justice system, particularly in the areas of charging, plea bargaining and sentencing.) Vorenberg, *supra* note 21, at 678; Frank Miller, Prosecution: The Decision to Charge a Suspect With a Crime 151-350 (1969).

23. Ch. 20, 1 Stat. 72, 92-93 (1789). (The Judiciary Act also provided for the appointment of the Attorney General to represent the United States in litigation before the Supreme Court and provide legal advice to the President and Department heads.)

24. United States General Accounting Office, Report to Congressional Requesters 95-150, *U.S. Attorneys: More Accountability for Implementing Priority Programs Is Desirable* 4 (1995) [hereinafter GAO/GGD 95-150]; P.S. Kane, *Why Have You Singled Me Out?, The Use of Prosecutorial Discretion for Selective Prosecution*, 67 Tul. L. Rev. 2293, 2294-95 (1993); Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. Rev. 1, 2-3 (1971).

25. For a detailed historical account of the state prosecutors rise to power *see* Minser, *supra* note 22, at 728-32.

26. *Id.* at 729.

27. Homer S. Cummings & Carl McFarland, Federal Justice 13 (1937); Minser, *supra* note 22, at 729 n.69.

28. Minser, *supra* note 22, at 729 (indicating that during the late seventeenth and early eighteenth centuries, each colony established the office of the Attorney General. Its duties included the presentment of criminal indictments. By the time of the American Revolution, public prosecution replaced private prosecution through county officials. Some officials were deputies of the state attorney general who were nominated by the county court. They received little supervision from the attorney general. Other deputies operated with direct supervision, and others were county officials nominated by the local courts.). *See* Cummings & McFarland, *supra* note 27, at 13.

were simply adjuncts to the local courts.[29] Criminal prosecutions shifted power from the local prosecutor to the local sheriff and coroner.[30]

In 1832, states began to include within their constitution, provisions for election of local prosecutors.[31] The result was expansion of the local prosecutors' power, primarily because they were no longer beholden to the opinions and politics of those who had appointed them.[32] The state prosecutor emerged as an executive official charged with using his discretion to apply local standards in enforcing local laws.[33] Eventually, the prosecutor's absolute discretion in the execution of its powers and the lack of professionalism in the prosecutor's office alarmed government commissions and legal scholars.[34] Crime commissions across the country scrutinized the local prosecutors offices and found that insufficient checks upon prosecutorial discretion existed in the system.[35] Despite this finding, however, little has changed, and prosecutors continue to amass and exercise power without any significant accountability.

Despite the laws which enable federal and state prosecutors to exist and carry out the criminal laws for the benefit of an ordered society, several scholars have argued that prosecutors' broad power, particularly as it relates to charging decisions, resulted not from any conscious legislative decision that prosecutors should enjoy such powers,[36] but merely by default.[37] However the power developed, its

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29. Joan E. Jacoby, The American Prosecutor: A Search for Identity 19 (1980).

30. *Id.*

31. Minser, *supra* note 22, at 729. Minser notes that the democratic zeal leading to the expansion of suffrage in the American republic from 1820 until just before the Civil War sparked the movement to elect local officials, including judges. After it became customary to elect local judges, it also became customary to elect the prosecuting attorney. *Id.*; Jacoby, *supra* note 29, at 24-26.

32. Jacoby, *supra* note 29, at 25, 38; Abraham Goldstein, *History of the Public Prosecutor, in* 3 Encyclopedia of Crime & Just. 1288 (Sanford Kodish ed. 1983). Professor Goldstein notes that the change in public and judicial perceptions of the local prosecutor from a low level judicial official to a member of the executive branch, was reflected in the new state constitution, which listed the prosecuting attorney as a member of the executive branch along with other local government officials.

33. Minser, *supra* note 22, at 729-30.

34. *Id.* at 730 n.80. See National Commission on Law Observance and Enforcement Report on Prosecution 14-15 (1931) (describing close connection between criminal justice and local politics during the early twentieth century.).

35. Jacoby, *supra* note 29, at 31. *See also* National Commission on Law Observance and Enforcement, supra note 34, at 15-16 (indicating that the prosecutor's office was generally filled by ambitious beginners who used the office as a stepping-stone to practice. The report also noted that the insufficient checks on prosecutorial discretion was "ideally adapted to misgovernment").

36. Misner, *supra* note 22, at 743. (noting that theoretically, criminal law policy is made by the legislature and implemented by the police, prosecutors, courts, and prisons. Since common law crimes have been abated and courts can no longer create new crimes to meet new challenges, the center for policy-making should be in the legislature. In reality, the legislature has relinquished much of its power to the prosecutor. For instance, prosecutors decide whether to charge, whether to prosecute, and the length of sentence. The prosecutor emerges as the real policy maker in the criminal justice system. As a result, the legislature is, at best, a lesser partner whose role is to set the outer parameters of criminal law policy and fund prisons.). *See also* Abraham S. Goldstein, The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea 52-75 (1981) (arguing that it is preferable to follow the common law development of rules for use of prosecutorial discretion rather than attempting to establish guidelines

breadth and scope have troubled commentators and scholars for many years.[38] Indeed, no valid purpose is served by affording prosecutors so much discretion.[39] With such broad, unchecked power comes the potential for abuse in the form of discriminatory charging based on impermissible grounds, including race.

This article examines the current standard of prosecutorial discretion and resulting claims of selective prosecution, particularly as these factors relate to race. Part II, while acknowledging that some prosecutorial discretion is necessary for an efficient and effective criminal justice system, analyzes the reasons historically given for granting prosecutors almost absolute discretion, especially as it relates to charging or refusing to charge an individual with a crime. It notes the existence of ethical and systemic checks that discourage prosecutors from abusing their authority as well as the existence of certain protections for the accused when a prosecutor charges for impermissible reasons. However, this section concludes that the present constraints and remedies are ineffective in preventing abuse of discretionary power.

Part III uses *United States v. Armstrong* to illustrate the stronghold prosecutors maintain in relation to whom to charge and in what jurisdiction to charge them. The article notes that a decision to charge a defendant in federal rather than state court substantially increases the penalty for the accused. It also argues that race matters when prosecutors make such decisions. This section also discusses specifically the Supreme Court's narrow interpretation of Rule 16 of the Federal Rules of Criminal Procedure, which limits a defendant's right to seek discovery from the government in connection with an allegation of selective prosecution. Through this holding, the Court may have unwittingly created a new "constitutionally related" supplementation to the rule, which could have consequences far beyond selective prosecution claims.[40] More importantly, however, the Court's decision may leave undiscoverable materials tending to exculpate a defendant.

Part IV examines suggestions for resolving the problem of unchecked prosecutorial discretion, but concludes that most are unlikely to detect or control prosecutions motivated by discriminatory purpose or mere abuse of power. However, recent proposals calling for direct oversight of prosecutors' officers and for the award of monetary compensation to the defendant who has been unsuccessfully prosecuted as a result of an impermissible charge, may prove

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through the rule-making process); and Kenneth Davis, Discretionary Justice: A Preliminary Inquiry 189 (1969).

37. Vorenberg, *supra* note 21, at 678-82.

38. *See* Thurman W. Arnold, *Law Enforcement: An Attempt at Social Discretion*, 42 Yale L.J. 7, 17-18 (1932) (arguing that virtual unreviewability of the prosecutor's authority borders on anarchy); Jackson, *The Federal Prosecutor*, 31 J. Crim. L. & Criminology 3, 5 (1940) (noting that if a prosecutor can choose his cases, he can also choose his defendants. This is the most dangerous power of the prosecutor because he might pick people he thinks he should get rather that picking cases that need to be prosecuted.). *See also* Packer, The Limits of the Criminal Sanctions 290-91 (1968) (noting that the need for discretion is not a virtue. Rather it is lawless because a prosecutor has the ability to pick and choose whom to prosecute.).

39. Vorenberg, *supra* note 21, at 680.

40. Unites States v. Armstrong, 517 U.S. 454, 471, 116 S. Ct. 1480, 1489 (1996).

sufficient to prevent malicious and unwarranted prosecutions. In extreme cases of abuse of prosecutorial powers, as in the case of Rolando Cruz, prosecutors should not be immune from criminal prosecution.

II. THE CONTINUUM OF PROSECUTORIAL CHARGING DECISIONS

Although the unbridled discretion granted to prosecutors in the charging process can lead to abuses, prosecutors nonetheless need to be entrusted with some degree of discretion for the criminal justice system to function efficiently. This section examines critically the reasons typically advanced for allowing prosecutors discretion in deciding when, what, and whom to charge.

A. The Need for Limited Discretion in Charging

The decision to charge an individual with a particular crime is a critical step in the criminal justice process.[41] In determining whether to charge and what to charge, the prosecutor must assess whether a particular set of facts fits within the criminal code,[42] weighing the strengths of the case and determining whether the alleged perpetrator is guilty or innocent.[43] Even when the circumstances point to guilt, prosecutors must consider the sufficiency of the evidence to sustain a conviction.[44] And even if the evidence proves sufficient, the determination must be made whether criminal sanctions are appropriate or criminal prosecution is in the community's best interest.[45] All of these decisions are currently left to the prosecutor's discretion.

Among the principal reasons advanced for allowing the prosecutor such discretion is that it serves to mitigate the ill effects of the trend toward legislative over-criminalization. According to this view, prosecutorial discretion functions as a kind of safety valve that alleviates the pressures of a criminal code that tends to make a crime of everything that people find objectionable, but which fails to take into account issues of enforceability or changing social mores.[46] Thus, while many states criminalize most forms of gambling, the enforcement of these gambling laws depends very much on the circumstances of the particular case, there being, for

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41. Yale Kamisar, et al., Modern Criminal Procedure 895-96 (8th ed. 1994); *Task Force Report*, The Courts 5 (1967) [hereinafter Task Force Report].

42. Kamisar et al., *supra* note 41, at 859-96.

43. *See* Task Force Report, *supra* note 41, at 7; Kamisar et al., *supra* note 41, at 895-96 (1994).

44. Kamisar et al., *supra* note 41, at 895-896.

45. *Id.*; *see also* George T. Frampton, Jr., *Some Practical and Ethical Problems of Prosecuting Public Officials*, 36 Md. L. Rev. 5, 21 (1976).

46. *See* Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 Am. J. Comp. L. 532, 533 (1970); *see also* Stephen A. Saltzburg & Daniel J. Capra, American Criminal Procedure 678-79 (5th ed. 1996); Minser, *supra* note 22, at 745. Professor Minser argues that the breadth of crime definition is a major source of prosecutorial power. He notes: "By choosing to create a large number of crimes, and by defining those crimes with the breadth proposed by the Model Penal Code, legislatures make it impossible to enforce all criminal statutes, and, at the same time, make it possible for a single act to be charged under many overlapping provisions." *Id.* at 745-46.

example, a general feeling that the legislature never intended to proscribe private gambling among friends.[47] Other laws, such as adultery statutes, are passed as "state-declared ideals." These statutes are "unenforced because we want to continue our conduct and [are] unrepealed because we want to preserve our morals."[48] Still other criminalized activities were enacted into law in the heat of a certain moment in time, when a particular mood dominated a tribunal or legislature or as a response to public reaction to a particular event.[49] These archaic laws whose "time has passed" go unenforced, yet remain on the books for a variety of reasons, not least of which is the general public's ignorance of their very existence and consequential indifference to their repeal.[50]

Clearly, some degree of prosecutorial discretion is desirable to avoid clogging the justice system with criminal prosecutions that are incompatible with current social views or goals. Prosecutors' offices are already heavily overworked. To require the mandatory charging of all offenses within the criminal code would drive them to the breaking point and make effective law enforcement virtually impossible.

An equally defensible reason for allowing a limited degree of prosecutorial discretion is essentially economic in nature. The government simply does not have sufficient resources to investigate, charge, and prosecute all offenses which come to its attention.[51] Were society willing to pay for more police officers, prosecutors, public defenders, judges, courtrooms, and prisons, the exercise of prosecutorial discretion would be less justifiable. Since society has been unwilling to pay for full enforcement, the government must have some discretion in determining what cases to charge.

B. Is There Justification for Broad Discretion?

Notwithstanding the necessity for some discretion in charging, the focus of inquiry is whether the expansive discretionary power as currently exercised is necessary or desirable. Three justifications are generally proffered to support the prosecutor's wide breadth of decision-making power.

One reason that is advanced for giving prosecutors great latitude when discharging their duties is that they are designated by statute as agents of the executive branch responsible for law enforcement.[52] As such, they assist the president in discharging his constitutional responsibility to "take Care that the Laws

47. LaFave, *supra* note 46, at 533.

48. Saltzburg & Capra, *supra* note 46, at 628.

49. LaFave, *supra* note 46, at 533.

50. *Id.* at 533. Saltzburg & Capra, *supra* note 46, at 628 (noting that it is difficult to gain support to repeal sodomy laws even though there is a large number of citizens engaging in the proscribed behavior).

51. LaFave, *supra* note 46, at 533-34.

52. *See* Wayte v. United States, 470 U.S. 598, 607, 105 S. Ct. 1524, 1530 (1985).

be faithfully executed."[53] In order to facilitate the execution of that duty, the government must retain broad discretion to enforce the country's criminal laws.[54] Along with the responsibility for law enforcement is a corresponding potential immunity from significant judicial review of a prosecutor's power to decide independently which crimes to prosecute and which charges to file. Such immunity exits under a theory of separation of powers.[55]

Others argue that the efficient management of the criminal justice system militates against substantial judicial review of prosecutorial charging decisions.[56] Such review would unduly burden the criminal process, causing further delay in already protracted criminal proceedings.[57] If judicial review of a charging decision were readily available, many defendants would seek it primarily to delay the criminal proceeding.[58]

Finally, broad prosecutorial discretion is often justified on the grounds that prosecutors need to individualize justice. The prosecutor is in the best position and has the expertise to make the complex charging decisions that are necessary in an individualized criminal justice system.[59] Individualized justice permits a prosecutor to look at the specifics of a given case and proceed fairly based on the facts and circumstances of each case.[60] In order to make decisions which are fair and equitable, a prosecutor must weigh the evidence in each case and decide how best to expend limited resources based upon the severity of each crime and the probability of convicting the defendant.[61] If prosecutors are required to act within strict accordance with the precise and narrow rules of law, the criminal law would be ordered but intolerable.[62] Further, since judges do not possess the necessary

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53. U.S. Const. art. II, § 3. The Constitution grants the executive branch the power and responsibility for law enforcement.

54. *Wayte*, 470 U.S. at 607, 105 S. Ct. at 1530.

55. *See* United States v. Johnson, 577 F.2d 1304, 1307 (5th Cir. 1978). For a discussion of separation of powers, *see*, for example, *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1521 (1988) [hereinafter *Race and the Criminal Process*]; Kane, *supra* note 24, at 2293, 2309; James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1545-54 (1981); Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 Geo. Wash. L. Rev. 659, 682-83 (1981); *see also* Goldstein, *supra* note 36, at 5, 51-58, 67-69; Angela J. Davis, *Prosecution and Race: the Power and Privilege of Discretion*, 67 Ford. L. Rev. 13, 20 (1998); Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: the Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. Pa. L. Rev. 1309, 1326 (1997).

56. *Race and the Criminal Process*, *supra* note 55, at 1521; *Wayte*, 470 U.S. at 607, 105 S. Ct. at 1530.

57. United States v. Falk, 479 F.2d 616, 637-38 (7th Cir. 1973) (en banc) (Pell, J., dissenting).

58. *Race and the Criminal Process*, *supra* note 55, at 1521.

59. *See Wayte*, 470 U.S. at 607-08, 105 S. Ct. at 1530; *Race and the Criminal Process*, *supra* note 55, at 1521; Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. Pa. L. Rev. 1365, 1368 n.10 (1987); Vorenberg, *supra* note 55, at 1545-54; LaFave, *supra* note 46, at 533-34.

60. LaFave, *supra* note 46, at 534-35.

61. *Id.* at 534-35.

62. Roscoe Pound, Criminal Justice in America 67 (1930).

level of expertise, they should avoid reviewing a prosecutor's discretionary exercise in charging.[63]

The foregoing reasons represent some compelling justifications for continuing to permit broad prosecutorial decision-making power. However, the danger of such broad, unrestrained power is that it is subject to abuse by prosecutors who may select defendants on impermissible grounds including race. No compelling argument can be made to support nearly absolute discretionary power, lacking formal checks by outside mechanisms.

C. Restraints on Broad Discretionary Power

Arguably, the exercise of prosecutorial discretion does not exist without constraints. There are several checks, which, in theory, exist to assure that the decisions concerning whether to charge a defendant are not arbitrary or violative of an accused's constitutional rights.[64] Even if a prosecutor's abuse of charging power initially goes undetected, the subsequent grand jury indictment, trial process, and jury are processes designed to detect and prevent such abuses. These checks, in conjunction with the prosecutor's adherence to high ethical standards, are supposed to ensure that, regardless of race or socioeconomic or other status, miscarriages of justice do not occur.[65]

The National District Attorney Association (NDAA) National Prosecutor Standards provide that a prosecutor should exercise discretion to file only those charges consistent with the interests of justice.[66] Similar rules, designed to reduce the likelihood that prosecutors will convict those who are innocent,[67] are found in the American Bar Association (ABA) Ethics and Professional Responsibility Committee's Model of Professional Conduct and the ABA Standards for Criminal Justice: Prosecution Function and Defense Function. For example, the ABA Standard for Criminal Justice § 3-3.9 provides:

> (a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued charges in the absence of sufficient admissible evidence to support the conviction.
> (b) . . . Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

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63. *Race and the Criminal Process, supra* note 55, at 1521.

64. *See* Daniel E. Lungren & Mark L. Krotoski, *The Racial Justice Act of 1994: Undermining Enforcement of the Death Penalty Without Promoting Racial Justice*, 20 U. Dayton L. Rev. 655, 674-77 (1995) (rejecting the need for the Racial Justice Act and noting the protections afforded minority defendants in the event a prosecutor abuses her discretion in charging capital cases).

65. *See* E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 Marq. L. Rev. 649, 658-59 (1996).

66. *Id.* at 658.

67. *Id.*

> (1) the prosecutor's reasonable doubt that the accused is in fact guilty[.][68]

Section 3-3.11 further provides:

> (a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.
> (b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.
> (c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.[69]

These national standards, as well as relevant state provisions, are designed to ensure that prosecutors act with scrupulous honesty.[70] If these directives are followed, prosecutors should not proceed without solid evidence of guilt, fail to disclose exculpatory evidence, or knowingly use false evidence or testimony.[71] While prosecutors must exercise discretion under these circumstances, they ought to be guided by ethical constraints reducing the probability that citizens will be wrongly charged and prosecuted.

Systemic controls also serve to restrain prosecutorial powers. One structural control against unwarranted prosecution exists in the grand jury. When the government seeks an indictment, it must make a presentment to a grand jury, which has been regarded historically as a primary protection for the innocent.[72] As the Supreme Court has noted, "[I]t serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was instead the result of an intimidating power, malice, or personal ill will."[73] In essence, the grand jury is supposed to serve as the gatekeeper of citizens' rights to assure that no one is wrongly charged and convicted.[74]

D. Ineffectiveness of Present Restraints on Broad Discretionary Power

Although there are ethical codes and systemic constraints governing prosecutorial conduct, they do not adequately address the issues in *U.S. v. Armstrong*, nor can these controls eliminate the subjective factors and external

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68. ABA Standards for Criminal Justice: Prosecution and Defense Function §3-3.9-11 (3d ed. 1993) [hereinafter Prosecution Function]; McCann, *supra* note 65, at 658.
69. Prosecution Function, *supra* note 68, at §3-3.11.
70. McCann, *supra* note 65, at 661.
71. *Id.*
72. Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364 (1962).
73. *Id.* at 390, 82 S. Ct. at 1373.
74. *Id.*

forces which contribute to the prosecutor's decision to charge. Individualized justice, though theoretically justifiable, runs counter to a fundamental concept in American law: that all citizens ought to be treated equally under the law.[75] Also inherent in the concept of individualized justice is the disparate treatment of some citizens. These factors bolster the argument that prosecutors should not have complete autonomy.

Although most prosecutors act in good faith, seeking to properly balance the duty to uphold the oath of office with the responsibility to act fairly and equitably when exercising that duty, errors in charging may occur. These errors may result when an inexperienced prosecutor is unable to independently determine the credibility of witnesses and the quality of evidence.[76] Other prosecutors may not have the knowledge, energy, time, skill, or patience to scrutinize witnesses and may instead rely on police reports rather than conduct their own independent investigation.[77] The result of such errors is that an innocent person might be charged and subsequently convicted.

More troubling are errors in judgment that spring from the close relationships that prosecutors necessarily develop with law enforcement officers. On the one hand, this relationship may be salutary. Over time, experienced prosecutors learn an officer's biases and prejudices as well as his character for honesty. They also develop the ability to discover whether an officer has obtained a confession from the accused by overreaching and whether the confession is reliable.[78] However, consistent interaction between police and prosecutors may also create problems. Such contact can often lead to friendship with the officer that clouds a prosecutor's ability to assess clearly whether an officer crossed legal boundaries in gaining a confession or securing evidence used to charge, try, and ultimately convict an accused.[79] In the worst case, an innocent person may be wrongly accused and convicted and imprisoned, and, in cases of capital murder, sentenced to death and executed.[80]

Another danger of unchecked discretion is that a prosecutor may be guided more by improper extraneous political pressures than by the legal and factual considerations of a given case. For example, a prosecutor, motivated by community pressure or political ambition, may inappropriately seek the death penalty. A prosecutor motivated by ambition to gain a higher office or simply to maintain her position may file unfounded charges or overcharge a case in order to invoke a

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75. LaFave, *supra* note 46, at 535-36 (1970) (quoting Kenneth Davis, Discretionary Justice at 170):

> The discretionary power to be lenient is an impossibility without a concomitant discretionary power not to be lenient, and injustice for the discretionary power not to be lenient is especially frequent; the power to be lenient is the power to discriminate.

76. McCann, *supra* note 65, at 661-63.

77. *Id.* at 664.

78. *Id.* at 664-65.

79. *Id.*

80. *Id.*

higher penalty.[81] However, such decisions are rarely subject to review, and the prosecutor's improper agenda is virtually impossible to substantiate.

Conversely, a prosecutor may refuse to indict a defendant whom he is legally and ethically bound to charge. A telling example of this flip-side of prosecutorial discretion arose in the context of the savings and loan scandal of the 1980s and early 1990s. The U.S. Attorney for the Southern District of Texas allegedly refused to expend resources for the investigation of bank fraud and embezzlement cases even when it was clear that millions of dollars had already been lost and billions were at stake.[82] The reluctance to prosecute was attributable primarily to the U.S. Attorney's desire to protect his friends and political connections from indictment.[83] Had there been an independent system of oversight of the U.S. Attorney's policies regarding these cases, many more defendants would have been properly indicted and convicted for fraud and embezzlement, resulting in severe criminal as well as civil punishment. Plainly, none of the arguments mustered in support of unfettered prosecutorial discretion, whether based on the need for separation of powers, governmental efficiency, or individualized justice, justifies this outcome.

The problems with prosecutorial discretion become even more ominous when race enters the equation. As one prosecutor observed: "The impact of racism, when present in a [prosecutor's] decision as to whom to charge, at what level to charge, and whether to negotiate a lower charge . . . cannot be exaggerated."[84] He further noted that:

> [W]e . . . cannot deny, that 114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.[85]

How charging decisions impact black defendants has been the topic of a number of studies over the past twenty years.[86] A leading statistical study

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81. *Id.*

82. *See* H.R. Rep. No. 98-1137, 98th Cong., at 124 (1984). In 1984, the House Committee on Governmental Operations found that U.S. attorneys were not to expend resources on bank fraud investigations. The House Committee also found that in 1983 the FBI, reduced by almost 15 percent the number of agents assigned to investigating white collar crime, especially embezzlement and fraud, and requested additional cuts in subsequent years. *See also* the Senate Banking Committee's testimony for the Resolution Trust Corporation (RTC), noting that even when it was clear that billions of dollars were being lost, government prosecutors did not issue one subpoena regarding the RTC (remarks of Senator John Kerry), 140 Cong. Rec. 8192, 8192-93 (1991).

83. *See* Pete Brewton, The Mafia, CIA and George Bush 61-62 (1992); David Burnham, Above the Law: Secret Deals, Political Fixes, and Other Misadventures of the U.S. Department of Justice 241 (1996).

84. McCann, *supra* note 65, at 675.

85. Rose v. Mitchell, 443 U.S. 545, 558-59, 99 S. Ct. 2993, 3001-02 (1979).

86. Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 Cap. U. L. Rev. 23, 40 (1994); *Race and the Criminal Process*, *supra* note 55, at 1525-29 (discussing multiple studies); Michael L. Radelet & Glenn

conducted by Meyers and Hagan to determine whether prosecutors consider race when determining whether to proceed with the most severe charges found that when a victim was white, prosecutors were more likely to pursue the highest available charge.[87] In fact, where a high profile case involves a black defendant, a prosecutor is more apt to seek the greatest penalty, particularly in homicide cases where the victim is white.[88]

Other studies focusing on the prosecutor's initial assessment decision also found discrimination based on race. For example, Spohn, Gruhl, and Welsh studied the prosecutor's decision to reject felony charges against black, white, and Hispanic defendants. The study revealed that prosecutors were statistically more likely at the initial screening stage to reject charges against white defendants than they were to reject charges against blacks and Hispanics.[89]

Even after a prosecutor makes a decision to charge, race continues to be a factor in how prosecutors proceed with the case. A recent study, which examined the screening and charging decisions in 881 sexual assault cases in a large Midwestern city,[90] found that black men who assaulted white women were more likely to have their cases filed as felonies and receive more serious charges.[91] A number of other studies evidence the link between race and disparity in charging and sentencing a defendant.[92]

The bottom line is that when prosecutors make charging decisions, race does matter. And one cannot underestimate the impact a prosecutor's exercise of discretion has on the outcome of a criminal case.[93] A prosecutor has complete discretion as to whether to dismiss a case or offer a plea. Unless a defendant can convince a fact finder of his innocence, the charging decision generally determines the outcome of the case.[94] The federal sentencing guidelines and the corresponding

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L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & Soc. Rev. 587, 615-19 (1985).

87. Weatherspoon, *supra* note 86, at 40; Martha A. Meyers & John A. Hogan, *Prosecutors and the Allocation of Court Resources*, 26 Soc. Probs. 439, 446 (1979).

88. *See* Weatherspoon, *supra* note 86, at 43; *see also* Bob Levenson & Debbie Salamore, *Prosecutors Seek Death Penalty in Black and White*, Orlando Sentinel Trib., May 24, 1992, at A1; Robert Bohn, *Race and the Death Penalty in the United States, Race and Criminal Justice* 71, 81 (Michael J. Lynch & E. Britt Patterson eds., 1991) (citing several studies involving state prosecutors which find racial bias in prosecutorial decisions to charge a defendant with a capital crime).

89. *See* Cassia Spohn et al., *The Impact of Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 Criminology 175 (1987).

90. *See Race and the Criminal Process*, *supra* note 55, at 1527 and n.23; Gary D. LaFree, *The Effect of Sexual Stratification By Race on Official Reaction to Rape*, 45 Am. Soc. Rev. 842, 844 (1980) (In addition to felony screening and charging seriousness, the study examined the correlation between race and arrest and verdict and sentence type.).

91. LaFree, *supra* note 90, at 844.

92. For a detailed look at other studies indicating that a defendant's sentencing severity is dependent upon race, *see Race and the Criminal Process*, *supra* note 55, at 1525-35 & nn. 19-63; Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 Mich. L. Rev. 1660, 1683 (1996).

93. Davis, *supra* note 92, at 1679.

94. *Id.*

mandatory minimum sentences further magnify the importance of the prosecutor's initial decision to charge.[95]

Some argue that a series of protections eliminate racial bias in the criminal process, particularly in capital cases.[96] For example, the prosecutor cannot consider race in charging.[97] Further, grand jurors who are citizens chosen on race-neutral grounds, presumably will not sanction an indictment unless it is supported by the evidence.[98] Even after being charged, an accused may file a motion claiming discriminatory prosecution.[99] If he is unsuccessful and proceeds to trial on the merits, he may seek a change of venue if he can demonstrate that he would be unable to receive a fair trial due to racial bias in the community.[100] Jurors, too, must be chosen on race-neutral grounds[101] and may be questioned about racial biases.[102] Prosecutors cannot invoke race in arguing a case.[103] A defendant's conviction will be overturned if he demonstrates that a prosecutor acted with discriminatory intent. And the same National Prosecutors' Standards and ABA Standards for Criminal Justice which call for prosecutors to act fairly and ethically under all circumstances also require prosecutors to act without racial motivation when making decisions, unless a crime is motivated by racial animus.[104] In essence, the argument asserts that even if a prosecutor's impermissible charging decision initially goes undetected, all of these other checks serve as gatekeepers for the defendant's rights.

This approach to prosecutorial discretion is naive, however, because it ignores the many ways in which a defendant's race subtly impacts the prosecutor's decision to charge. In determining the likelihood of obtaining a guilty verdict, a prosecutor typically evaluates the strength of the evidence, the victim's interest in prosecution, and enforcement priorities.[105] Unfortunately, while engaging in this process, such seemingly "race-neutral" factors can have a discriminatory impact[106] if the prosecutor subconsciously views a case involving a black defendant and a white victim as more worthy of investigation and thus works more vigorously to uncover

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95. *Id.*; *see also infra* Part III.

96. Lungren & Krotoski, *supra* note 64, at 674-77.

97. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 608, 105 S. Ct. 1524, 1530 (1985).

98. *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254, 106 S. Ct. 617 (1986). For a history of the grand jury, *see* R. Younger, The People's Panel 1-2 (1963).

99. *But see infra* Part III arguing that, due to evidentiary barriers, a defendant's right to file a claim for racially selective prosecution offers little protection to a minority defendant.

100. *See* Irwin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639 (1961).

101. *See* Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986).

102. Turner v. Murray, 476 U.S. 28, 36-37, 106 S. Ct. 1683, 1688 (1986); *see also* Ristaino v. Ross, 424 U.S. 589, 596, 96 S. Ct. 1017, 1021 (1976).

103. Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871 (1974).

104. McCleskey v. Kemp, 481 U.S. 279, 292, 107 S. Ct. 1756, 1762 (1987). Barclay v. Florida, 463 U.S. 939, 948, 103 S. Ct. 3418, 3423 (1983).

105. Davis, *supra* note 92, at 1679. *See* Town of Newton v. Rumery, 480 U.S. 386, 396, 107 S. Ct. 1187, 1182 (1987) (holding that prosecutors ought to be granted broad discretion since they must evaluate the strength of the case as well as other enforcement policies).

106. Davis, *supra* note 92, at 1679. *See also, Race and the Criminal Process*, *supra* note 55, at 1520-27; Davis, *supra* note 55, at 34-38.

evidence that will result in conviction.[107] A significant number of empirical studies conducted over the last twenty years establish that cases involving black defendants and white victims were prosecuted more vigorously than cases involving white defendants and black victims.[108] In fact, prosecutors sought more serious charges, refused offers for pleas, and refused to dismiss charges during initial screening more frequently when the defendant was black.[109]

It is nearly impossible to detect malevolent racial bias, let alone subconscious discrimination, particularly when the case presents facially viable reasons for seeking an indictment against a minority defendant. Under the circumstances, the notion that the grand jury serves as the protector of citizens' rights is highly disputable. Some commentators and courts argue that the grand jury is simply an arm of the prosecutor's office. In *Hawkins v. Superior Court*,[110] for example, the court expressed its scepticism of the grand jury process:

> The prosecuting attorney is typically in complete control of the total process in the grand jury room: he calls the witnesses, interprets the evidence, states and applies the law, and advises the grand jury on whether a crime has been committed. The grand jury is independent only in the sense that it is not formally attached to the prosecutor's office; though legally free to vote as they please, grand jurors virtually always assent to the recommendations of the prosecuting attorney, a fact borne out by available statistical and survey data. Indeed, the fiction of grand jury independence is perhaps best demonstrated by the following fact to which the parties herein have stipulated: between January 1, 1974, and June 30, 1977, 235 cases were presented to the San Francisco grand jury and indictments were returned in all 235.[111]

Even if the *Hawkins* court's view of the grand jury is cynical, that fact remains that a symbiotic relationship between the grand jury and the prosecution effectively prevents the grand jury from protecting citizens against racial bias. Only the

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107. David C. Baldus et al., Equal Justice and the Death Penalty: A Legal and Empirical Analysis (1990). It is important to note that prosecutors are usually white males, meaning that 70% of prosecutors are male and 88% of prosecutors are white, non-Hispanic. *See* Bureau of Justice Statistics, U. S. Depart. of Justice, Prosecutors in State Courts 3 (1993); Davis, *supra* note 55, at 32-33 (indicating that while "unconscious" racism may be less offensive than purposeful discrimination, it is no less harmless); Sheri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 Cornell L. Rev. 1016 (1988) (exploring unconscious racism in criminal law decisions); Edward P. Boyle, Note, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 Vand. L. Rev. 937, 939 (1993) (describing unconscious or "aversive" racism).

108. *See Race and the Criminal Process*, *supra* note 55, at 1520-32 (discussing race and its impact on the prosecutor's charging decision).

109. *See supra* notes 88-89; *see also* William J. Bowers et al., Legal Homicide 340-44 (1980); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 26 Crime & Delinq. 563, 612-14 (1980).

110. 586 P.2d 916 (1978).

111. *Id.* at 919.

prosecutor and her witnesses appear before the grand jury. Prosecutors are permitted to offer evidence that could not be offered at trial.[112] Prosecutors may also use illegally seized evidence,[113] and, as the Supreme Court held in *United States v. Williams*, prosecutors have no obligation to inform the grand jury of evidence of a defendant's innocence, no matter how compelling.[114] The final result is that the grand jury hears only one side of the evidence and reacts to that presentation.

Once a defendant is charged, it is virtually impossible to prevent race from entering other phases of the trial. The racial-neutrality argument does not prevent a prosecutor from striking a potential juror because of his race while offering a neutral pre-textual justification for the strike.[115] Along these same lines, a prosecutor may choose a minority juror, believing that she is more likely to convict a minority defendant. This conviction would be based not on the facts and

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112. *See* Costello v. United States, 350 U.S. 359, 76 S. Ct. 406 (1956) (holding that hearsay evidence may be introduced to the grand jury as the basis of an indictment); Saltzburg & Capra, *supra* note 46 at 708-09. Saltzburg & Capra note four reasons tending to support the holding in *Costello*:

> First, inadmissible evidence often has probative value, and the grand jury's function is investigative, not adjudicative. Second, many evidentiary rules are designed to ensure fairness in an adversary proceeding, and the grand jury is not adversarial. (Related to this is the argument that a prosecutor cannot be expected to object to her own evidence, and that the general rule is that, even at trial, evidence that is technically inadmissible will be admitted if no objection is made). Third, any misleading effect of inadmissible evidence will be remedied at trial. Fourth, grand jury proceedings would be greatly burdened if the rules of evidence were applicable to them. The court would have to review decisions as to the admissibility of evidence. In order to make relevance and other rulings, supervising courts would have to ask grand juries why they wanted certain evidence, and this might infringe upon the independence of the grand jury.

Id.; *see also* Davis, *supra* note 55, at 22 n.34; Andrew D. Leipold, *Why Grand Juries Do Not (And Cannot) Protect the Accused,* 80 Cornell L. Rev. 260, 266 n.24 (1995); Vorenburg, *supra* note 55, at 1537-38.

113. United States v. Calandra, 414 U.S. 338, 94 S. Ct. 613 (1974) (holding that illegally seized evidence can be used for the basis of grand jury questioning and possibly as the basis for a grand jury indictment).

114. United States v. Williams, 504 U.S. 36, 112 S. Ct. 1735 (1992) (holding that the rule requiring prosecutors to present all substantial evidence exceeded the court's supervisory authority because "the grand jury is an institution separate from the courts, over whose functioning the courts do not preside." *Id.* at 47, 112 S. Ct. at 1742.).

115. *Batson*, 476 U.S. at 106, 106 S. Ct. at 1728 (Marshall, J., concurring). Justice Marshall argued for eliminating peremptory strikes because of the possibility that prosecutors could make a discriminatory decision and offer a race-neutral justification. He stated:

> [A]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. . . . A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As Justice Rehnquist concedes, prosecutors' peremptory challenges are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. . . . Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice.

Id.

evidence, but rather on the prosecutor's calculation that a juror will dislike a defendant enough to convict him. An interesting example of this jury selection strategy existed in the O.J. Simpson case.[116] Although advised to strike black women from the jury, prosecutors opted to retain them, calculating, although incorrectly, that black women's anger with O.J. Simpson's relationship with a white woman and the black community's general rejection of the relationship would lead to a conviction.

Prosecutors are easily able to circumvent the mandate not to invoke race when arguing a case by indirectly implicating a defendant's race. A black male defendant may be "Willie Hortonized" by a skillful prosecutor who persuasively characterizes the defendant as a villain, causing the white jurors to fear that the defendant will strike again if not convicted.[117] In such cases, the resulting conviction often bears little relationship to the alleged crime and the extent of the defendant's participation in it. It is, instead, based more on the strong emotion aroused against the accused.

E. Proving a Claim of Selective Prosecution

Having the right to file a motion claiming selective prosecution based on race or other impermissible grounds offers little protection to a defendant. Indeed, the trend of courts has been to increasingly limit the application of this remedy. Thus, while selective prosecution cases initially arose in a non-criminal context, they appeared at first to offer broad safeguards under an equal protection theory.[118] In *Yick Wo v. Hopkins*,[119] one of the first selective prosecution cases, the Supreme Court invalidated a facially neutral ordinance, holding that it was applied discriminatorily against Chinese laundry operators while leaving white operators unmolested.[120] The Court held:

> Though the law itself be fair on its face, and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to

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116. For a general discussion of race and the O.J. Simpson trial, *see* Rory K. Little, *Guilt, Reasonable Doubt and the Reasonable Woman*, 6 Hastings Women's L.J. 275 (1995); Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith, Spectacles of Our Times*, 35 Washburn L.J. 225, 233 (1996); Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. Colo. L. Rev. 989, 992 (1996).

117. David C. Anderson, Crime and the Political Hysteria (New York, Random House 1995); Robert S. Blanco, *Mixing Politics and Crime*, 59 Dec. Fed. Probation 91 (1995).

118. For a detailed discussion of the historical development of selective prosecution claims, *see Race and the Criminal Process, supra* note 55, at 1535-43.

119. 118 U.S. 356, 6 S. Ct. 1064 (1886). Thomas W. Joo, *New Conspiracy Theory of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. Rev. 353, 355 (1995) (arguing that the court's holding in *Yick Wo* was based on protection of economic rights rather than a conscious intent to protect the Chinese against racial discrimination).

120. *Id.* at 358, 373-74, 6 S. Ct. at 1065, 1072-73.

> their rights, the denial of equal justice is still within the prohibition of the Constitution.[121]

Despite the hope *Yick Wo* offered to defendants challenging discriminatory practices on the part of prosecutors, the Court subsequently limited the scope of the equal protection safeguards in both the civil and criminal contexts, replacing them with a strict intent standard.[122]

The selective prosecution doctrine also developed along racial and non-racial lines. In the non-racial context, federal circuit courts were initially receptive to evidence of disproportionate impact as proof of an equal protection violation.[123] As the law in selective prosecution cases continued to develop, however, courts rejected disproportionate impact as a means of proving discriminatory purpose. Instead, courts began to hold that in order to prevail in these types of cases, the defendant must meet a heightened standard by proving both discriminatory effect and discriminatory purpose.[124]

One of the first times the Supreme Court applied the two-pronged discriminatory effect and discriminatory purpose test to selective prosecution cases occurred in *Wayte v. United States*.[125] In that case the defendant, a vocal opponent of the military draft, alleged discriminatory prosecution, claiming he was chosen for prosecution in violation of his First Amendment rights because he wrote letters to government officials, including the President, indicating that he had not and would not register for the draft.[126] In support of his claim, Wayte presented statistical evidence that more than 500,000 citizens failed to register for the draft, yet only vocal non-registrants were prosecuted.[127] In rejecting Wayte's claim, the Court employed the discriminatory effect and discriminatory purpose standard.[128] The Court held that even if the passive enforcement policy had a discriminatory effect, there was no evidence that the government purposefully prosecuted the defendant and others because they were vocal objectors.[129]

What is clear after *Wayte* is that a defendant must make a *prima facie* showing of discriminatory effect and discriminatory purpose even before obtaining an evidentiary hearing.[130] However, statistical evidence of disproportionate impact no longer suffices to show discriminatory purpose. As one commentator notes,

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121. *Id.* at 373-74, 6 S. Ct. 1072-73.

122. *See Race and the Criminal Process*, *supra* note 55, at 1536; Snowden v. Hughes, 321 U.S. 1, 8, 64 S. Ct. 397, 401 (1944).

123. *See* United States v. Crowthers, 456 F.2d 1074, 1078-79 (4th Cir. 1972); United States v. Steele, 461 F.2d 1148, 1151-52 (9th Cir. 1972); United States v. Falk, 479 F.2d 616, 617-24 (7th Cir. 1973) (en banc).

124. United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974).

125. 470 U.S. 598, 105 S. Ct. 1524 (1985); *see* Andrew H. Elder, *Selective Prosecution for Failure to Register for the Draft: Have First Amendment Rights Been Infringed?*, 53 U. Cinn. L. Rev. 765 (1984).

126. 470 U.S. at 601, 105 S. Ct. at 1527.

127. *Id.* at 604-07, 105 S. Ct. at 1529-30.

128. *Id.* at 608 n.10, 105 S. Ct. at 1531 n.10.

129. *Id.* at 608-10, 105 S. Ct. at 1531-32.

130. *Id.*

"Because statistical evidence is often the only kind available to show intent or purpose, the ruling on this sufficiency issue, as well as the strict requirements concerning other thresholds of proof, have curtailed severely if not foreclosed the selective prosecution defense."[131]

In terms of the proof required, defendants claiming racially selective prosecution in charging are treated virtually the same as those claiming abuse of prosecutorial discretion in the non-racial context and face the same burden of showing discriminatory effect and purpose. Courts have consistently held that, even in the context of race, statistical evidence is insufficient to establish intent to discriminate even though judges and prosecutors are unable to justify or explain the disproportionate impact in charging decisions on any grounds other than race. In fact, the Supreme Court has already considered and rejected the sufficiency of statistical studies to support a black defendant's equal protection challenge to the imposition of the death penalty. In *McCleskey v. Kemp*,[132] Warren McCleskey, a black man, was sentenced to death for killing a white police officer during the course of a robbery.[133] Relying on the statistical study of Georgia homicide cases by Professor Buldus, McCleskey alleged that his death sentence violated the equal protection clause of the Fourteenth Amendment.[134]

The Supreme Court rejected this evidence of discriminatory death sentencing patterns to prove intentional racial discrimination necessary to establish a claim under the Fourteenth Amendment and held that a convict challenging a death sentence had to prove that the prosecutor in his case consciously intended to discriminate on the basis of race.[135] The Court also ruled that the results of decisions by prosecutors over the course of many cases could not prove intentional discrimination.[136] Justice Powell left the door open for a possible remedy by

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131. Note, *The Right to Nondiscriminatory Prosecution: The Effect of Announced Screening Policies*, 36 La. L. Rev. 1107, 1110 (1976); *see also Race and the Criminal Process*, *supra* note 55, at 1542.

132. 481 U.S. 279, 107 S. Ct. 1756 (1987).

133. *See id.* at 287, 107 S. Ct. at 1764.

134. *Id.* Specifically, McKleskey relied on the following findings of the Baldus study, which were noted by the court:

> The "raw numbers" found by the Baldus study also indicate that killers of whites received the death penalty in 11% of the cases while killers of blacks received it in only 1% of the cases. The "raw numbers" also indicated a "reverse racial disparity" based on the race of the defendant: 4% of black defendants received the death penalty, compared with 7% of whites. Baldus further found that the death penalty was applied in 22% of the cases involving black defendants and white victims, 8% of the cases involving white defendants and white victims, 1% of the cases involving black defendants and black victims, and 3% of the cases involving white defendants and black victims. Regarding prosecutorial choices, Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims, 32% of the cases involving white defendants and white victims, 15% of the cases involving black defendants and black victims, and 19% of the cases involving white defendants and black victims.

Id. at 286-87, 107 S. Ct. at 1764.

135. *Id.* at 291-92, 107 S. Ct. at 1766.

136. *Id.* at 292-95, 107 S. Ct. at 1766-67. *See also* Arlington Heights v. Metropolitan Hous. Dev.

concluding that arguments about the persistent pattern of racially discriminatory death sentencing were best left to legislative bodies who could fashion appropriate responses.[137] In 1988, the Racial Justice Act was introduced in Congress in response to the *McCleskey* decision.[138] Since that time, however, Congress has failed to pass the Act.[139]

III. *U.S. v. ARMSTRONG*: FURTHER NARROWING A DEFENDANT'S ABILITY TO SUCCESSFULLY ATTACK RACIALLY SELECTIVE PROSECUTION?

Although much of the writing in the area of racially selective prosecution focuses on the prosecutor's decision to seek the death penalty based on the defendant's race, these same concerns about prosecution based on race extend to the decision to charge a defendant for narcotics violations. A defendant must still make a *prima facie* showing of discriminatory effect motivated by a discriminatory purpose before obtaining an evidentiary hearing on claims. Defendants, in order to establish a claim of selective prosecution, must also have access to discovery.

By way of example, this section briefly looks at the federal government's war on drugs and, in particular, the criminal justice system which makes it imperative that courts vigilantly monitor certain prosecution decisions, given that a disproportionate number of black males are being charged, convicted, and sentenced to imprisonment for narcotics violations.[140]

Corp., 429 U.S. 252, 264-67, 97 S. Ct. 555, 563-64 (1977) (holding that proof of discriminatory purpose is required in claims under the Equal Protection Clause of the Fourteenth Amendment).

137. McClesky v. Kemp, 481 U.S. 319, 107 S. Ct. 1756 (1987). Some commentators argue that given the Court's history of requiring proof of discriminatory purpose, the *McCleskey* decision, from a doctrinal perspective, was not surprising. *See* Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388, 1402-08 (1988). Kennedy argues that "[e]xisting doctrine would not have made a contrary result implausible; had there been the will, available precedent could have lit the way. The point is that the decision rendered, albeit lamentable, was well within the ambit of expectations reasonably derived from prior rulings." *Id.*

138. H.R. 4442, 100th Cong., 2d Sess. (1988). For statements by Representative Conyers in introducing the bill, *see* 134 Cong. Rec. E1174 (daily ed. A, Apr. 21, 1988). For a discussion of Congress's authority under Section 5 of the Fourteenth Amendment to pass the Racial Justice Act, *see* Laurence H. Tribe, American Constitutional Law 1514 n.97 (2d ed. 1988); Note, *Too Much Justice: A Legislative Response to* McCleskey v. Kemp, 24 Harv. C.R.-C.L.L. Rev. 437, 470-96 (1986) [hereinafter *Too Much Justice*]; Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us?, An Examination of Section 5 of the Fourteenth Amendment*, 141 U.P.A. L. Rev. 1029, 1086-91 (1993).

139. For a detailed discussion of the history of the RJA, *see* Lungren & Krotoski, *supra* note 64, at 656-61. *But see* Don Edwards & John Conyers, Jr., *The Racial Justice Act: A Simple Matter of Justice*, 20 U. Dayton L. Rev. 669 (1995). H.R. 5269, 101st Cong., 2d Sess. (1990). This version of the RJA passed the House as a part of the Comprehensive Control Act of 1990 but was subsequently dropped by the conference committee. The RJA was introduced and defeated in both the Senate and House in 1991. *See* H.R. 1249, 102d Cong., 1st Sess. (1991); H.R. 2851, 102d Cong., 1st Sess. (1991). The bill introduced in the House was renamed the "Fairness in Death Sentencing Act." *See* 137 Cong. Rec. 58300 (daily ed. June 20, 1991). The RJA was passed by the House in 1994 but died in conference. *See* H.R. 4017, 103d Cong., 2d Sess. (1994).

140. Weatherspoon, *supra* note 86, at 31; Ed Wiley III & Sean Jensen, *Black and Latino Males*

This section also looks at the Supreme Court's interpretation of Rule 16 of the Federal Rules of Criminal Procedure in light of its holding in *U.S. v. Armstrong*.[141] In *Armstrong*, the respondent challenged the government's decision to charge him for federal rather than state narcotics offenses, and filed a motion for discovery in support of his claim of selective prosecution. This section discusses whether the Court's narrow interpretation of the rule was warranted or even necessary to resolve the issues presented by the defendants and concludes that the court unjustifiably and narrowly interpreted the rule. It does not definitively assert that the defendants in *Armstrong* satisfied the threshold necessary to establish the right to discovery. It does argue, however, that the *Armstrong* Court placed another roadblock in the defendant's path, further closing the door on a defendant's successful assertion of racially selective prosecution. Moreover, it asserts that the Court created a new standard, a constitutional supplementation to Rule 16. This section then concludes that the Court's interpretation of the rule may have unfortunate consequences far beyond selective prosecution cases.

A. Selective Enforcement in the War on Drugs

Most Americans, regardless of their race, agree that the sale of illegal narcotics needs to end.[142] In response to this concern, the federal government launched the "war on drugs," implementing policies to end the sale of illegal drugs. The problem is that black communities appear to be the primary targets of drug enforcement decisions. And black men are the primary targets for arrest, generally receiving higher sentences than whites for the same offenses.[143] One commentator argues that the architects of the drug war specifically targeted blacks and Hispanics for the benefit of whites.[144] He maintains that the architects knew that drug use was declining in the white communities but not among blacks and Hispanics, who would, therefore, be the primary casualties of the war.[145]

Although no evidence exists of a conspiracy designed specifically to destroy minority communities, there is evidence that drug policies have detrimentally impacted minorities, and, specifically, blacks. The Anti-Drug Use Act of 1986 and subsequent legislation imposed extremely high penalties for the possession and distribution of cocaine base (crack).[146] These same provisions make a distinction between powder cocaine, which is more prevalent among whites, and crack, treating crack cocaine more severely. One gram of crack is the equivalent of 100

Suffer the Most in the War on Drugs, Scholar Says, Black Issues in Higher Educ., Aug. 12, 1993, at 9; United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 156 (1995).

141. Fed. R. Crim. P. 16; U.S. v. Armstrong, 517 U.S. 457, 116 S. Ct. 1480.

142. Weatherspoon, *supra* note 86, at 30.

143. *Id.*; Davis, *supra* note 92, at 169-74.

144. Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America 82, 95-97 (1995).

145. *Id.* at 104.

146. *See* U.S. v. Armstrong, 517 U. S. 456, 476, 116 S. Ct. 1480, 1492 (Stevens, J., dissenting); 100 Stat. 3207, 21 U.S.C. § 841-852 (1994).

grams of powder cocaine.[147] The distribution of 50 grams of crack is punishable by the same mandatory minimum sentence of ten years incarceration that applies to the distribution of 5,000 grams of powder cocaine.[148] The sentencing guidelines expand the ratio of penalty levels above the mandatory minimums such that, for any amount of crack cocaine, the guideline range is the same as if the offense involved 100 times the amount of powder cocaine.[149] As a result, the penalties for crack offenders are three to eight times longer than for the same or similar powder cocaine offenders.[150]

It is clear that most of the burden of the elevated federal penalties falls on blacks. Recent studies indicate that, while 65% of those who have used crack are white, in 1993 they represented only four percent of the federal offenders convicted of trafficking crack.[151] The majority of defendants convicted of all crack cocaine offenses are black.[152] During the first year and one-half of guideline implementation, the sentencing disparity between blacks and whites grew such that blacks received sentences averaging more than 40% longer than whites.

These disparities did not happen by chance. The discriminatory practices of prosecutors, who have virtually unrestrained discretion in deciding whether to charge, what to charge, whom to charge, and whether to offer pleas, undeniably affected the outcome.[153] For example, a prosecutor whose case involves possession of narcotics by a first-time offender has the option of resolving the case at screening or charging the accused with possession. The prosecutor's decision will mean the difference between diversion or probation or a prison sentence.[154] Where the charges are to be brought also plays a critical role in the sentence a defendant receives. If the prosecutor decides to pursue narcotics offenses in federal court rather than state court, the sentencing is generally far more harsh. The difference

147. 21 U.S.C. § 841(b)(1)(A)(iii) (1994); 21 U.S.C. § 841(b)(1)(A)(ii) (1994).

148. *See* 21 U.S.C. § 841(b)(1)(B)(ii) (1994); 21 U.S.C. § 841(b)(1)(B)(iii) (1994). Conviction for simple possession of five grams of crack results in a mandatory five-year sentence. However, the maximum sentence of possession of any quantity of other drugs is one year.

149. *See* United States Sentencing Commission, Guidelines Manual § 2D1.1(c) (1995) [hereinafter USSG].

150. United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 145 (Feb. 1995) [hereinafter Special Report].

151. In 1993, 88.3% of federal prisoners convicted of trafficking were black, and 84.5% of federal prisoners convicted of crack possession were black. *Id.* at 152-53. Conversely, in 1993, 32% of federal prisoners convicted of trafficking powder cocaine were white, and 58% of federal prisoners convicted of powder cocaine possession were white. *Id.*

152. *See* Bureau of Justice Statistics, Sentencing in the Federal Courts: Does Race Matter?, 6-7 (1993).

153. *See generally* David C. James, *The Prosecutors's Discretionary Screening and Charging Authority*, 29 APR Prosecutor 22 (1995).

154. Davis, *supra* note 92, at 1671-72. *See generally* William J. Powell & Michael T. Cimino, *Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House*, 97 W. Va. L. Rev. 373 (1994); Steve Y. Koh, Note, *Re-Establishing the Federal Judge's Role in Sentencing*, 101 Yale L.J. 1109 (1992); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal. L. Rev. 1471 (1993); Elizabeth A. Parsons, Note, *Shifting the Balance of Power: Prosecutorial Discretion Under Federal Sentencing Guidelines*, 29 Val. U. L. Rev. 417 (1994).

is particularly stark in the case of crack offenses where the impact of the decision to prosecute in federal court falls largely on blacks.

Black defendants recently challenged prosecutorial decisions to proceed in federal court, alleging racially selective prosecution.[155] In order to get an evidentiary hearing on such claims, a defendant must meet a very high standard and must have access to discovery. Unfortunately, recent decisions make it almost impossible to obtain discovery in support of such claims. Section B discusses the narrowing of the right to discovery and its impact on selective prosecution claims.

B. Interpretation of Rule 16 of the Federal Rules of Criminal Procedure

In *U.S. v. Armstrong,*[156] nine black defendants charged with federal narcotics offenses filed a motion for dismissal of the indictment, alleging that the government prosecuted them in federal rather than state court because they were black, while prosecuting all white defendants in state court. The decision to charge the defendants with federal rather than California offenses had great significance. If prosecutors had charged the defendants under California law, the minimum sentence for selling more than 50 grams of crack would have been three years, and the maximum five years.[157] However, because the federal prosecutors charged defendants under federal law, the penalty range increased dramatically from ten years to life.[158]

In attempting to prove their allegation of racially selective prosecution pursuant to Rule 16 of the Federal Rules of Criminal Procedure, the defendants filed a motion for discovery. In their motion, they argued that the government was required to turn over documents that included the government's prosecution strategy for trying cocaine cases because the information was material to their selective prosecution claims.[159] The Supreme Court rejected the claim on the basis of Rule 16(a)(1)(C), which states in pertinent part:

> Upon the request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof which are within the possession, custody or control of the government, and which are *material to the preparation of the defendant's defense* or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.[160]

The Supreme Court concluded that the only logical interpretation of the rule was that it was intended to allow access to evidence necessary for use in the

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155. United States v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480 (1996).

156. *Id.* For a detailed discussion of *U.S. v. Armstrong* and its impact on the prosecutor's charging decision, *see* Davis, *supra* note 55, at 42-50.

157. *Armstrong*, 517 U.S. at 479 n.5, 116 S. Ct. at 1493 n.5.

158. *Id.* at 479, 116 S. Ct. at 1493.

159. *Id.* at 461-63, 116 S. Ct. at 1485.

160. Fed. R. Crim. P. 16(A)(1)(C) (emphasis added).

defendant's case in chief and not to support a selective prosecution claim.[161] Nevertheless, the Sixth Amendment to the United States Constitution fails to support the Court's narrow interpretation of the term "defense" to include only an accused's case in chief. The amendment provides that "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]."[162] The limitation on the meaning of "defense" is found nowhere within the Sixth Amendment. In addition, there does not appear to be any precedent to support the majority's conclusion.

The Court reasoned that its conclusion was supported by "perceptible symmetry" between "documents material to the preparation of the defendants' defense" and "documents 'intended for use by the government as evidence in chief at the trial.'"[163] The Court found that its interpretation was bolstered by section (a)(2) of Rule 16, which excluded from defense inspection "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with investigation or prosecution of the case."[164] The Court noted that Rule 16(a)(1)(C) permits a defendant to examine documents material to his defense. In contrast, section (a)(2) prohibits a defendant from examining government work product in connection with his case.[165] The Court found that it would be implausible to interpret 16(a)(1)(C) and (a)(2) so as to give the defendant the right to examine all prosecution work product except his own.[166]

The majority's narrow interpretation of Rule 16 is unwarranted and is not supported by the rule's history. The advisory committee notes that the 1974 amendment to Rule 16 specifically states that the rule was revised to provide greater discovery to both the prosecution and the defense.[167] Moreover, the Court's discussion of perceptible symmetry is without merit. The Court makes much of the rule's juxtaposing of the phrase "material to the preparation of the defendant's defense" with the phrase "intended for use by the government as evidence in chief at the trial" to establish that the evidence defendants sought was available only for use in their case in chief.[168] However, the Court fails to employ basic grammar principles in interpreting the rule.

Rule 16(a)(1)(C) uses "or" in setting forth the circumstances under which defendants may have access to the prosecution's evidence. The plain and ordinary meaning of "or" expresses an alternative, giving a choice of one among two or more things.[169] To that end, the defense has the option of requesting specific information either: "(1) because it is material to the defendant's defense *or* (2) if the government intends to use the information in its case in chief at the trial, apart

161. *Armstrong*, 517 U.S. at 462-63, 116 S. Ct. at 1485.
162. U.S. Const. amend. VI.
163. *Armstrong*, 517 U.S. at 462, 116 S. Ct. at 1485.
164. *Id.* at 462-63, 116 S. Ct. at 1485.
165. *Id.* at 463, 116 S. Ct. at 1485.
166. *Id.*
167. Fed. R. Crim. P. 16, advisory committee's note.
168. *Armstrong*, 517 U.S. at 462, 116 S. Ct. at 1485.
169. Fed. R. Crim. P. 16, advisory committee's note.

from the need to establish materiality, *or* (3) if the information was obtained from or belongs to the defendant."[170] The purposes are distinct, and one is not inextricably tied to the other. This position finds support in the rule's history, which states that the government is required to provide discovery "if any one of three situations exists."[171] It then allows the defendants access to specified documents and information if: "(a) the defendant shows that disclosure of the document or tangible object is material to the defense, (b) the government intends to use the document or tangible object in its presentation of its case in chief, or (c) the document or tangible object was obtained from or belongs to the defendant."[172] It is clear from the history of the rule that it was not intended to limit access to information to attack racially selective charging to the defense of a defendant's case in chief.

The majority's reliance on 16(a)(2) to support its limitation on the rule is also without merit. As noted in Justice Breyer's concurrence, the majority concludes that since the defendant will need prosecution work product in proving a claim of selective prosecution while the rule exempts discovery of work product, then the rule embodies a limitation which makes it irrelevant to the defense efforts to establish a selective prosecution defense.[173] However, the majority ignores that the work product privilege is not absolute.[174] In the civil context, for example, work product is discoverable upon a showing of necessity or justification.[175] There is nothing inherently more serious or mysterious about the criminal prosecution which warrants an absolute exclusion of government work product from discovery by the defense in racially selective prosecution cases. If a defendant makes the appropriate showing, the information ought to be provided. In the final analysis, however, the majority unnecessarily narrows Rule 16 by creating an onerous limitation on its scope. The Court's holding has been followed in *United States v. Turner*.[176]

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170. *Id.* (emphasis added).

171. *Id.*

172. *Id.*

173. *Armstrong*, 517 U.S. at 471-76, 116 S. Ct. at 1489-92 (Breyer, J., concurring).

174. *See* United State v. Nobles, 422 U.S. 225, 239, 95 S. Ct. 2160, 2170 (1975); 8 Charles A. Wright et al., Federal Practice and Procedure § 2022, p. 324 (2d ed., 1994).

175. *Armstrong*, 517 U.S. at 474, 116 S. Ct. at 1491; Hickman v. Taylor, 329 U.S. 495, 510, 67 S. Ct. 385, 393 (1947); Jeffrey F. Ghent, *Development, Since* Hickman v. Taylor, *of Attorney's "Work Product Doctrine,"* 35 A.L.R.3d 412, 465-469 § 25 (1971); *see* Wright et al., *supra* note 174, at 324.

176. 104 F.3d 1180 (9th Cir. 1997). In *Turner*, five black defendants charged with distribution of cocaine alleged they had been selected for prosecution on crack cocaine charges because of their race and sought discovery in support of this allegation. *Id.* at 1181. The court held that the defendants could not rely upon the rule of criminal procedure relating to discovery. However, defendants could obtain discovery if they made an appropriate threshold showing, producing some evidence that similarly situated defendants of other races could have been prosecuted but were not. *Id.* at 1184. *But see* United States v. Jones, 159 F.3d 969 (6th Cir. 1998). In *Jones*, the court held that a black defendant was entitled to discovery on a selective prosecution claim based on unprofessional behavior by white police officers who arrested him and testimony implying that the local police department referred him for federal prosecution because of his race. Officers who executed the planned arrest wore custom-made T-shirts bearing the defendant's picture and the words "See ya, wouldn't want to be ya," and "going back to prison." While in Mexico, one officer sent the defendant a postcard depicting a black woman

Ironically, after concluding its discussion of Rule 16, the *Armstrong* majority considered the possibility of a constitutionally related supplementation of the rule which would authorize discovery.[177] The Court indicated that "[t]he justifications for a rigorous standard for the elements of a selective-prosecution claim thus required a correspondingly rigorous standard for discovery in aid of such a claim."[178] To justify this right of discovery, the Court required "some evidence tending to show the existence of the essential elements" of a racially selective prosecution claim.[179] Applying the new standard to *Armstrong*, the Court considered only whether the evidence presented "constitute[d] 'some evidence tending to show the existence of the essential elements' of a [racially] selective prosecution claim," including that the government failed to prosecute similarly situated defendants of other races.[180] Even under the new standard, the Court concluded that the evidence was insufficient to authorize constitutionally related supplementation of Rule 16 discovery.[181]

What is clear after *Armstrong* is that a defendant must meet a very high standard in order to establish entitlement to discovery. Yet without initial access to discovery, defendants may never meet the burden of proving an equal protection violation, that the prosecutor's charging decision had a discriminatory impact and was motivated by discriminatory purpose. The *Armstrong* decision further solidifies the prosecutor's right to exercise unrestrained decision-making power, leaving defendants at the mercy of those prosecutors who charge based on race or other constitutionally impermissible grounds. As a result, many blacks as well as other minority defendants will continue to face the prospect of incarceration, potentially for life in federal prison for crack cocaine offenses, while many white defendants receive a minimum prison sentence for the same or similar offenses in state court or are allowed to go free.

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with a basket of bananas on her head with a note which read in part "chances are good you're going to jail for a long time." While the district court found that the defendant did not meet its burden as to selective prosecution, the court of appeals disagreed. It noted that while eight non-black defendants had been prosecuted in state court for crack offenses, the defendant, his wife, and co-defendant were referred for federal prosecution and while the defendant and his wife were taunted by T-shirts and postcards, their white co-defendant was not. The court concluded that the defendants met the burden set forth in *U.S. v. Armstrong*. *Id.* What is troubling is that the defendants produced an overwhelming amount of evidence to support their claim. The officer's racial bias was blatant. In most instances, however, such racial animus will be difficult to uncover, leaving the defendant without access to discovery to prove his selective prosecution claim. In addition, the *Armstrong* decision is murky and provides no real guidance as to what constitutes "some evidence" to allow a court to find a defendant is entitled to discovery.

177. *Armstrong*, 517 U.S. at 468-70, 116 S. Ct. at 1488-89.

178. *Id.* at 468, 116 S. Ct. at 1488.

179. *Id.*

180. *Id.* at 470, 116 S. Ct. at 1489.

181. *Id. See* Anne B. Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection after* United States v. Armstrong, 34 Am. Crim. L. Rev. 1071, 1090 (1997) (suggesting that even though the defendants in *Armstrong* did not prevail, such evidentiary hearings are useful because they expose disparate treatment of some defendants in the legal process, which may lead to a reduction in improper selective prosecution).

Unfortunately, *Armstrong* may be instrumental in denying discovery in cases other than those involving claims of racially selective prosecution. If read broadly, the opinion could be interpreted to deny Federal Rule 16 authorization for discovery into government documents that are material to the preparation of claims which do not constitute "defenses" as defined by the Court. Among such claims are claims for pre-indictment delay.[182] These claims are analogous to the racially selective prosecution claims in *Armstrong* as both involve proof of discriminatory effect and purpose.

The essential elements for pre-indictment delay claims are (1) substantial actual prejudice to the defense at trial and (2) intentional delay for a tactical advantage or some bad faith purpose.[183] What is important about such claims is that a defendant must have access to discovery in order to uncover governmental tactics and reasons for pre-indictment delay.

Arguably, a defendant would not have access to such information since it is not material to his "case in chief," as required in *Armstrong*, and is merely information sought pre-trial to support dismissal of an indictment. If the courts decide to extend the holding in *Armstrong*, it will almost ensure a defendant's inability to fully present his claim, leaving prosecutors to charge or refuse to charge without accountability.

IV. SETTING REASONABLE LIMITS ON PROSECUTORIAL DISCRETION

Many commentators and scholars recognize the need to narrow the broad discretionary powers afforded prosecutors when deciding to charge defendants. They suggest a number of measures which might help to rein in such broad sweeping, yet rarely scrutinized, exercises of authority and bring some accountability to prosecutors for their unethical decisions. This section looks at some of these proposed solutions and the reasons these measures will have limited success in controlling racially motivated prosecutions. Drawing from previous proposals by commentators and scholars, this section makes suggestions which might aid in controlling prosecutorial decision-making powers.

A. Internal Restraints

One possible resolution entails requiring prosecutors to prescribe and follow internal regulatory procedures, policies, and guidelines.[184] These regulations might involve adopting detailed standards which guide the exercise of discretionary

182. For a discussion of pre-indictment delay, *see* Unites States v. Crouch, 84 F.3d 1497 (5th Cir. 1996) (en banc).

183. *Id.* at 1500.

184. *See Race and the Criminal Process*, *supra* note 55, at 1550-1551.

charging decisions and require written reasons for certain discretionary decisions.[185] This formal regulatory scheme could be used to oversee charging decisions by testing the underlying regulatory policies for discrimination under an equal protection theory.[186] If the policy is deemed constitutional, the prosecutor's announced policy could be compared with her conduct in a given case. Any deviation from the prescribed policy might be enough to make a *prima facie* showing of discriminatory prosecution, shifting the burden of proof to the government to explain its actions.[187]

Such guidelines might play an important role in reducing abuse of prosecutorial discretion, yet their usefulness is limited. For example, guidelines might be helpful in preventing non-racial selective prosecution cases where an illicit motive is likely to be focused and more easily detectible.[188] Following carefully drafted guidelines adds credibility to a prosecutor's assertion that his decision to prosecute was based on legitimate considerations.[189] However, racial motivation flows from many sources, is often unconscious, and can potentially affect every charging decision.[190] As a result, one can never guarantee that a prosecutor's decision does not have racial underpinnings.

Another proposed solution would require promulgation of written rules and that a prosecutor obtain approval from a centralized authority before proceeding with investigating or charging a case under these rules.[191] The procedure would assure efficiency and consistency in the prosecutor's office as well as protect a defendant's right to detect and attack a rule which has not been followed.[192] This approach also has its disadvantages. It involves review by one unfamiliar with the case; a prosecutor may manipulate the facts so as to convince the reviewing authority of the need to prosecute; and due to matters such as size, staff, and workload in a given office, the centralized standards may be both disruptive and burdensome.[193]

A similar procedural approach requires prosecutors to submit written reports to their supervisors substantiating their charging and sentencing decisions. However, the reasons may not be verifiable, or a prosecutor may provide so many justifications for a decision that it is difficult to determine whether race was the underpinning for a particular decision.[194]

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185. *See id.*; Abrams, *supra* note 24, at 57; Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. Chic. L. Rev. 246, 291-98 (1980); LaFave, *supra* note 46, at 537-38.

186. Note, United States v. Falk: *Developments in the Defense of Discriminatory Prosecution*, 72 Mich. L. Rev. 1113, 1122-23 (1974).

187. Vorenburg, *supra* note 55, at 1564; Fritz B. Ziegler, Note, *The Right to Nondiscriminatory Prosecution: The Effect of Announced Screening Policies*, 36 La. L. Rev. 1107, 1113 (1976).

188. *See Race and the Criminal Process*, *supra* note 55, at 1538.

189. *Id.* at 1549.

190. Davis, *supra* note 92, at 1679.

191. *See* Kane, *supra* note 24, at 2308; Abrams, *supra* note 24, at 2-39.

192. *See* Frase, *supra* note 185, at 296-97.

193. Kane, *supra* note 24, at 2308; Abrams, *supra* note 24, at 56.

194. Kane, *supra* note 24, at 2308; Frase, *supra* note 185, at 292-96 (evaluating the written

B. External Controls

One solution for reining in prosecutorial powers would involve expansion of judicial review of the prosecutorial decision-making process by drawing upon the review process already in existence for administrative agency decisions.[195] There is no separation of powers argument in the administrative review process, and there is no legitimate justification for such a limitation in the context of prosecutorial discretion.[196] Moreover, if judges are competent to review administrative agency decisions, they are no less competent in circumstances where one asserts abuse of one's constitutional rights.[197] The judiciary frequently argues that by implementing a process of review, prosecutorial decision-making will hinder the judicial process. However, courts have been willing to review administrative agency decisions. One commentator noted that such an argument "must yield to the need for control over prosecutorial discretion to prevent its abuse. Protection of the criminal defendant's right to be free from prosecutorial discrimination must rank above judicial expediency."[198] However, the judiciary has been unyielding in its refusal to engage in significant review of prosecutorial charging decisions. Absent a change, some prosecutors will continue to abuse their discretionary charging powers in violation of a defendant's constitutionally protected rights.

While many suggestions for controlling a prosecutor's discretion have been rejected, recent proposals may not only be acceptable but also a feasible means of imposing accountability on the prosecutors. One feasible means of monitoring prosecutorial discretion is to allow closer scrutiny by the United States Department of Justice through its watchdog department, the Office of Professional Responsibility (OPR). Over the last few years, the OPR has investigated several complaints against government prosecutors, leading to discipline or forced resignation of those prosecutors deemed to have engaged in misconduct.[199] Crucial to the success of this measure is the providing of easily accessible reporting procedures by public and private complainants.[200] In addition, OPR case reports should be available annually to ensure the OPR's credibility.[201] In fact, Attorney General Janet Reno has been credited with putting pressure on the OPR to provide reports for public and internal interests, noting that the "reports are important for the department's credibility."[202]

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reasons approach).

195. Kane, *supra* note 24, at 2309.

196. *Id.*

197. *Id.*; Charles P. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 Am. Crim. L. Rev. 473, 475 (1976).

198. Kane, *supra* note 24, at 2309-10.

199. *Reports and Proposals*, 60 Crim. L. Rep. 1159 (B.N.A. Nov. 13, 1996).

200. *Id.*

201. *Id.*

202. *Id.*

Along the same lines, a recent report by the General Accounting Office indicates that there appears to be no enforcement priorities in many U.S. Attorneys' offices.[203] In addition, the Department of Justice had no requirements for U.S. Attorneys to measure their own effectiveness or the effectiveness of the U.S. Attorneys' offices which were the subject of the report since it had no set process for doing so. The reports recommended that there ought to be more accountability for implementing priority programs. Establishing and following these priorities will not only foster confidence in prosecutors but will also provide a means for a defendant to challenge a prosecutor's charging based on race or other impermissible grounds.[204] In addition, on November 26, 1997, Congress enacted what has been called the Hyde Amendment, allowing criminal defendants who have been both acquitted and vindicated after unreasonable prosecutions to recover the costs of a defense they should not have had to incur.[205] For the first time criminal defendants could ask the court to order the government to reimburse a part of their attorney's fees and costs.[206]

The Hyde Amendment extends the Equal Access to Justice Act (EAJA), which provides fees to prevailing private parties in civil suits by or against the government, to criminal cases. Any such awards will be paid for by the Justice Department's budget.[207] Although opponents of the Amendment argue that it will cost the taxpayers a fortune, such predictions are not supported by the awards in civil cases. Nor are these predictions supported by the calculations of the Congressional Budget Office, which estimates the maximum total cost would be 7.5 million dollars per year.[208]

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203. *See* GAO-GGD 95-150, *supra* note 24, at 2-3.

204. *Id.*

205. Commerce, Justice & State Act, Pub. L. No. 105-119, Tit. VI, §617, 111 Stat. 2519 (1998) (The Provision can be found as a statutory note to 18 U.S. C. A. §3006 A). The Statute provides:

> During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which a defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act, may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matter occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

Id.

206. *See* Stuart Taylor, Jr., *It's Payback Time*, Texas Lawyer, Nov. 10, 1997, at 23.

207. *Id.*

208. *Id.*

Opponents of the EAJA also argue that there will be a floodgate of unwarranted litigation by those seeking fee awards.[209] However, it is unlikely that a defense lawyer would invest time and effort in these cases unless the court seemed likely to find an underlying prosecution unreasonable.[210]

A final attack on the legislation is that it will force prosecutors to make decisions based on their office budget rather than focusing their full attention on doing justice.[211] However, other areas of the law such as tort law, including constitutional torts, demonstrate that the law "should provide financial disincentives to harmful and unjustifiable conduct by the government and its agents."[212] What is crucial about the proposal is its recognition that there are not adequate safeguards against abusive prosecutions. As House Judiciary Chairman Henry Hyde points out, "If your government, your last resort, is your oppressor, you really have nowhere to turn."[213] Even though the Amendment will not resolve all abuses of discretion, it will at least give the government notice that in some instances it will have to pay for its discriminatory charging practices.

Although the foregoing suggestions present some viable options for curtailing prosecutorial abuses, they do not go far enough, particularly in light of the matter of Rolando Cruz, where it is alleged that prosecutors intentionally acted to violate his rights. As Professor Lawrence Marshall indicates, "There are some prosecutors who will put innocent people on death row, who will frame people because they sort of believe [they are] guilty, unless we create a system that will rein them in. Our current system undervalues the fact, and it must be changed."[214]

Abuses by prosecutors appear to be rare. However, there are those who believe that abuses of power happen more often than anyone can imagine, with little or no consequences.[215] At least part of the problem is attributable to the absolute immunity prosecutors presently have, which protects them from civil liability for anything they do or say while in the courtroom.[216] Such immunity may lead some prosecutors to cross the line separating ethical conduct from unethical conduct, believing that crossing the line is justified to reach the proper outcome.[217] This

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209. *Id.*

210. *Id.* As of this date, there are no reported cases interpreting the Hyde Amendment.

211. Taylor, *supra* note 206, at 23, 26.

212. *Id.*

213. *Id.* at 26.

214. Terry Burns Copley, *Lawyers: Too Many Bad Prosecutors*, The State Journal Register, June 22, 1992, at 11.

215. *Eye On America Takes a Look at the Misconduct of Prosecutors and How Many Innocent People are Being Sent to Jail* (CBS Evening News, Tues., June 1, 1999). News anchor John Roberts interviewed a New Orleans attorney, Laurie White, who helped to reverse the convictions of nine men and to free six of them from prison by showing that in each case prosecutors either withheld or had evidence that pointed to the defendants' innocence. In one of the most egregious cases, prosecutors convicted a black defendant for murder causing him to spend 27 years in prison. Despite statements from two eyewitnesses, prosecutors withheld evidence that a white suspect was at the murder scene. Unfortunately, of the nine cases where Laurie White found misconduct, not one prosecutor faced public sanction.

216. Copley, *supra* note 214, at 11.

217. *Id.* (Noting that some prosecutors cross the line because they believe what they are doing is

cloak of immunity should be removed, thus allowing prosecutors to be sued for their intentional misconduct. The result would be that those prosecutors who are inclined to violate a defendant's rights will have to pay for doing so.

In circumstances where the behavior is egregious, such as in the case of Rolando Cruz, we must be willing to criminally charge those prosecutors who purposefully pursue a wrongful prosecution. Unfortunately, such prosecutions are rare. However, if they were to become more common, prosecutors would realize that they will be judged by the very laws they are required to uphold.

The consequences for abuses of power could have been devastating for a defendant like Rolando Cruz. However, experts simply do not believe that criminally charging the prosecutors would have any repercussions beyond the county where the offenses occurred.[218] But why should this be the expectation? If we have judges, police officers, councilmen, and legislators in prison for criminal wrongdoing, why is it that we are unwilling to acknowledge that prosecutors commit criminal acts and should be subject to the same punishment?[219] Some prosecutors argue that the prospect of criminal sanctions will have a chilling effect on the way prosecutors perform their duties.[220] The possibility of criminal sanctions will not have an impact on the overwhelming majority of state and federal prosecutors who perform their duties with integrity. But this should be the result for prosecutors who are inclined to abuse their power to gain a conviction.

V. CONCLUSION

The prosecutor's office has become the most powerful office in the criminal justice system.[221] Nowhere is this power more evident than in the areas of charging, plea bargaining, and sentencing.[222] This article recognizes that in order for prosecutors to effectively perform their duties, they must have discretion. However, affording prosecutors such great autonomy in deciding whom to charge, whether to offer a plea, and the appropriate sentence to seek also provides occasion for prosecutors to cross the line of legitimate exercise of authority, leading to abuse of discretionary power. Nowhere is this more evident than in the matter of Rolando Cruz. While there are some restraints on the prosecutor's powers, these restraints have not adequately protected those who assert they have been singled out because of their race or for other impermissible reasons.

With regard to race, statistical studies which focus on the intersection of the decision to prosecute overwhelmingly support the proposition that the race of the defendant matters when prosecutors decide whether and what to charge. This is particularly true in cases involving the decision to seek the death penalty and the

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right. They believe they know who is guilty, and cross the line out of fear that the guilty person will be exonerated).

218. Hansen, *supra* note 19, at 27.

219. Copley, *supra* note 214, at 11.

220. Hansen, *supra* note 19, at 27.

221. Minser, *supra* note 22, at 741.

222. *Id.*

decision to file federal narcotics charges. Unfortunately, the courts have been unreceptive to the use of these studies to establish that a prosecutor has engaged in racially selective prosecution in a specific case. The Supreme Court has made a defendant's allegation of racially selective prosecution even more difficult by narrowing a defendant's right to discovery in support of such claims. We cannot underestimate the discretionary power of prosecutors, particularly as they emerge as real policy-makers in the criminal justice system.

Many solutions have been offered to rein in the prosecutor's discretionary authority, which appears to be unreviewable, especially as it relates to the decision to charge. Unfortunately, no one solution will resolve the issue. Perhaps a combination of suggestions will come closer to drawing a line over which a prosecutor cannot cross. Yet, until courts and legislatures relinquish their hands-off approach and accept responsibility for setting policy for the reviewing of prosecutorial decisions, those prosecutors who would abuse their power and pursue citizens based on race or other impermissible grounds will continue to do so, knowing that the odds of being sanctioned are slim to none. If we remove immunity from civil liability that prosecutors presently enjoy and impose criminal sanctions for intentional abuses of powers, prosecutors will realize that they are subject to the same laws they are appointed to enforce.