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Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*

DWIGHT L. GREENE**

It came as a shock . . . and then I was pretty angry. Addiction is a medical problem. You wouldn't put a heart patient in jail for having a heart attack. And you wouldn't prosecute an epileptic for having a seizure. . . . It's been a nightmare! . . . My baby was taken away from his mother for the first ten months of his life; there was no bonding with his mother. If this was to protect my baby, [taking him away] was more damaging. . . . And what about my other children? . . . And one more thing, after all the publicity in my case, the prosecutor later prosecuted a thirty-six year old white woman lawyer to show he wasn't prejudiced; but the judge dismissed her case quick.

Ms. K. Hardy, first Michigan prosecution for delivering drugs to unborn.¹

SOME pregnancies are being transmogrified into a front in the "war on drugs." Mothers are being prosecuted; their newborns taken away. In these selective anti-drug crusades, prosecutors claim they are carrying out their appropriate role in executing the will of the American people in the "war on drugs." These prosecutors typically say they just want to teach some drug-addicted pregnant women a lesson: if you use crack/cocaine while pregnant, society will prosecute you for distributing drugs to your unborn.

Others, however, do not see these prosecutions as reflecting the leg-

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1. Interviews for the purposes of this article by author and assistants with Ms. Kimberly Hardy on Friday, February 8, 1991 and December 3, 1990. (Memorandum of interviews on file with author). In April, 1991, an appellate court reversed *nisi prius* and dismissed the felony complaint against Ms. Hardy based on its interpretation of the drug statute used by the prosecutor. The Michigan Supreme Court in July, 1991, denied the prosecutor's application for leave to appeal. *People v. Hardy*, 188 Mich. App. 305, 469 N.W.2d 50 (1991), *appeal denied*, 91346 (Mich. 1991).

isolated will of the American people, or as just and unbiased exercises of prosecutorial discretion. Many state courts, advocates for women and minorities, and legal academics critique these prosecutions as beyond the legislative intent of general anti-drug distribution laws and as perniciously biased, unconstitutional prosecutions against women, particularly poor women of color.² While sound, these critiques do not go far enough.

A central yet unexamined aspect of these prosecutions is whether they reflect inherent defects in democratic controls over prosecutorial discretion. Currently, there is no independent public source of information about systemic characteristics and practices of prosecutorial justice. Partially because of this lack of information, there is little control over American prosecutors. This is particularly so at the precharging stage where, from behind closed doors, prosecutors choose which laws to enforce, how to enforce them, and whom they should be enforced against. Thus, where prosecutions are even arguably authorized by statute, prosecutors enjoy vast unfettered power because judicial constraints are anemic and the efficacy of other controls is ineffective.

These concerns are exacerbated in the context of the prosecution of drug-addicted mothers. Here, the effects of prosecutorial policy choices on minorities, women and children are obfuscated by calling these choices part of a "war on drugs." In the frenzy of rousing drug war hyperbole there is great risk of unrealized and unchecked exercises of prosecutorial discretion. Prosecutors reflect the unstated but operative norms in American courtrooms which are predominately affluent, white, usually male, and often Protestant perspectives.³ Instead of unbiased law enforcement which respects the autonomy of women, these prosecutions may be based on pluralistic ignorance,⁴ discrimination predicated

2. See, e.g., Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1425 (1991).

3. There has been little scholarly focus on the race, gender and class of the prosecutor's voice in America. Generally, in American legal institutions the norm, if unspecified, is presumptively white, male and upper middle class. See, e.g., Scales-Trent, *Women in the Lawyering Process: The Complications of Categories*, 35 N.Y.L. SCH. L. REV. 337, 339 (1990) (noting that the white male is presumed to represent the paradigm of what is considered "normal"); cf. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1, 20-21 (1990) (recalling the historical exclusivity and continuing predominance of the white male voice through the denial of legal capacity, including testimonial, to both men and women of color and white women). A similar white male norm exists throughout even a relatively progressive state court system. REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, Vol. I at 12 (April 1991).

4. Pluralistic ignorance refers to erroneous cognitive beliefs or knowledge shared by one group regarding other individuals or groups. O'GORMAN, *Pluralistic Ignorance and Reference Groups: The*

upon class, racial, ethnic and cultural group characteristics,⁵ and the lack of women's power and reproductive rights. Alternative perspectives on the prosecution of drug-addicted mothers, currently eclipsed by drug war rhetoric, ought to be investigated and appropriately incorporated.

Independent systemic information about what prosecutors actually do is a critical first step in controlling prosecutors. Information is the basis for legislative reform, judicial intervention, and most important, the formation of citizen coalitions which would hold prosecutors accountable and transform prosecutors' offices into unbiased, nonoppressive, governmental offices. To rectify our lack of information about prosecutorial discretion and its particularized impact upon eclipsed constituents, this article proposes the creation of Prosecutorial Research, Information and Reporting Boards.

These Boards would have dual functions. Their primary function would be to study and generate public information on American prosecutors. This would facilitate monitoring prosecutors and be a step towards improving democratic controls over prosecutorial discretion. The Boards' second function would be to balance prosecutors' biased majoritarian perspectives with outsider community perspectives on prosecutorial justice.

Prosecutors publicly characterize their own behavior as consistent with the law and in pursuit of some public policy they perceive to be generally accepted, such as the "war on drugs." The Boards proposed below are designed to provide counterpoint to this public orchestration of prosecutorial policies by independently studying and reporting patterns of prosecutorial behavior. And given the proposed method for composing Board membership, the Boards should not only tell independent stories, but also reveal the perspectives of the outsider communities most affected by prosecutors. Voices now drowned out, like those of minority women, should have a better chance of being heard.

To create this potential for outsiders to be heard, the membership of each Board would be elected in proportion to the communities where the prosecuted crimes occurred.⁶ To the extent that prosecutors and their

Case of Ingroup Ignorance, in SURVEYING SOCIAL LIFE, PAPER IN HONOR OF HERBERT H. HYMAN 148 (H. O'Gorman ed. 1988). For a more in-depth discussion of pluralistic ignorance, see *infra* notes 117-119 and accompanying text.

5. See Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. L. FORUM 139, 152-60 (1989); Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

6. This scheme builds upon current law which requires that part of the crime occur within the

intake agencies, like the police, focus disproportionately on minority and other less powerful communities, these Boards would create feedback mechanisms, balancing prosecutors' majoritarian perspectives with those of the communities most impacted. Compton or Harlem would have more representation on the local Board than Beverly Hills or the Upper East Side of Manhattan. Thus, while not altering majoritarian control over the selection of prosecutors, the proposed Boards would reflect the interests of, and be more sensitive to, those most directly affected by crime and its prosecution, such as victims, defendants, relatives, friends or neighbors of Board members and their discrete communities.⁷

This article proceeds in four parts. Part I discusses prosecutorial discretion and its potential abuse. The prosecution of drug-addicted women is used as a paradigm. Part II surveys the justifications for allowing prosecutors wide latitude and the current inadequate constraints on their discretion. The ways in which the demographics, pluralistic ignorance and ideology of American courts contribute to doctrinal anemia is highlighted. Part III discusses how gender, color and class may perniciously influence prosecutors and how feminist and critical race methodologies can help reveal these biases. Finally, Part IV discusses some reforms and proposes the creation of the Boards. It outlines the dual functions of the Boards in providing information for democratic control of prosecutors and providing outsider community perspectives to expose gender, race and class biases.

prosecutor's local jurisdiction to establish venue. It assumes, however, that most jurisdictions are conglomerates of even smaller communities and that minority views may be systemically eclipsed within the larger unit.

7. These Boards would not necessarily cure the disease of prosecutorial injustice based on gender, race or class. Reform actually might serve majoritarian interests by legitimizing prosecutors' offices that remain controlled by dominant white male norms. Cf. D. BELL, *AND WE ARE NOT SAVED* 63 (1987) (suggesting that reforms resulting from civil rights litigation invariably promote the interests of the white majority in America). Moreover, the substantive positions of even the "outsider" members of these Boards are not determined and entirely predictable. This problem in representational democracy is analogous to the problems and assumptions of "minority" districts under the Voting Rights Act. As Professor Lani Guinier has observed in her powerful article on that Act, assuring authenticity and responsiveness of elected minority representatives is no easy task. Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1103, 1133 (1991) (suggesting that authenticity refers to community-based and culturally rooted leadership which psychologically values the group from which the representative comes, and that responsiveness assumes a community system of accountability that extends beyond election day ballots to include ongoing monitoring and political participation).

I. PROSECUTORIAL DISCRETION

A. *A Selective Gateway to Criminal Court*

Prosecutorial discretion is a potential source of societal injustice. The prosecution of poor, minority, drug-addicted women is a paradigm of our lack of control over prosecutorial discretion. While the issue of whether women should be prosecuted for drug related behavior during pregnancy has been considered elsewhere on the merits,⁸ the focus of this article will be on the democratic institutional defects which allow the problems revealed by the prosecutions of drug-addicted mothers to arise. Focusing upon these prosecutions is like peering through a magnifying glass into the hegemony of prosecutorial discretion.

Kimberly Hardy's story is fairly typical. Ms. Hardy, an African-American, not married,⁹ unemployed mother of three, was not known to the police or prosecutors prior to being charged in connection with her pregnancy in August of 1989. Indeed, before the birth of her son, Aréanis, Ms. Hardy had scant contact with even health officials.¹⁰ Prenatal care had been limited since she had no private health coverage, little public health coverage, and little money.¹¹

Ms. Hardy became addicted to crack after having been socially introduced to cocaine. She attempted to obtain treatment for her addiction and had made some progress towards restoring her health when she suffered a relapse shortly before her baby was born.¹² And unfortunately, as is typical throughout much of the United States,¹³ no treatment was available for drug-addicted pregnant women in Muskegon County, Michigan, where Ms. Hardy lives.¹⁴ Ms. Hardy, a bright, articulate wo-

8. *E.g.*, Dolgin, *The Law's Response to Parental Alcohol and Crack Abuse*, 56 BROOKLYN L. REV. 1213 (1991); Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1, 76 (1984); Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse"*, 101 HARV. L. REV. 994, 1009-1012 (1988); Note, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209 (1987); Roberts, *supra* note 2, at 1425; Kolata, *Racial Bias Seen on Pregnant Addicts*, N.Y. Times, July 20, 1990, at A13, col. 1 (reporting Charleston, S.C. mandatory treatment option in lieu of criminal prosecutions).

9. Ms. Hardy is still residing with her baby's father.

10. Memorandum, *supra* note 1.

11. Hoffman, *Pregnant, Addicted- and Guilty?*, N.Y. Times, Aug. 19, 1990, (Magazine), at 44, 53.

12. *Id.*

13. *See, e.g.*, Lee, *Pregnant Drug Abusers Find Hope in Program*, N.Y. Times, Dec. 17, 1990, at B3, col. 1 (reporting 500,000 drug abusers in New York City but treatment for only 42,000, with programs frequently rejecting pregnant women); Hoffman, *supra* note 11, at 33 (stating few programs nationwide accept pregnant drug-addicted women because of liability problems posed by high risk pregnancies).

14. Memorandum, *supra* note 1. Ms. Hardy was born in Mississippi where she graduated from

man with a high school education, was not aware that cocaine drug addiction might have long-term deleterious effects on her unborn, but nevertheless wanted to be rid of her drug dependency for her family and herself.¹⁵

At the time Ms. Hardy delivered Aréanis in the local county hospital the baby seemed healthy to her. Yet when she left the hospital, her premature baby did not go with her. Eleven days later Ms. Hardy was informed that not only would her new son not be coming home, but also that her two older children were being removed. Thereafter, Ms. Hardy was charged with child abuse and the delivery of cocaine via the umbilical cord to her new-born infant.¹⁶ Ms. Hardy was selected for prosecution after the prosecutor, Tony Tague, requested area hospitals to report any babies testing positive for cocaine at birth.¹⁷ Prosecutor Tague, a white male with some training in the Manhattan District Attorney's Office, did this to "educate these women to realize that there are consequences not only to the child . . . but also the legal consequences that I would consider reckless behavior. [My] No. 1 concern is protection of the children."¹⁸ While this may be true, Ms. Hardy's prosecution also garnered Tague, a small time local prosecutor, national recognition as a warrior in the "war on drugs."¹⁹ Another result of the prosecutor's war was that Aréanis spent his first ten months without Ms. Hardy, his

high school before moving to Michigan. . . This is a typical post World War II migration of Southern African-Americans in search of opportunity. *See generally* N. LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA passim* (1991). Lemann's book is flawed in suggesting that the underclass culture in Northern ghettos is directly traceable to this migration pattern. Systematic research indicates that Southern-born African-Americans generally experienced greater economic success than their Northern-born counterparts and that their northern migration has not produced the contemporary plight of urban African-Americans. *See* P. Ritchey, *Urban Poverty and Rural to Urban Migration*, 39 *RURAL SOCIOLOGY* 12, 26 (1974) (cited in W.J. WILSON, *THE TRULY DISADVANTAGED* 178 n.68 (1987) (noting that urban poverty is largely the consequence of age, being a female head of household, or the status imputed on being black and *not* rural to urban migration)).

15. Memorandum, *supra* note 1.

16. Hoffman, *supra* note 11, at 44, 53. Ms. Hardy was charged under a drug trafficking statute.

17. *Id.* at 44.

18. *MacNeil/Lehrer Newshour* (WNET television broadcast, June 28, 1990) (transcript on file with author).

19. Hoffman, *supra* note 11, at 55. Tague's self promotion has even gone so far as to publish a "book" with his picture in the front, chronicling his office's "multi-disciplinary" approach in the search by prosecutors "across the nation" for ways to combat the threat of infants born with cocaine or other harmful drugs in their system. A. TAGUE, *DRUGS: PROTECTION OF PREGNANT ADDICTS AND DRUG AFFECTED INFANTS IN MUSKEGON COUNTY, MICHIGAN: A MULTI-DISCIPLINARY APPROACH OF PROSECUTION AND TREATMENT* (1991). Among its many defects, omissions and misrepresentations, the "book" does not indicate that both of the prosecutions actually initiated by Tague have been dismissed by Michigan courts as inconsistent with the legislative statutory intent.

mother. After ten months the state finally allowed Aréanis to come home, along with his two older siblings.²⁰

Prosecutions like that of Ms. Hardy raise a congeries of difficult legal, moral and ethical questions, especially by those sensitive to governmental behavior which may be biased against women and minorities. In the interview quoted above, Ms. Hardy herself identified four ways in which these prosecutions may be abusive. First, these addicted women have such diminished capacity for choice that it is inappropriate to criminally prosecute them for the involuntary delivery of drugs to part of their body, their unborn. Second, in addition to being arbitrary and abusive, the effect of these prosecutions on the women and their families, including the infants, is so damaging that it outweighs any societal benefit.²¹ Third, prosecutors' targets may be perniciously chosen based upon the confluence of their race, gender and class.²² And finally, Ms. Hardy alludes to the tendency of prosecutors to expand abusive behavior initially targeted at powerless groups to the relatively more privileged. Abusive practices and accretions of state power legitimized in the context of the war on minority drug users establishes precedents easily extended to the general population.

To appreciate the perception that prosecutors are inappropriately targeting poor, minority, drug-addicted women for prosecution, it is necessary to focus on prosecutors' proactive role in creating this entire category of prosecution. The problem of babies born to drug-addicted women is not new,²³ yet criminal prosecutions of the mothers involved is

20. Memorandum, *supra* note 1. See generally Rimer, *Drugs, Then Bureaucracy, Divide Mother and Children*, N.Y. Times, Jan. 15, 1991, at B1, col. 2 (reporting how society is better at protective separation of drug-addicted mothers from their children than in putting these families back together, even after successful recovery from addiction).

21. These prosecutions are bad policy choices because they give too little weight to the excuse of drug addiction, the effects of addiction, history and current life circumstances on childbearing choices, and the ability of poor and minority addicted women to both provide for themselves and their children. The preferred policy would be to create safe harbors for these distressed women and their families. See Lee, *supra* note 13 (comprehensive, community-based programs offering prenatal care and drug counseling for pregnant mothers have proven successful in practice). See generally M. EDELMAN, *FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE 83-94* (1987) (suggesting that society needs to develop better family support systems); Dolgin, *supra* note 8, at 1215 (suggesting that the disadvantages of coercive intervention in the families of drug-addicted parents often exceed the societal benefits).

22. E.g., Dolgin, *supra* note 8, at 1228; Roberts, *supra* note 2, at 1424. See also Kolata, *supra* note 8, at 13 (reporting that the majority of women who are prosecuted for using drugs while pregnant are members of racial minorities, despite the fact that the problem is just as severe amongst white, middle class women).

23. E.g., Carcaterra, *Mother Hale of Harlem Has Saved 487 Drug-Addicted Babies With an Old Miracle Cure: Love*, PEOPLE, March 5, 1984, at 211.

relatively new.²⁴ And what has changed is not the law but prosecutors' interpretation and enforcement of already extant general statutes.

Prosecutions of drug-addicted mothers generally have *not* been brought under statutes specifically addressed to the problem of drug-addicted mothers and the harm they may cause to their unborn or newly born children. Rather, these prosecutions have been predicated upon novel theories and adaptations of child abuse or neglect statutes, assault/battery statutes, or even drug trafficking statutes.²⁵

And although the courts of last resort in most jurisdictions have not yet been heard from, the developing weight of state court authority rejects these criminal prosecutions of drug-addicted mothers as beyond the legislative intent of general drug prohibition and other statutes.²⁶ Prosecutors appear to be usurping state legislative authority by stretching and distorting drug laws. Whether their recent interpretations of more general statutes are sound, prosecutors and not legislators are the agency now deciding that drug-addicted mothers should be criminally prose-

24. Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1329-30 (1990) [hereinafter Note, *Rethinking (M)otherhood*]. The issue is not whether women can or should be prosecuted for other crimes, such as the sale or possession of contraband drugs. Rather, the issue is whether drug-addicted women should be prosecuted for the separate possible crime of exposure of their unborn children to contraband drugs through the umbilical cord.

25. E.g., Hoffman, *supra* note 11, at 33 (detailing Ms. Hardy's story as typical); Phillips, *Lawyer Says Harshbarger Altered Fetus Case Facts*, Boston Globe, Aug. 14, 1990, at 17, col. 1 (reporting D.A.'s dropping fetal homicide charges); Whitaker, *Protecting Baby From Mom*, N.Y. Newsday, Nov. 6, 1989, at 8 (reporting Florida conviction of 23 year old woman for "delivering cocaine through umbilical cord" to her child); McNamara, *Fetal Endangerment Cases on the Rise*, Boston Globe, Oct. 3, 1989, at 1, col. 2 (stating that prosecution for fetal endangerment is on the rise as a result of the Supreme Court's decision to give states greater power in regulating abortions in *Webster v. Reproductive Health Services Inc.*); Chambers, *Dead Baby's Mother Faces Criminal Charge on Acts in Pregnancy*, N.Y. Times, Oct. 9, 1986, at A22, col. 1 (stating that a pregnant mother was arrested and charged with "failing to provide medical care to the fetus" after taking marijuana and amphetamines while pregnant, and failing to quickly summon medical help when she began to hemorrhage).

26. For example, of the approximately 12 written opinions of the courts which have considered prosecutions for delivering drugs through the umbilical cord, only one intermediate appellate Florida court has upheld the theory. In that case, the only woman on the panel issued a vigorous dissent. See *Johnson v. Florida*, No. 89-1765, slip op. (Fla. Fifth Dist. Ct. App. April 18, 1991) *appeal docketed*. The case is being appealed to the Florida Supreme Court. These 12 opinions do not include cases decided without published opinions. Judicial decision-making without reasoned and public justification is questionable. See, e.g., Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants In the United States Court of Appeals*, 87 MICH. L. REV. 940, 941 (1989) (questioning the care and legitimacy of unpublished decision-making by the courts). For a survey of the longstanding debate on the necessity of written, well reasoned opinions to justify judicial decisions, see P. BREST, PROCESSES OF CONSTITUTIONAL DECISION-MAKING 1086-118 (1975).

cuted. What accounts for this new prosecutorial interest in drug-addicted mothers and their newborns? Prosecutors claim that this flurry of activity is the result of neutral exercises of their discretion. Yet virtually all of the prosecutors' offices have been headed by white males; and the targeted women have been disproportionately poor and minority mothers.²⁷ Does this recent interest reflect genuine concern by white male prosecutors for the welfare of mostly poor, African-American, Hispanic and a few white infants? Or is this new prosecutorial interest undergirded by bias against the newborns' mothers and by less altruistic political and economic motives, such as appealing to majoritarian sentiments to punish crack/cocaine mothers for burdening society with their special needs children?²⁸

The answer to these questions may depend upon whether one views social phenomena from the top of society or from the bottom.²⁹ In this

27. See Paltrow & Shende, State by State Case Summary of Criminal Prosecutions against Pregnant Women and Appendix of Public Health and Public Interest Groups Opposed to These Prosecutions (ACLU Reproductive Freedom Project Memorandum) (May 21, 1991) (on file with author) (indicating that of the 55 defendants as of May 21, 1991, whose racial/ethnic background is known, thirty-two are African-American, twelve are white, two are Latina, and one is Native American).

28. The impression that these prosecutions may be biased is supported by prosecutors' selection of crack users, who in the media's camera are mostly minorities, as the target defendants, and their failure to prosecute women for the harms caused by other drugs, most especially alcohol. If the rationale behind these prosecutions is to punish and deter drug-induced harm to the unborn, then there should have been prosecutions of women for the well documented harms caused by fetal alcohol syndrome (f.a.s.). See Note, *Rethinking (M)otherhood*, *supra* note 24, at 1210. F.a.s. permanently and severely damages over 8,000 children a year according to conservative estimates. Rosenthal, *When a Pregnant Woman Drinks*, N.Y. Times, Feb. 4, 1990, § 6 (Magazine), at 30. If long-term harm to children was the triggering event, this would present the unlikely image of affluent pregnant white women being subject to arrest at their country clubs or in the suburban home of a friend for having a drink. Poor black women just do not see this ever happening no matter what the harm to the unborn. And nuanced distinctions, such as the fact that it is generally only a misdemeanor to deliver alcohol to a minor, just don't wash that well in the ghetto or barrio. In fact, pregnant women who drink may be little comforted by the current prosecutions; for prosecutors could decide that to show evenhandedness they were going to arrest and prosecute pregnant white women drinking in public restaurants or at country clubs.

29. Some at the bottom see coincidence, fairness and neutral process (whether judicial or explicitly political) differently than some at the top. See Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324, *passim* (1987) (suggesting that experiencing discrimination and feeling the falsity of the liberal American promise creates a special voice). Those of us who experience America from within the veil of color often perceive racist speech and stereotyping that goes unnoticed by whites; but which, nevertheless, impacts upon both our experience and the ways others experience us. Lawrence, *supra* note **, at 435. Racist speech and stereotyping is a significant determinant of both who we are and can be within the academy, the courtroom and beyond. Moreover, many at the bottom are not convinced that the phenomena of racial disparities in America are the result of minority preferences, merit or neutral qualifications. *Compare* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 500-04 (1989) (rejecting claims that general societal discrimination in an industry plus gross disparity between the general minority pop-

area, as in others, some perceive traditional biases with respect to gender,³⁰ race and class³¹ as having again combined to oppress those at the bottom differently from those at the top.³² To the extent these prosecu-

ulation and minority firms employed by the city as qualified prime contractors were enough to use racial quotas with *id.* at 532 (Marshall, J., dissenting) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 477-78 (1980)) (stating that minority construction contractors had long been denied "participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination" and thus neutral qualifications merely incorporated past bias). From down under it appears that what one has and what one gets in America is substantially the result of a rigged game and not the neutral workings of a fundamentally sound system. Whether women get prosecuted, and if so which ones, seems to have as much to do with gender, class and race as it does with whatever harm these mothers are causing, relative to societal and other harms to children which go unprosecuted and unremedied. Kolata, *supra* note 8, at A13, col. 1. Prosecuting addicted mothers may be just more American injustice.

30. See, e.g., Roberts, *supra* note 2, at 1424.

31. See, e.g., Quindlen, *Kids In Cars*, N.Y. Times, Jan. 6, 1991, § 4, at 19, col. 1 (reporting prosecution for vehicular homicide of poor Hispanic man for not using child restraint safety seat while transporting his sick daughter and suggesting race/cultural bias); Resnick, *Car Seat Trial Ends, Leaving A Legal Void*, Nat'l L.J., May 20, 1991, at 8 (reporting the dismissal of vehicular homicide charges against Ramiro de Jesus Rodriguez); *Unbelted Girl Dies; Father Charged in Crash*, N.Y. Times, Jan. 10, 1991, at A20, col. 1 (reporting similar prosecution of Angelo Sergi in Pennsylvania).

32. There are at least two ways in which women at the top are treated differently. First, the likelihood that women will be reported to authorities by health care professionals depends in part upon their race and class. According to one study despite slightly *more* frequent drug use among white pregnant women than among minority women (15.4% to 14.1%, respectively) there was evidence that minority women were *ten times* more likely than white women to be reported to state officials for positive drug tests at the time of birth of their children than drug abusing white women, including evidence of alcohol toxic syndrome. See Chasnoff, Landress & Barrett, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 N. ENG. J. MED. 1202 (1990). In addition, better informed affluent women can create options for themselves which avoid—or at least minimize—the risk of detection and reporting by leaving jurisdictions where prosecution is likely before delivering their babies. Thus, whether a woman is criminally prosecuted may depend less on her behavior and more on whether she is black and treated at the local clinic rather than treated at the Betty Ford Clinic. Similar arguments are made against state determination of the legality of abortion rights; it reduces the abortion option only for the immobile poor. E.g., L. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 50-51 (1990) (describing travel option of affluent women seeking abortions).

The second reason why more affluent white women are not prosecuted as often is the focus of this article. As with drug investigations generally, the police and prosecutors tend to look for wrongdoing mostly in minority communities. They look on street corners, not in office buildings, for drug dealing. Cf. Barbieri, *Davis Polk Drug Case Over?*, *Manhattan Lawyer*, Oct. 20, 1987, at 7 (reporting how Davis Polk & Wardwell hired a private investigator to handle its in-house drug problem). This skews both the perception and reality of police and prosecutorial efforts. For example, there appears to be little effort by prosecutors to encourage or force private health care providers to test and report affluent (mostly white) women for the harm caused to their unborn or newly born by alcoholism, cocaine addiction or other prenatal toxins. While this author would not support such efforts, if prosecutors were really serious about uniformly enforcing the law, they could use the same undercover tactics so frequently employed in minority communities to infiltrate private medical care facilities and collect evidence of affluent patient drug use and willful or systemic failures in testing and reporting. Prosecutors seem to feel that the problem of crack and heroine addicted poor mothers

tions are based upon the pernicious—albeit in the case of some prosecutors unconscious and unintentional—influences of gender, race and class, these prosecutions of drug-addicted women are paradigms in two senses. First, these prosecutions illustrate the general dangers of prosecutors having too much discretion and too little accountability.³³ In this aspect, the problem of the prosecution of drug-addicted mothers is illustrative of the general dilemma of how to limit, structure and check even necessary prosecutorial discretion.³⁴ Second, there are unique problems arising from the possible sexism, racism, and classism in these exercises of prosecutorial discretion.³⁵ This article shall assay these various concerns and advance reforms to improve the quality of prosecutorial justice and our knowledge about how prosecutors are actually executing their office.

B. *The General Need to Check Prosecutorial Discretion*

*We have to open our eyes to the reality that justice to individual parties is administered more outside courts than in them, and we have to penetrate the . . . areas of discretionary determinations by police and prosecutors . . . where huge concentrations of injustice invite drastic reforms.*³⁶

There are many, many crimes on the books. Indeed, social behavior has been grossly overcriminalized.³⁷ There are more crimes on the books

demand intervention with criminal investigations and sanctions, while behavior which similarly harms the children of the affluent, whether from crack, cocaine, alcohol or other harmful drugs, is appropriately treated as a private medical matter. Because this discrimination is in part hidden by prosecutorial discretion, there has been no public debate on the policy choices being made by prosecutors. Similar perceptions and problems arise where the targets are poor minority males. See Greene, *Drug Decriminalization: A Chorus in Need of Masterrap's Voice*, 18 HOFSTRA L. REV. 457, nn.62 & 65 (1990) (reporting perception that the "war on drugs" is a war on minority males).

33. This article is not primarily concerned with whether being addicted and pregnant can be a crime consistent with the Constitution. This article assumes *arguendo* that prosecutors have or could be provided by legislatures specific and constitutional statutory authorization to prosecute women because they ingest illegal substances during pregnancy. The problem focused upon in this article is whether the current lack of constraints on prosecutorial discretion creates excessive potential for abusive and pernicious decision-making.

34. Any discretion not necessary to the prosecutorial function should be eliminated by the legislature. Prosecutors should have no more power than is necessary. See, e.g., K.C. DAVIS, DISCRETIONARY JUSTICE 53-96, *passim* (1969).

35. Prosecutorial discretion may have long been exercised against women because of their class standing. See, e.g., F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 5-6 (1964) (describing the practice of prosecuting prospective mothers for extramarital sexual relations when they are without the financial resources to pay for the medical expenses of childbirth or subsequent care of children). In this particular area, the perception is that racial bias is operating. E.g., Roberts, *supra* note 2, at 1432; Kolata, *supra* note 8.

36. K.C. DAVIS, *supra* note 34, at 215.

37. See LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533-39 (1970). Like the horribly destructive consequences which can follow prosecution of drug-ad-

than there are police, prosecutors, judges and jails available to enforce them.³⁸ And even if there were adequate resources available, the application and administrative interpretation of these laws is at least as important as their enactment or judicial interpretation.³⁹ Additionally, some state agent must assay whether there is sufficient evidence to go forward. Thus some governmental process and decisionmakers must decide which behavior will be subjected to criminal process.⁴⁰

This composite is what former New York Chief Judge Breitel phrased the "power to consider all circumstances and then determine what legal action is to be taken."⁴¹ Enter discretionary criminal law enforcement, the "inescapable responsibility for exercising discretion."⁴² While the sage observations of Chief Judge Breitel, himself a former prosecutor, are sound, it does not follow that this "inescapable responsibility" of the prosecutor need be given carte blanche. Prosecutors' roles in the criminal justice system are far too pivotal as the gatekeeper to the American courthouses and the primary architects of criminal law enforcement policy to allow inadequate information and review to continue.⁴³

dicted mothers, a tragic West Virginia case illustrates the potential harm caused by overreliance on criminal sanctions to solve intimate human problems. In this case a man was prosecuted for his attempt to commit suicide and sentenced to six months in jail. While in jail he killed himself. *Man Hangs Self in Jail Cell*, Wash. Times, Feb. 4, 1991, at A6. As with the prosecution of drug-addicted pregnant women, this prosecutor used the crude club of criminal law enforcement in an attempt to coerce compliance and deter human despair. What was needed was not criminal sanctions but the healing, reconstitutive salve of human love, caring and support—the resurrection of hope. The moral crime committed was the prosecution, not the attempted suicide.

38. *E.g.*, Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1525, 1548 (1981).

39. *Id.* at 1521 n.1 ("The Law is written by legislators, interpreted occasionally by appellate courts, but applied by countless individuals, each acting largely for himself. How it is applied outweighs in importance its enactment or its interpretation.") (quoting Baker, *The Prosecutor - Initiation of Prosecution*, 23 J. CRIM. L. & CRIMINOLOGY 770, 796 (1933)).

40. Prosecution for crime was not always the responsibility of a public official. In England, even during the colonial period, prosecutions were regularly the responsibility of the private party aggrieved by the alleged criminal behavior. *See, e.g.*, J. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 3 (1980); W. SEYMOUR, *UNITED STATES ATTORNEY: AN INSIDE VIEW OF "JUSTICE" IN AMERICA UNDER THE NIXON ADMINISTRATION* 20 (1975).

41. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 427 (1960).

42. *Id.* at 432.

43. Similarly, the discretion of police need not be given carte blanche. Exercises of police discretion play a critical threshold role in deciding which crimes are to be prosecuted. K.C. DAVIS, *supra* note 34, at 84-90; Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L. J. 543, 556-557 (1960). And the potential abuses inherent in police discretion are exacerbated when race is a factor in their decision-making. *E.g.*, Note, *Developments in the Law; Race and the Criminal Process: Race and the Prosecutor's Charging Decision*, 101 HARV. L. REV. 1520, 1521 (1988) [hereinafter *Developments in the Law -*

At the threshold, if the prosecutor's office refuses to prosecute cases of a particular type, the police are effectively blocked from proceeding beyond arrest into the courtroom.⁴⁴ Moreover, in many areas, including the prosecution of pregnant drug addicts, it is the prosecutor who suggests the direction of investigative inquiry⁴⁵ and the collection of the data on which criminal prosecution is predicated⁴⁶ for the police and other possible reporters.⁴⁷ Determining which crimes get prosecuted is not nearly

Race and the Prosecutor's Charging Decision]; Note, *Program Budgeting for Police Departments*, 76 YALE L.J. 822, 823, 827-88 (1967). Yet with respect to crimes that do not call for immediate police responses, such as non-street crimes, prosecutors can be the principal architects of the focus of criminal law enforcement. See, e.g., Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision-Making*, 13 AM. CRIM. L. REV. 473, 476-78 (1976) (stating that prosecutors, as the most powerful figures in criminal administration, have the freedom to choose which criminal code violations to prosecute although technically their duty is to pursue all violations of the criminal code. This freedom is viewed as "uncontrolled" decision-making).

44. Cf. *Manhattan Neighborhoods*, *Newsday*, Feb. 13, 1991, at 23 (reporting Manhattan District Attorney's refusal to prosecute bystander case where police selected African-American man out of more than 150 predominantly white bystanders). This refusal by the District Attorney is both office policy and consistent with a federal court order barring bystander arrests. See Pitt, *Lawyers Say Officers Ignore Order on Bystanders*, N.Y. Times, Sep. 28, 1990, at B1, col. 2; Pitt, *Police Reinstate Rules on Bystander Arrests*, N.Y. Times, Oct. 7, 1990, at 46, col. 1 (reporting that the New York City Police department reissued guidelines on the legal rights of bystanders peacefully criticizing police operations).

45. In Ms. Hardy's case, the prosecutor received information from an area hospital that Hardy's newborn tested positive for cocaine. There is no indication that all newborns were tested and if tested, reported. Hoffman, *supra* note 11, at 35, 44.

46. In the area of prosecuting drug-addicted mothers, the medical and scientific research and publication communities bear some responsibility for bias in the underlying data and, consequently, for prosecutorial and public misperceptions. First, funding and publishing decisions are prejudiced against research intended to show there may be no demonstrable adverse effects of cocaine during pregnancy. The scientific community and its mainstream publishers have decided *a priori* that only those studies which affirm their prejudices should be funded and published. See, e.g., *Bias Against the Null Hypothesis: The Reproductive Hazards of Cocaine*, THE LANCET 1440 (1989). Second, in medical research there is a bias against including women and minorities in studies for fear they might distort the "normal," meaning white male, result. Kolata, *In Medical Research Equal Opportunity Doesn't Always Apply*, N.Y. Times, March 10, 1991, § 4, at 16, col. 1 (reporting on the exclusion of women and minorities from medical research studies, including heart research). See C. CLINTON, *THE OTHER CIVIL WAR: AMERICAN WOMEN IN THE NINETEENTH CENTURY* 150-52 (1984) (noting that the entire structure of medicine is biased because it treats women as special, gynecological, and male as normal). Yet notably this ordinary bias against including women and minorities is reversed in the area of illegal drug use where the research samples are structured to include disproportionate numbers of minority women. See Chasnoff, *supra* note 32. Gender and race-based stereotyping may account for this reversal. To the medical research establishment, poor colored women may be natural subjects for research on illegal drug use.

47. The concept is borrowed from statutes requiring the reporting of child abuse. E.g., CAL. PEN. CODE § 11166(a) (West 1991) (stating that certain persons who know or reasonably suspect a child to have been the victim of child abuse shall report the child abuse instance to the proper authorities); N.Y. SOC. SERV. LAW § 413 (McKinney 1990).

as reactive a process as some prosecutors would have the public believe.⁴⁸ Prosecutors are proactive gatekeepers to the courts and jails and important determinants in law enforcement because they choose courses of action or inaction.⁴⁹

As identified by Davis,⁵⁰ there are three sources of a prosecutor's discretionary power: (1) purposeful legislative delegations, (2) vague statutory terms which administrators must define, and (3) public acquiescence in administrative assumption of ungranted power. The third category identified by Davis is the greatest source of potential abuse since it amounts to the unbridled and unchecked power to decide whether to investigate and then to prosecute x over y, when both could be investigated and prosecuted. However, the first two categories are sources of potential abuse as well.

The first source of prosecutorial discretion is where the legislature purposefully delegates discretion to prosecutors. This may be done for many reasons, the most common being (a) the legislature does not have the time or competence to set forth the rules or administrative regulations in every area required and (b) the legislature may not have the political will or ability to precisely define the contours for administering or allocating resources within the criminal justice system.⁵¹ Illustrative

48. See, e.g., Anderson, *Thornburgh on the Record*, A.B.A. J., Jan. 1991, at 56 (reporting Attorney General Thornburgh's comments to the effect that the government did not prejudicially select former Mayor Marion Barry of Washington, D.C. for prosecution because the government enforces the law whenever it has been violated). There may have been good, non-political, non-racially biased reasons for prosecuting Mayor Barry; but it is sheer duplicity to suggest that he was not targeted for investigation and prosecution as an exercise of prosecutorial discretion.

49. K.C. DAVIS, *supra* note 34, at 4.

50. Davis's essay remains the best treatment of prosecutorial discretion. However, it suffers from some substantial defects which are only touched upon here. See, e.g., Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 275-76 (1977) (disputing Davis's claim that certain European controls on prosecutorial discretion are effective). But see Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1564 (1978).

First, it is questionable to what extent lessons from administrative law are applicable to criminal proceedings. Even lessons drawn from the criminal enforcement of I.R.S., S.E.C., antitrust, and labor laws may not transplant well to non-business areas. Second, Davis assumes the primary problem with prosecutorial discretion is the denial of individual justice. While this may be a primary problem, certainly the view from the bottom is that biases based on group characteristics, such as gender, class and race, are also candidates for primacy. Compare Vorenberg, *supra* note 38, at 1555 (suggesting that group-based biases are among the most pernicious potential dangers of unbridled prosecutorial discretion). Davis also misunderstands the view from the bottom when he misconstrues civil disobedience by civil rights groups. K.C. DAVIS, *supra* note 34, at 28 (suggesting that such groups would oppose the statement that "the rule of law is preferable to that of any individual").

51. The government has been held to have discretionary power to proceed against only "major"

of (a) might be broadly phrased child abuse statutes where the potentially offensive behavior might be best left to the enforcing authorities to resolve, subject to constraining due process judicial review for adequate notice.⁵² Illustrative of (b) might be the legislative inability to prune the criminal code to eliminate those crimes for which there is no longer the public will to enforce. Adultery and possibly marijuana possession may fall into these categories.⁵³

The second source of prosecutorial discretion may arise from intentional vagueness necessary to obtain passage of the law,⁵⁴ or inability to wisely anticipate the various criminal circumstances to be encountered with sufficient particularity and clairvoyance to do justice. As to both of these sources of prosecutorial discretion, greater legislative clarity may generally be a false hope since prosecutors must give meaning to somewhat vague statutes through application to actual facts. Legislatures could end these prosecutions by clearly stating that such prosecutions are not authorized. Yet in the political environment of the "war on drugs" this would not appear likely without a clear factual case against such prosecutions having been made. Building such factual cases is one possible project for the Boards, suggested in Part IV.

The third source of prosecutorial discretion is the power to be selective.⁵⁵ Federal or state prosecutors are virtually never compelled by common law or statute to prosecute any particular instance of criminal

violators where there were insufficient resources to proceed against all violators. *Moog Industries v. FTC*, 355 U.S. 411 (1958).

52. See, e.g., *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939) (reversing conviction under statute which criminalized being a "gangster").

53. The difficulty in decriminalizing anything was recently illustrated in Connecticut where adultery was decriminalized only after it was realized that prosecutorial discretion rendered the law null except in cases where the adultery statute was used by vindictive spouses. Johnson, *Bill to Void Adultery Laws to Go to Weicker*, N.Y. Times, April 4, 1991, at B7, col. 1.

54. K.C. DAVIS, *supra* note 34, at 49.

55. The power to be selective, the screening power, was eloquently discussed by Justice Jackson when he was Attorney General. He said:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. . . . He may dismiss the case before trial, in which case the defense never has a chance to be heard. . . . If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. . . . [A] prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. . . . It is in this realm - in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects *some group of unpopular* persons and then looks for an offense, that the greatest danger of abuse of prosecution power lies.

K.C. DAVIS, *supra* note 34, at 190 (citing 24 J. AMER. JUD. SOC. 18-19 (1940) (emphasis added).

behavior.⁵⁶ Generally speaking, prosecutors may exercise individual will in deciding which cases to bring before magistrates, or grand or petit juries.⁵⁷ As with virtually any other discretionary governmental act, such power can be abused and thus should be and is to some extent subject to checks on the abusive, arbitrary and possibly unconstitutional exercise of that power.⁵⁸ The need to limit discretion is the primary concern of this article. Prosecutorial discretion is troublesome both because of its generally unconstrained nature and because minority and gendered voices are underrepresented in the policy making of prosecutors' offices.

Ordinarily, prosecutorial decision-making, entailing some or all three of these varieties of discretion, proceeds through several precharging phases, each of which can contribute to the scope of prosecutorial discretion and the potential for prosecutorial abuse: interpretation of the law, determining the sufficiency of the evidence, and deciding which charges should be brought.

(1) *Interpretation.* Prosecutors must first interpret law, for if prosecutors conclude that a law does not apply to a fact pattern, no matter what the police or other investigators conclude, the case will never get to court. Only those cases the prosecutor concludes fall within a criminal prohibition ever make it further in the criminal process. And usually, it is not until the case gets to court that there is any effective check on the prosecutor's interpretation of law. As stated earlier, there remains a substantial question as to whether prosecutors are properly interpreting and

56. This source of prosecutorial discretion is the focus of much of Davis's critique and his suggested "reform" to a more Germanic system. K.C. DAVIS, *supra* note 34, at 191-195. Commentary on Davis's proposal has both disputed the accuracy of his reporting and interpretation of the German system and questioned whether it would be a sensible reform here. See Goldstein & Marcus, *supra* note 50.

57. This is not to say that within a particular prosecutor's office each individual who is a prosecutor has unfettered discretion. In large offices, and particularly in the federal system, individual assistants are at least theoretically supposed to operate within policy guidelines. However, most prosecutors' offices are small, see J. EISENSTEIN, COUNSEL FOR THE UNITED STATES 4-8 (1978). Even in large organizations, the degree of individual discretion can be immense. Moreover, in larger organizations, the head prosecuting attorney has tremendous discretion to exercise (usually) his (not her) will to prosecute whatever cases he chooses. Once formal charges have been brought, frequently the prosecutor is no longer free to decide not to prosecute without the permission of the court. In the federal system, for example, once there has been a grand jury indictment, the prosecutor must then petition the court to allow a *nolle prosequi*. FED. R. CRIM. P. 48(a); e.g., *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977); *United States v. Salinas*, 693 F.2d 348, 351-52 (5th Cir. 1982).

58. See K.C. DAVIS, *supra* note 34, at 80-96. The current constraints on prosecutorial discretion are discussed below.

applying the statutes under which drug-addicted mothers are being prosecuted.⁵⁹

(2) *Sufficiency of Evidence.* While prosecutors are ethically obligated not to bring cases which they know are not supported by probable cause,⁶⁰ this still leaves much latitude for prosecutorial discretion.⁶¹ There is no requirement, for example, that prosecutors believe that there is sufficient evidence to convict someone before charging them with a crime.⁶² And the gap between probable cause and proof beyond a reasonable doubt can be wide indeed.⁶³ The determination of whether to go forward with a criminal case based on the available evidence is largely a function of prosecutorial discretion, here meaning, the judgment call on whether the case is winnable before a fact finder, jury or judge.⁶⁴ Factors of race and class can greatly influence this determination because in America the amount of evidence required to convict can depend on the

59. See *supra* notes 21, 22, 25, 26 and accompanying text.

60. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1980). A finding of probable cause requires a determination both that the law can be applied to the facts and that there is sufficient evidence the defendant probably committed the crime.

61. See generally Vorenberg, *supra* note 38, at 1547-48 (implying that prosecutorial discretion is not only based on the evidence presented but also entails the likelihood of successful conviction and whether possible conviction is worth the resources required).

62. The ABA Standards do state that "[a] prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction." STANDARDS FOR CRIMINAL JUSTICE Standard 3-3.9(a) (1986). The application of these standards is not entirely clear. For example, surely the Standards do not intend to suggest that it is improper for a prosecutor to permit the pendency of criminal charges while the process of collecting evidence is properly ongoing. This is precisely what goes on in the typical case where arrest is the triggering event for a prosecution. Thus the ABA Standard must mean that the prosecutor cannot permit continued prosecution where the prosecutor knows, or should have known, of the absence of sufficient admissible evidence. In any event, there may be no sanction for violating these standards. M. FREEDMAN, UNDERSTANDING LAWYER'S ETHICS 222 (1990) (concluding that there are no penalties for prosecutors who violate the ABA standards).

63. Rudolph Giuliani, the former United States Attorney, has discovered it is much easier to indict Bess Meyerson, Imelda Marcos and others than it is to convict them. Roberts, *Giuliani Defends Past in Assessing Political Future*, N.Y. Times, Aug. 12, 1991, at B1, col. 1.

64. See generally Kaplan, *The Prosecutorial Discretion - A Comment*, 60 NW. U.L. REV. 174, 176-180 (1965) (noting that the prosecution of criminal cases would almost never be commenced unless the chances of conviction seemed better than fair). In theory, either a judicial officer or a grand jury reviews evidence to assure that there is sufficient basis for the probable cause determination. And while there is some debate within legal communities as to the efficiency and efficacy of the grand jury or preliminary hearing as checks on prosecutorial discretion, they can be effective only if defendants have meaningful access to counsel to prepare their cases before the grand jury or preliminary hearing judge. Such counsel is not likely to be available for poor, minority, drug-addicted women.

defendant's race and class.⁶⁵ Given that sufficiency of the evidence, above the minimum required by law, is a question of what is enough to get a local jury to convict, in areas like the prosecution of drug-addicted women the likely demographics of the jury could affect which cases get prosecuted. To the extent that prosecutors and juries believe that poor and minority women are more likely to be abusive mothers than are affluent white women, poor and minority women are likely to be prosecuted and convicted on less evidence. This is an unfair systemic bias.

(3) *Which Charges, if Any, for Which Persons - Tailoring the Criminal Justice System.* Often there are a range of charges which potentially could be brought against a defendant. For example, with pregnant drug addicts, the prosecutor might be able to charge a woman with drug possession,⁶⁶ distribution,⁶⁷ and/or abuse and neglect of the unborn or newly born child.⁶⁸ The prosecutor's power is very much the power to decide which charges, if any, to bring.⁶⁹ For example, in those states

65. *Id.* at 184-85 (suggesting that less proof of criminal conduct was necessary in narcotics cases where defendants were persons from lower socio-economic classes).

66. *Green v. State*, 260 Ga. 625, 398 S.E.2d 360 (1990) (holding that although no contraband was found on accused, evidence of cocaine metabolites in urine analysis was sufficient evidence of drug possession), *cert. denied*, 111 S.Ct. 2059 (1991). *Cf. York, Documents Detail Case Against Barry: A Dozen Ready to Testify They Saw Drug Use, Court Papers Say*, Wash. Post, May 8, 1990, at A1, col. 2 (reporting that prosecutors would use chemical analysis of Washington Mayor Marion Barry's hair as evidence to demonstrate repeated cocaine use by the mayor).

67. *See supra* note 26.

68. *See supra* note 25.

69. In the federal system, with its recent sentencing "reform" limiting the discretion of judges, the power of prosecutors theoretically has been increased. Today, the power to charge may be far more determinative of the ultimate sentence than it was under the prior system. S. SHANE-DUBOW, A. BROWN & E. OLSEN, *SENTENCING REFORM IN THE UNITED STATES 10-11* (1985) (arguing that judicial discretion at the sentencing stages has virtually been replaced by unfettered prosecutorial discretion at the charging stage); *Developments in the Law - Race and the Prosecutor's Charging Decision*, *supra* note 43, at 1521 (arguing that prosecutorial discretion in the charging phase is virtually unchecked and that there is room for racial bias to enter the decision-making process); Note, *Developments in the Law; Race and the Criminal Process: Race and Noncapital Sentencing*, 101 HARV. L. REV. 1626, 1640-41 (1988) (arguing that the federal sentencing guidelines' presumptive determinate sentencing method has in effect replaced judicial discretion at the sentencing stages with unfettered prosecutorial discretion in their charging decisions). Prosecutors are not externally accountable for these exercises of discretion. Yet this critique is tempered by: 1) the non-litigable policy of the Department of Justice, which predates the sentencing guidelines, of requiring government attorneys to charge the defendant with the most serious crime consistent with conduct that is likely to result in a sustainable conviction, and 2) the current requirement that minimum charges filed not drop below that which would allow imposition of the guideline sentence after a conviction. UNITED STATES DEPT. OF JUSTICE, *PRINCIPLES OF FEDERAL PROSECUTION 16* (1980). The point would still remain that, should the executive choose not to limit itself, as many state prosecutors have not, no other body is in a position to even report the use of discretion to the public for evaluation.

which enhance penalties for criminals with prior records, the prosecutor must generally decide whether to charge a person with a prior felony record as a predicate felon.⁷⁰

A prosecutor, faced with a range of potential charges, and perhaps the decision of whether to charge someone as a predicate felon, must decide if the particular prosecution will do more harm to the individual than good for society. For example, in one case it might be argued that labelling a pregnant woman a criminal might hurt her, her offspring and society more than allowing other social support and punitive mechanisms to come into play. Thus the prosecutor might not want to prosecute a pregnant drug-addicted doctor because such a prosecution might ruin her career, reduce the child's chances for as good a life as possible and increase the burden on society with very little offsetting deterrent effect.⁷¹ On the other hand, from the prosecutor's perspective, how else can he deter poor black women other than by sending them to jail? In making these decisions the difference between rich and poor, well connected or not, along with prosecutorial bias, can be crucial.

The availability of prosecutorial justice is frequently determined by the resources available to the potential target. For instance, "white collar" suspects frequently learn of potential prosecution in advance through witnesses who have been interviewed or subpoenaed, like their private medical doctor or health care facility. These suspects then hire well-paid criminal defense lawyers with social, political and professional access to the prosecutor's office to argue at case screening conferences against instituting criminal charges or to lessen the seriousness of the crimes to be charged.⁷²

70. N.Y. PENAL LAW § 70.10 (McKinney 1978); TEX. PENAL CODE ANN. § 12.42 (Vernon 1974); Vorenberg, *supra* note 38, at 1529.

71. Female medical doctors or residents who spend long hours on their feet are at a higher risk of having low birth weight, premature babies. Miller, Katz & Cefalo, *Pregnancies Among Physicians: A Historical Cohort Study*, 34 J. REPROD. MED. 790 (1989). In effect, these doctors run some of the same significant risks in having babies, as do women who have not received adequate prenatal care and pregnant drug-addicted women. If the prenatal behavior of drug-addicted mothers can be subject to state control through criminal sanctions, could these pregnant doctors also be subject to some state control because of the effects of their behavior on their unborn? If the answer to this question is of course not, then why treat the potentially harmful behavior of one group differently from that of the other? If the trigger which justifies state intervention and control is the potential harm to the unborn, the justification should apply equally to both groups.

72. This is an area where access to well-connected legal counsel prior to formal charges being filed either in court or through a grand jury can be critical. See J. EISENSTEIN, *supra* note 57, at 171-78 (suggesting that the reputation and influential status of certain private attorneys may be of great significance in the revealing of evidence by the prosecutor before trial); cf. W. SEYMOUR, *supra* note 40, at 60.

Typically, there is no record made of these conferences, nor is there any public disclosure of the content of the meeting or a written memorandum reflecting the reason for exercising prosecutorial discretion. The potential for pernicious, albeit at times unconscious, discrimination in making the decision whether to prosecute is obvious and substantial. In the aggregate, these kinds of contacts can skew the impact of prosecutorial discretion away from the privileged and towards the socially, politically and economically disadvantaged, as is the case with drug-addicted women being prosecuted.

At a more formal level, often after making a rather preliminary assessment of the potential charges which could be brought against someone and the evidence which might support such charges, a prosecutor has the option to initiate but then discontinue prosecution, usually on condition that the defendant not engage in any criminal conduct for some period of time. Here again access to effective advocacy can be crucial.

In such situations, prosecutors have the option to stop the criminal process at the door to the courthouse even where there is sufficient evidence to convict. Typically such declinations or diversions are invoked for first time or minor violators where it is determined by the prosecutor that some alternative to prosecution will better serve the defendant and society. In the federal system these programs are typically referred to as deferred prosecutions⁷³ and under some state law, as adjournment in contemplation of dismissal.⁷⁴ In either case, there is substantial discretion whether to provide this option to a defendant and again, the unchecked potential for pernicious abuse is currently hidden from any public scrutiny. If there are less dollars than would be required to prosecute all of the potential violations coming to the prosecutor's attention, then the prosecutor must decide to which cases limited law enforcement resources will be allocated.⁷⁵ Given scarce resources and no guidance from the legislature or courts, prosecutors will establish priorities consistent with their own agendas.⁷⁶ And even though politics,⁷⁷ race, gender

73. *United States v. Lockwood*, 382 F. Supp. 1111, 1114 (E.D.N.Y. 1974).

74. N.Y. CRIM. PROC. LAW § 170.55 (McKinney 1982).

75. *E.g.*, Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 247 (1980); Vorenberg, *supra* note 38, at 1548-49.

76. W. SEYMOUR, *supra* note 40, at 58-59; Vorenberg, *supra* note 38, at 1548-49 (suggesting that most prosecutorial resource allocative decisions are the result of a haphazard process).

77. Under the ABA "the prosecutor should give no weight to personal or political advantages or disadvantages which might be involved or to a desire to enhance his [or her] record of conviction." STANDARD FOR CRIMINAL JUSTICE Standard 3-3.9(c)(1986). *But see* J. EISENSTEIN, *supra* note 57, at 152-53 (stating that prosecutors seek high rates of conviction to enhance their credibility and

or class should not enter into this decision-making process, if it does, and the prosecutor is not aware of his racism or gender bias,⁷⁸ then these factors contribute to abuse.⁷⁹ Assuming that the executive function of prosecutors has all of these potential sources of abuse, what are the constraints on prosecutorial discretion? This is the subject of Part II.

II. LIMITING THE SCOPE OF PROSECUTORIAL DISCRETION

*[T]he idea that a prosecuting attorney should be permitted to use his discretion concerning the law which he will enforce and those which he will disregard [should appear] to the ordinary citizen to border on anarchy.*⁸⁰

Two views on the scope of prosecutorial discretion are rivals: (a) there are attractive rationales for retaining broad prosecutorial discretionary power, versus (b) current constraints on prosecutorial discretion are anemic, particularly with respect to real and perceived gender, class and race biases.

A. *Attempts to Justify the Status Quo: Should Prosecutorial Discretion Be So Unconstrained?*

Attempts to justify the extent of unconstrained prosecutorial discretion have been predicated upon three related rationales: first, separation of powers; second, prosecutorial expertise; and third, efficiency concerns with respect to the criminal justice process. All of these have been discussed elsewhere and so only a cursory discussion will be undertaken here.⁸¹

One of the clearest rationalizations for the judiciary's refusal to compel prosecutions was offered by the late District Judge Lloyd Mac-

reputation and to appease pressure usually exerted by the local legislature and judiciary); Destefano & Moses, *Rudy Giuliani At A Turning Point*, *Newsday*, Jan. 29, 1989, (Magazine), at 8 (reporting that former U.S. attorney, Rudy Giuliani, often prosecuted cases because of their perceived press or political value).

78. Cf. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (stating that a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation).

79. The potential for abusive prosecutorial discretion arises in other areas as well. For example, bail recommendations and plea negotiations and terms are greatly impacted upon by discretionary prosecutorial decisions. See Vorenberg, *supra* note 38, at 1533-34 (on plea negotiations). These other very significant aspects of potential prosecutorial injustice are not discussed here because with respect to drug-addicted women and many other potential defendants, the most critical issue is whether prosecutions should be initiated at all and not what the ultimate disposition of cases should be.

80. Arnold, *Law Enforcement: An Attempt at Social Dissection*, 42 YALE L.J. 1, 7 (1932).

81. K.C. DAVIS, *supra* note 34; *Developments in Law - Race and the Prosecutor's Charging Decision*, *supra* note 43; Vorenberg, *supra* note 38.

Mahon. He relied upon a rather simplistic version of the separation of powers doctrine:

[I]t is not the business of the Courts to tell the [prosecutor] to perform what [the courts] conceive to be his duties. Article II, Section 3 of the Constitution, provides that 'the President shall take Care the Laws shall be faithfully executed.' The prerogative of enforcing the criminal law was vested by the Constitution, therefore, not in the Courts, nor in private citizens, but squarely in the executive arm of government. [This Presidential power was legislatively conferred on the United States Attorney.] *The federal courts are powerless to interfere with his discretionary power.* The Court cannot compel him to prosecute . . . whatever his reason is for not acting.⁸²

Yet even accepting for the sake of argument that this is a sound doctrinal view of separation of powers,⁸³ it does not justify the current acquiescence to prosecutorial discretion. While prosecutorial function requires some discretion, courts should not permit prosecutors any more discretion than is necessary.⁸⁴ Moreover, while the separation of powers doctrine prevents the courts from compelling prosecutors to act, it does not prevent courts from intervening when prosecutors act unequally, as with racially motivated actions.⁸⁵

As part of the prosecutor's unique executive function, some have argued that there is a need for confidentiality which should preclude public oversight and judicial or legislative review. The need for confidentiality, however, is not a sufficient reason to prevent review of prosecutorial discretion. In reviewing prosecutorial action, there is rarely a need to reveal details of specific cases to the public. Any review of individual

82. *Pugach v. Klein*, 193 F. Supp. 630, 634 (S.D.N.Y. 1961) (MacMahon, J.) (emphasis supplied). *Accord* *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973); *Peek v. Mitchell*, 419 F.2d 575 (6th Cir. 1970). *Cf.* *Leeke v. Timmerman*, 454 U.S. 83, 85-87 (1981) (per curiam) (holding over dissent that private citizens and jailed inmates lack judicially cognizable interests in whether prison guards are prosecuted for criminal civil rights violations for beating the plaintiff inmates). *Compare* *Becker, Judicial Scrutiny of Prosecutorial Discretion in the Decision Not to File a Complaint*, 71 MARQ. L. REV. 749, 766 (1988) (stating that Wisconsin courts previously had the power to initiate criminal proceedings if the local prosecutor was unwilling to do so).

83. Separation of powers doctrine is and ought to be far more complex than is reflected in Judge MacMahon's view. For an example of the better scholarship conceptualizing the prosecutor as administrator, see generally *Bubany & Skillern, supra* note 43, at 477 n.20, 495-505 (1976). Although lodged squarely in the realm of the modern administrative state, Professor Edley's recent effort illuminates the normative strength of separation of powers doctrine and some of the recognized defects of its formalism as a theory of governance. C. EDLEY, JR., *ADMINISTRATIVE LAW* 13-95 (1990).

84. K.C. DAVIS, *supra* note 34, at 58.

85. *See* *Wayte v. United States*, 470 U.S. 598, 608 (1985).

non-public case files could be the function of a Board or its staffs.⁸⁶

Nor does the expertise of prosecutors justify granting them unfettered discretion any more than it would for any other expert executive or administrator.⁸⁷ The courts certainly have limited other discretionary executive functions when confronted with racist or sexist policies and practices.⁸⁸ And while the prosecutorial function takes into account many intangible factors including administration, resource allocation, case evaluation and assessment, equity, fairness, and justice, which make judicial review difficult, these legitimate bases for granting prosecutors some discretion also reveal the potential for abuse. Prosecutors could readily rely upon, albeit perhaps unconsciously, improper considerations, including racist, sexist or classist stereotypes or other forms of pluralistic ignorance.⁸⁹ This should be guarded against, notwithstanding prosecutorial expertise. Yet the courts, especially the federal judiciary, are feeble. Current federal doctrine, reinforced by the judiciary's demographics and life experiences shared with prosecutors, make the

86. In cases where security is a genuine concern, there should be no need for prosecutors to reveal an informant's name or any other information which would put an informant's life in jeopardy or undermine ongoing investigations. Judicial intermediation might be necessary in such cases, with sealed testimony, available only to a reviewing court.

87. As Judge Bazelon and Justice Black have argued in several eloquent dissents, prosecutors should have less discretion given the uniquely important liberty interests at stake. *Cf. Berra v. U.S.*, 351 U.S. 131, 139 (1956) (Black, J., dissenting) (giving prosecutor unreviewable discretion to decide "whether the judge and jury must punish identical conduct as a felony or a misdemeanor" is questionable); *Henderson v. U.S.*, 349 F.2d 712, 714 (D.C. Cir. 1965) (Bazelon, C.J., dissenting) (noting potential abuse when prosecutor treats violators of the same crime differently, on the unfounded contention that drug addicts are probably involved in "bigger stuff," and therefore warrant harsher sentences); *Hutcherson v. U.S.*, 345 F.2d 964, 973-74 (D.C. Cir. 1965) (Bazelon, C.J., dissenting) (choosing to prosecute under a federal statute instead of a state statute is actually choosing a minimum 10 year sentence, rather than a maximum 10 year sentence, without either sentencing information or expertise in sentencing).

88. *E.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding prosecutor's discretionary use of peremptory challenges to exclude black jurors on account of race violated the core guarantee of equal protection). *See, e.g.*, *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (holding school's discretionary policy of not admitting men as matriculated students to state's only nursing school required "exceedingly persuasive justification" particularly given that its effect was to perpetuate stereotypes about nursing which depressed women's wages).

89. *See O'GORMAN, supra* note 4 and accompanying text. Research released in January of 1991 by the National Opinion Research Center at the University of Chicago and sponsored by the National Science Foundation, found that white Americans still believe, often unconsciously, in very racist stereotypes about blacks and Hispanics with respect to laziness, tendency to commit acts of violence, intelligence and national loyalty. T. Smith, *Ethnic Images 5* (General Social Survey Topical Report No. 19) (Released Jan. 8, 1991). There is no reason to believe that prosecutors as a group are free from such thinking. Indeed, given the skewed populations to which they are exposed, prosecutors may be more prone to such stereotyping.

current judiciary an inhospitable forum, hard of hearing toward outsider voices and in general anemic centurions of justice.

B. *The Current Inadequate Constraints: The Courts, the Legislature, the Electorate*

Theoretically, there are several checks available to limit abuses in prosecutorial discretion. First, decisions to prosecute are subject to judicial oversight. Second, prosecutorial discretion may be legislatively controlled by pruning criminal statutes, setting priorities for prosecutorial budgets, providing less vague standards and creating or requiring the creation of written guidelines, policies and procedures. Finally, prosecutors are accountable to the electorate, directly⁹⁰ or indirectly.⁹¹ None of these theoretical checks are likely to provide poor, minority, drug-addicted women much actual protection from abusive prosecutors.

i. *The Anemic Judiciary*

*Absolute discretion means unchecked and unreviewable discretion. When no other authority can reverse the choice made, even if it is arbitrary and unreasonable, discretion is absolute.*⁹²

Prosecutors are virtually free at the critical early stages in the criminal law process to do as they please.⁹³ The judiciary gives only lip service to constraining prosecutorial discretion.⁹⁴ There are no effective judi-

90. Currently, forty-four states hold elections for the office of prosecutor. *See, e.g.*, MICH. COMP. LAWS ANN. § 168.191 (West 1989).

91. This is the case with respect to federal prosecutors, who are accountable to the United States Attorney General and through that officer to the President. The Congress can exercise control through its advise and consent function. U.S. CONST. art. II, § 2, cl. 2; *Morrison v. Olson*, 487 U.S. 654 (1988). Congress may also initiate impeachment proceedings. U.S. CONST. art. I, § 2, cl. 5; *Chandler v. Judicial Council of 10th Cir.*, 398 U.S. 74 (1970). The most direct form of control stems from Congressional choice of the wording and the scope of criminal statutes.

92. K.C. DAVIS, *supra* note 34, at 151-52.

93. To constrain this discretion, Davis suggests courts mandate prosecutors to articulate rules or standards. These rules need not be in the form of generalizations, but rather hypotheticals leaving latitude for further development over time. K.C. DAVIS, *supra* note 34, at 60. Davis's suggestion might not prevent injustice in cases not covered by hypotheticals, but his suggestion could facilitate some judicial review and legislative and public scrutiny of prosecutorial discretion. Davis also suggests a variation on the Administrative Procedure Act's rule-making procedure, including public comment and staff review. *Id.* at 65. *See generally* Friedman, *Some Jurisprudential Considerations in Developing an Administrative Law for the Criminal Pre-Trial Process*, 51 J. URBAN L. 433 (1974) (emphasizing the need for administrative law to promote equality and fairness in prosecutorial discretion in the criminal pre-trial process).

94. *Cf.* *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982) ("A charging decision does not levy an improper 'penalty' unless it results directly from the defendant's exercise of a protected legal right, rather than the prosecutor's normal assessment of the societal interest in prosecution."); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962)

cially enforced standards or constraints on the executive decision of whether to prosecute.⁹⁵

Yet under our system of government all persons should be able to obtain recourse from the judiciary in safeguarding basic values of equal treatment by the government and fair and impartial criminal process. This is especially so when the claim is that minorities are being oppressed by majorities and their representatives.⁹⁶ In these cases the courts may be the last institution between democracy and the tyranny of fixed majority factions.⁹⁷ The hope, often unfulfilled, is that the courts, and especially the federal courts,⁹⁸ will constitutionally deflect majority passions from isolating and unfairly persecuting individual members of powerless groups. The courts might even exercise moral leadership in reminding this nation of its higher aspirations.⁹⁹ Unfortunately, as current constitutional doctrine reflects, the closing days of the twentieth century are much like the closing days of the nineteenth century with courts again pretending that the racially disparate impact of law does not warrant judicial action.¹⁰⁰ Demographics, pluralistic ignorance, and ideology impair the ability of American courts to hear the voices of women and minorities and to fairly adjudicate their claims.¹⁰¹

(selectivity in enforcement is constitutional provided that it is not based upon "an unjustifiable standard such as race, religion, or other arbitrary classification.")).

95. Typically the decision whether to prosecute is unfettered prior to indictment. *See, e.g.,* K.C. DAVIS, *supra* note 34, at 189 (raising the question: "Why should the vital decisions [the prosecutor] makes be immune to review by other officials and immune to review by the courts, even though our legal and governmental system elsewhere generally assumes the need for checking human frailties?"); Frase, *supra* note 75, at 303 (arguing that prosecutorial discretion is broad and "unchecked by any formal, external constraints or regulatory mechanisms"); Vorenberg, *supra* note 38, at 1523-25.

96. This is the specter raised by the evolving pattern of targeting poor minority women of color. *See supra* notes 21, 28. As discussed in Part III below, this emerging pattern is consistent with pernicious traditions in America of dominating and controlling women and minorities, but especially women of color.

97. J. ELY, *DEMOCRACY AND DISTRUST* 152-54 (1980) (arguing that the courts have a unique and legitimate role in disallowing race-based fixed factions from distorting pluralistic political process).

98. Although often undeserved, the federal courts occupy a unique position in the minds of oppressed racial groups and others, and in the strategies of the lawyers committed to their liberation struggles. *See, e.g.,* 1 R. KLUGER, *SIMPLE JUSTICE* 65 (1975) (stating that the Supreme Court is considered to be by many the "esteemed broker of national disputes").

99. M. PERRY, *MORALITY, POLITICS, & LAW* 134-36 (1988).

100. *See Plessey v. Ferguson*, 163 U.S. 537 (1896).

101. Demographics are crucial. Minority representation on the courts of America is important for several reasons. The visibility of minorities in the judiciary is important symbolically as a token of fairness and equality in America. However, tokenism addresses only appearances and justice requires authentic minority representation for the substantive positions and sensitivities that minorities can bring to the bench. *See* Welch, Combs & Gruhl, *Do Black Judges Make a Difference?*, 32

The demographics of the federal judiciary are illustrative of both federal and state judiciaries¹⁰² and have a special significance given the federal judiciary's unique historical role as the perceived centurion of constitutional justice.¹⁰³ The demographics of the federal courts, however, do not bode well for their continued occupancy of that role.¹⁰⁴ The Nixon, Ford, Reagan and Bush federal courts are "insiders'" courts,¹⁰⁵

AM. J. POL. SCI. 126 (1988). See generally Guinier, *supra* note 7, at 133, 1103 (suggesting electoral reform proposals which would better address the political reality of black voters). For example, pluralistic ignorance cannot be altered by mere tokenism. A substantial number of minority judges is necessary to assure receptive, fair and open judicial forums. The proportionality of minority representation is also a useful *prima facie* test for whether the American system is working as it should. Unless there is some very good explanation as to why not, America's governmental institutions should include roughly the same percentage of each group as that group occupies in the general population.

102. This is illustrative because state courts do not have better demographic representation than do federal courts. See, e.g., *Chisom v. Roemer*, 111 S. Ct. 2354, 2359 (1991) (noting there has never been an African-American elected to the Louisiana Supreme Court); *HLA v. Attorney General of Texas*, 111 S. Ct. 2376, 2379 (1991) (noting that only 5% of the district judges in Harris County, Texas were African-American despite the fact that the population was 20% percent African-American). While 41 states have some African-American representation on their courts, only 36 have representation on major courts. Graham, *Judicial Recruitment and Racial Diversity on State Courts*, 74 JUDICATURE 28, 30 (1990). The percentage on courts of general and appellate jurisdiction is small enough to amount to tokenism. African-American judges constitute approximately 3.8% of all state court judges, but are disproportionately concentrated in part-time and limited jurisdiction courts. *Id.* at 32. The percentage of African-Americans on the bench roughly mirrors the percentage of lawyers in the country who are African-Americans, approximately 3%. *Id.* However, this paltry number is inadequate to substantively influence state court decision-making and overcome judicial pluralistic ignorance. Moreover, since minority lawyers generally make less money than their white counterparts, judgeships are relatively more attractive. Thus for economic reasons one would expect a high proportion of minority lawyers would want to be judges. However, there are other barriers at work. See generally Cook, *Black Representation in the Third Branch*, 1 BLACK L.J. 264 (1972) (discussing the underrepresentation of African-Americans on the bench).

103. The federal courts have traditionally been looked to as the backbone of federal constitutional justice. See, e.g., J. ELY, *supra* note 97, at 83 (discussing the Supreme Court's role in the protection of the politically powerless); 1 R. KLUGER, *supra* note 98, at 65-66.

104. Right from the outset it should be made clear that group characteristics of the judiciary do not preclude individual judges from stepping away from their groups and listening to outsider voices. For example, just because a judge can be grouped demographically with other white males who are apparently heterosexual and relatively affluent does not necessarily mean that a judge will act like them. A few extraordinary people do successfully manage to get beyond these limitations. But the myth of the self-created and self-determining individual is often carried too far. The group definitions society imposes on people, the group characteristics we use in defining ourselves, and how these groupings define the contours of our lives is often understated. Who one is in life and the choices one has are for the most part circumscribed by factors beyond an individual's control. These typically include the family into which one is born, gender, race and socio-economic class. And if you do not believe that groups matter sometimes much more than individual traits, take the following test suggested by Professor Linda Green: If you could, would you take a pill and be reincarnated as a poor black girl in America? If your honest answer is no, then reflect on the meaning of America's judges being overwhelmingly affluent white males.

105. The antonymic terms "insider" and "outsider" are sociological terms Justice O'Connor has

not representative of America as a whole.¹⁰⁶ The federal judiciary is demographically way out of balance; it is much wealthier,¹⁰⁷ racially whiter and more disproportionately male than any American governmental institution should be.

For federal circuit court appointments, no minority women need apply. Federal circuit court appointments are Presidential and generally without the traditional deferential courtesy extended to United States Senators at the district court level.¹⁰⁸ They are thus a good indicator of the kind of judiciary a president desires. Of the approximately 150 appointments made to the United States Circuit Courts by Nixon, Ford,

used, particularly in troubling cases involving marginalized minority religious rights. *E.g.*, Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

106. While the dissent in *Chisom* was wrong as a matter of statutory construction on whether Congress intended judges to be included within the term representative for the purposes of the Voting Rights Act, *Chisom v. Roemer*, 111 S.Ct. 2354, 2366 (1991) (noting that Congress intended "representative" to mean "someone who has prevailed in a popular election"), the dissent makes a quite sound general point. Judges are not or should not be representatives in the same sense that legislators are representatives. *Id.* at 2373 (Scalia, J., dissenting). Yet judges should be representatives in another sense. Judges must both appear to be impartial and fair, and in fact be impartial and fair, see C. BLACK, JR., *THE PEOPLE AND THE COURT* 37-42, 57-63 (1960) (suggesting that the Court's role in government is to legitimize governmental action in part by appearing to be an impartial tribunal willing and able to constrain government). In order to be impartial and fair, the judiciary as a group must be able to apprehend the arguments and the voices of those asserting claims. By virtue of its present demographics, pluralistic ignorance, and ideology, the courts are not able to fulfill their proper representational roles.

The appearance of impartiality may be compromised by the large number of judges who were prosecutors during their formative years. Out of 135 Reagan, Ford and Nixon appointments to the federal circuit courts, 46 (34%) had former prosecutorial experience. See Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 324-25 (1989). Cf. J. EISENSTEIN, *supra* note 57, at 48 (stating that being a United States Attorney is a stepping stone to the federal judiciary).

107. Over half of the people appointed to the circuit courts by Reagan had net worths in excess of one-half million dollars. See Goldman, *Reagan's Judicial Legacy*, *supra* note 106, at 324 (reporting that 32.1% had a net worth between \$200,000 and \$499,000, 33.3% had a net worth between \$500,000 and \$999,999, and 17.9% had a net worth over one million dollars) [hereinafter *Reagan's Judicial Legacy*]. To appreciate how extraordinary such net worths are in America, consider that according to the Census Bureau, as of 1988 the median net worth of white households was \$43,279 and of Black households only \$4,169. BUREAU OF THE CENSUS, CURRENT POPULATION REPORT, HOUSEHOLD WEALTH AND ASSETT OWNERSHIP (Household Economic Studies, Series P-70, No. 22) (1990). Thus, over half of Reagan's circuit court appointees had a net worth in excess of 11 times the median white American household and over 120 times the net worth of the median black American household! Given the order of magnitude of these economic differences, it is not surprising that this comparatively wealthy group of judges is not in touch with the economic exigencies of the choices faced by poor minority women. Even white males of modest financial means have found it necessary to resign from the federal bench. See McAllister, *The Judiciary's 'Quiet Crisis': Prestige Doesn't Pay the Tuition*, Washington Post, Jan. 21, 1987, at A19, col. 1.

108. Goldman, *Reaganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313, 315 (1985).

Reagan and Bush, approximately 97% were white, 93% were white males, 4% were white women and 3% were minority males.¹⁰⁹ This author's research reveals no, *zero*, minority women were appointed by these four Presidents to any United States Circuit Court. Given the ideologies of the Mitchell/Smith/Meese/Thornburgh Departments of Justice, and the class, complexion and predominant gender of the federal judiciary appointed by the Republicans over nineteen of the last twenty-three years, the federal judiciary would not appear to be well-positioned to hear the claims of minority women.¹¹⁰

As a group, these judges are so underrepresentative of some groups in America that they are not equipped to fairly adjudicate the claims of these outsiders.¹¹¹ Issues of race, gender and class intersect in ways that these judges as a group are not experientially equipped to comprehend.¹¹² These judges are probably just as afflicted as are other white Americans by beliefs in insidious racial and ethnic stereotypes about African-Americans and Hispanics.¹¹³ Many whites still believe stereotypes such as the

109. See *Reagan's Judicial Legacy*, *supra* note 107, at 325 (1989).

110. This is nothing new in America. Throughout American history the federal judiciary has been demographically overrepresentative of affluent white males, and during most periods in history this judiciary has willingly served as the instrument of white male control over minorities, women and the poor. Sadly, *Dred Scott v. Sandford*, 60 U.S. 393 (1856), *Plessy v. Ferguson*, 163 U.S. 537 (1896), *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) and *McCleskey v. Kemp*, 481 U.S. 279 (1987) are much more typical of the American Supreme Court than is *Brown v. Board of Educ.*, 347 U.S. 483 (1954) or *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

111. Not included in the above statistics is President Carter's impressive record for appointing minorities and women to the federal courts. Of Carter's 56 appointment to the Courts of Appeals, 16.1% were African-American, 3.6% Hispanic, 1.8% Asian, and 19.6% were women. Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 *JUDICATURE* 344, 350 (1981). These aged and aging judges have a dwindling but still beneficial impact on the appearance and substantive quality of justice in America.

112. Many federal judges do not recognize how their own prejudices and privileged life experiences impact the ways in which they view the behavior of those who appear in front of them. This proposition is true even if one ignores the astounding insensitivity of at least one man the Bush administration nominated to the 11th Circuit Federal Court. Lewis, *Heeding the Grass Roots In Judicial Nominations*, *N.Y. Times*, Apr. 13, 1991, at 6, col. 1 (reporting on the first defeat of a Bush judicial nominee, District Judge Kenneth L. Ryskamp, who had repudiated neither his membership in a reputedly all white club which excluded Jews nor his comments endorsing African-American suspects being mauled by police dogs).

113. How many federal judges see a black man in a BMW and think to themselves that he is probably a drug dealer? Most federal judges have no experiential basis on which to contradict American racial stereotyping, and their view from the bench in this age of drug war mania does nothing but reinforce the worst portrayals of America's minorities. See generally Bodenhauser & Wyer, *Effects of Stereotypes on Decision-Making and Information-Processing Strategies*, 48 *J. PERS. & SOC. PSYCHOLOGY* 267, 268 (1985) (demonstrating how stereotypes can contribute to greater punishments for members of stigmatized groups when the behavior punished is apprehended as consistent with the stereotype).

alleged desire of Blacks and Hispanics to be on welfare, their inability to be caring parents, and their angry or hostile nature.¹¹⁴ Racially and class segregated housing, schools, churches and clubs are the norm in America and the judiciary, given its demographics, is likely to be more sheltered from real integration than the average American. The white men on the American judiciary have little to no experience with minorities who are not in a servile relationship. In short, the federal judiciary looks and with but rare exceptions acts much like Justice Kennedy's former all male, mostly white club.¹¹⁵ These narrow demographics create an environment ripe for pluralistic ignorance to breed and fester.

The likelihood that the judiciary is misapprehending the claims being presented to it is increased under conditions where pluralistic ignorance can go unchallenged. Pluralistic ignorance refers to the false social knowledge shared by one group regarding one or more other groups.¹¹⁶ For example, when nontrivial discrepancies emerge between beliefs shared among judges about what other groups are doing and thinking and what those other groups are in fact doing and thinking, pluralistic ignorance exists. It refers to patterns of intergroup false beliefs and usually occurs unnoticed and unintended, but nevertheless acts as an influential and often decisive component in defining social actions.¹¹⁷ Pluralistic ignorance is a particularly insidious form of inaccurate intergroup ignorance because there is not only incorrect knowledge, but it is shared and believed to be shared with others in the group. This has the effect of increasing the ingroup's confidence in the incorrect information and enhances the likelihood that the error will go unrecognized. Pluralistic ignorance is shared self-reinforcing group bias, without doubt.¹¹⁸

As applied to the American judiciary, pluralistic ignorance can be defined as a group of privileged, mostly affluent white males talking amongst themselves about what are the reasonable choices for poor people of color to be making in situations virtually none of the judges have ever been in. Pluralistic ignorance affects the courts' methodology and the doctrine they espouse. The current white male Republican federal courts apparently are content to use a legal methodology consistent with

114. T. Smith, *supra* note 89, at 5.

115. See, e.g., Lewis, *Judicial Nominee May Be Imperiled*, N.Y. Times, Mar. 20, 1991, at A14, col. 1 (discussing a Federal Appeals Court nominee's membership in a country club which allegedly excluded African-Americans and Jews).

116. See O'GORMAN, *supra* note 4.

117. *Id.*

118. *Id.*

the world views of those who put them in their life-tenured positions.¹¹⁹ These courts only reflect the views of those that elected their Presidents.¹²⁰ For example, both Scalia's and Kennedy's appointments could cynically be viewed as reflecting not just "the merits" of these two men, but as providing representation for white ethnic American males who feel under siege and who are the backbone of the new Republican Presidential majority.¹²¹ These Republican judges were not appointed to and do not appear to be providing justice to those traditionally excluded from the American Dream: the poor, African-Americans, Native Americans, Latinos, Asian-Americans, women and others.¹²² To some of these

119. The theory or method of constitutional interpretation in which these judges believe is generally consistent with that of the legal methods/ideologies of the administrations that appointed them. The effect of adopting these methodologies is not truth and justice but rather to preserve original American privilege of the "reasonable white Protestant man" against those of different race, gender, and class, by appointing judges that sincerely but wrongly believe that the insider's view carries with it the moral force of right. Cf. Marshall, *Commentary: Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987) (explaining that the Constitution was very much a "product of its times" and intended to convey the racist ideologies of some of its framers).

Virtually all of Reagan's appointees (97.4%) were Republicans. *Reagan's Judicial Legacy*, *supra* note 107, at 324-25. That these Republican appointees were confirmed with remarkably little opposition even during periods when the Democrats were in control of the Senate is more a testament to the comfortable accommodation provided by the Democrats to the reigning Republicans, than it is to the candidates' neutrality or commitment to social justice and equality. K. PHILLIPS, *THE POLITICS OF RICH AND POOR* 47 (1990); L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 93 (1985). The Senate's rejection of the controversial Bork nomination is one of the exceptions to the rule that the Senate is comfortable confirming an overwhelmingly affluent white male judiciary. Only in the most egregious cases will the Senate seriously consider not confirming a nominee. See, e.g., Lewis, *supra* note 115. With a few notable exceptions, most United States Senators are just insiders of a slightly different stripe; they do not represent the "underclass" in America and frequently accommodate their Republican privileged counterparts like George Herbert Walker Bush or J. Danforth Quayle.

120. Note, *All The President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 770-72 (1987) (comparing the Reagan-appointed circuit judges and those of other Republicans with those of Democrats and finding that Republican appointees were more "conservative" in cases where discrimination had been claimed, and were more hostile to the claims of criminal defendants). From down under, case by case adjudications may be just a myth diverting attention from the extent to which federal judges see the world and act as products of their biased backgrounds, not unlike most people. The totality of the circumstances and other similarly vague rubrics may merely camouflage judicial bias not even fully realized by the judges who are pluralistically ignorant.

121. Some views that Justices Kennedy and Scalia have brought to the table of justice would serve caucasian males better than poor minority women. See, e.g., *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3045 (1990) (Kennedy, J., dissenting with Scalia) (setting forth concerns from the "perceptions" of those "minorities" that did not make the government's minority list). Cf. Scalia, *The Disease as Cure*, 1979 WASH. U.L.Q. 147, 152 (discussing his view that the "debt" of Italians, Jews, Irish, and Poles who took no part in slave-based oppression, is comparatively a "molehill").

122. This is not to suggest that most judges are not sincere people of great integrity who are deciding constitutional questions as they really see them. Rather, the suggestion is that this judiciary, as a group, tends to see America in ways which are largely consistent with who they are —

judges the problem of race in America is just somebody else's history.¹²³ These men interpret the Constitution in pursuit of the dream that advantages them: a publicly non-ethnic, colorless America where the uninterrupted legacy of slavery and hegemony of color is simply ignored.¹²⁴

What little direct data there is, collected by a currently sitting circuit court judge, suggests that where the defendants are black, the judges which identify themselves as having a judicial philosophy or viewpoint in tune with the Rehnquist Court are much more likely to see the world like white police officers than like blacks who admittedly have been victimized by a white mob.¹²⁵ The federal courts are—and are likely to be for years—literally white men's courts with no apparent effort to reach out to other perspectives.¹²⁶ The consequence of this is that the federal judi-

consummate affluent white male insiders. Cf. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970) (opining that "[o]nly a few appellate judges can throw off the fetters of their middle-class backgrounds . . . and identify with the criminal suspect instead of with the policeman . . .").

Nor is it to suggest that judges are *entirely* predictable. Earl Warren may illustrate that who someone has been before *he* is appointed to the Court is no guarantee of what positions *he* will take on particular issues. And certainly Justice Blackmun has been a wonderful justice although appointed by a President who resigned in the disgrace of Watergate. How likely are such surprises from Justices Rehnquist, Scalia, Kennedy or even Souter? As Professor Tribe persuasively argues, generally when Presidents have tried to pick Justices and inferior Article III federal judges because of their views on one or more issues, these Presidents have been generally successful at getting what they wanted. L. TRIBE, *supra* note 119, at 60.

123. E.g., *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3028-29 (1990) (O'Connor, J., dissenting); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

124. See Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991).

125. Bright, *Do Philosophy and Oral Argument Influence Decisions? Getting There*, A.B.A. J., Mar. 1991, at 68, 71. By contrast, judges identifying with the Warren and Burger Courts could hear and potentially credit the voices of outsider victims. Judge Bright's study is consistent with the real life incident at Howard Beach, where a black victim of a white mob's racial attack was initially treated with the presumption of black criminality by law enforcement officers. C. HYNES, *INCIDENT AT HOWARD BEACH: THE CASE FOR MURDER* 32-38 (1990). See generally Bodenhauser & Wyer, *supra* note 113, at 268 (where experimental data suggested that preconceived, stereotype-based impressions color the meaning ascribed to acts of indeterminate meaning).

126. And for those disinclined to believe that demographics make a difference in the content, tone and quality of judicial justice, just imagine the difference in deliberations on an appellate panel over issues revolving around race and gender if women and minority judges were on each of these panels and *heard*. Exercises of prosecutorial discretion would be more closely scrutinized, and the situated "choices" of poor minority women better understood. Unfortunately, many appellate court panels after four Republican Administrations have used the white male model for court appointees which reflects the exclusion of outsider views. In addition, the federal criminal bar practicing before the judiciary is also virtually an all white club. Thus the courts do not even have translators to help educate them from in front of the bench. Cf. Torres & Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 647 (arguing that legal story-telling in the courts often evades the questions of power, perspective and domination)[hereinafter *Translating Yonnonidio*]; Torres, *Local Knowledge, Local Color: Critical Legal Studies and The Law of Race Relations*, 25 SAN DIEGO L. REV. 1043, 1051 (1988).

ciary does not appear to be a receptive forum for poor minority women defendants. Like most outsiders, these women should not look to the federal courts as likely sources of their salvation.¹²⁷

Such courts are ill-equipped to understand the nature of choice for the women and minorities that come before them. The cases in connection with the meaning of choice for poor and minority women in regard to abortions are illustrative.¹²⁸ It is simply hard for these courts to comprehend what it is like to be a poor woman trying to "choose" whether to abort a pregnancy when the woman may not be able to afford the pregnancy or the abortion. To appreciate the role of pluralistic ignorance in judicial misapprehension of these questions, imagine for a moment the nature of the deliberations, as a privileged affluent group of white men turn to each other to discuss, develop and verify the opinions in these cases.

Similarly, in the context of the war on drugs and especially as it is waged against minorities, the court has repeatedly misapprehended the nature of choice. The *Bostick* case decided in June of 1991 is illustrative.¹²⁹ In *Bostick*, the Court held that armed drug enforcement agents may approach a man seated in the back of an interstate bus without reasonable suspicion sufficient to justify a fourth amendment seizure, question the man and request to search his luggage so long as the police do not convey a message that compliance is required.¹³⁰ Justice Marshall for himself and two other justices proffered a vigorous and sound dissent, concluding that when officers conduct dragnet sweeps where passengers must either cooperate or exit their bus and possibly be stranded, that this "choice" is no "choice" at all.¹³¹

127. See, e.g., D. BELL, *supra* note 7, at 48. For a variety of reasons state court may not be subject to this same sense of futility for outsider causes. Cf. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550-51 (1986) (explaining that state courts have begun to take their obligations seriously as protectors of civil rights and liberties).

128. See, e.g., *Rust v. Sullivan*, 111 S. Ct. 1759, 1778 (1991) (holding that Title X program funding restrictions did not affect indigent women's right to choose an abortion); *Id.* at 1784-86 (dissenting as to the impact on a woman's freedom of choice Title X restrictions on medical advice have under government funded program); L. TRIBE, *supra* note 32, at 15-16 (surveying earlier pertinent case law).

129. *Florida v. Bostick*, 111 S. Ct. 2383 (1991).

130. For the *Bostick* majority, that the man was confined was the result of his decision to take the bus, not police action. The appropriate constitutional inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. *Id.* at 2386-88.

131. *Id.* at 2394. Justice Marshall's dissent points out that our nation is told it is engaged in a "war on drugs" and that law enforcement's job is to devise effective weapons, "[b]ut the effectiveness of a law-enforcement technique is not proof of its constitutionality." *Id.* at 2389. While sweeps are occasionally fruitful, they "are inconvenient, intrusive, and intimidating." *Id.* at 2390. This is

As Professor Maclin demonstrated in connection with earlier cases, the Court's fourth amendment reasonable person standard is unrealistic. Under the circumstances in many recent cases, no real and innocent reasonable person would in fact feel free to decline police requests.¹³² But of more direct significance in respect to the Court's inability to apprehend the voices of minorities, nowhere did the Court even mention the most salient fact in deciding whether an innocent reasonable person in Bostick's situation would have felt coerced. Bostick is an African-American.

In America, "[r]ace matters,"¹³³ and Bostick's being an African-American is relevant in at least two respects. First, although sophisticated police would never admit it, the fact that Bostick was an African-American male was a substantial factor in his being targeted for investigation, since "[r]ace is among the first things that one notices about another individual."¹³⁴ This would be hard to prove under current standards virtually requiring the police to admit race based discrimination in open court.¹³⁵ But the fact that unspoken racism is hard to prove does not mean it was not a significant factor.¹³⁶

Second, the Court was like Alice in Wonderland on the issue of Bostick's consent to search.¹³⁷ Bostick, as an African-American male, would not have felt free to refuse the entreaties of two armed white police of-

especially true in the context of buses. Sweeps are particularly repugnant to American ideals insofar as they require Americans to show their papers to pass through the public way. Bostick's consent was unconstitutionally obtained because he was unadvised of his rights, had no reason to know a refusal to cooperate could not be held against him, and was subjected to the intimidating effect of being partially blocked in the back of a bus and questioned by an armed officer.

132. Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1303 (1990).

133. See Aleinikoff, *supra* note 124, at 1066.

134. *Id.* at 1066.

135. While a defendant might be entitled in discretionary administrative cases to an inference of discriminatory intent, this is true only if the defendant could prove disparate impact. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 84-99 (1986) (holding that racially disparate use of peremptory challenge and other circumstances can give rise to an inference of unconstitutional prosecutorial practice). Generally, it is difficult for the defendant to prove that minorities are being disproportionately targeted for investigation because of their race, because the agency best positioned to collect and maintain such data is the law enforcement unit against which this information would be used. Indeed, in this author's experience and that of others with whom he has spoken, when counsel even tries to raise this line of questioning with police officials, judges frown, allow police officers to feign ignorance, and attempt to severely limit this line of inquiry, even during non-jury pretrial proceedings.

136. See Lawrence, *supra* note 78, at 322.

137. Make-believe images of the flawlessness of police departments is common. See, e.g., Rohter, *Police Beating Unsettles World of Make-Believe*, N.Y. Times, Mar. 26, 1991, at A14, col. 1 (discussing how the videotaped beating of Rodney King shattered the fictionalized image of the Los Angeles police created by television).

ficers in the back of a bus in the South. Given the continuing history of violence by law enforcement officers against American black males,¹³⁸ only a court of privileged whites could convince itself that in the intimidating situation created by the police, an innocent African-American, would have felt he had the "choice" to refuse these white police officers.¹³⁹

In real America, as opposed to the pretend colorless fairylands the courts create for themselves, one of the circumstances surrounding any determination of free choice in an interaction with the police is the target's race.¹⁴⁰ Yet as with poor women and abortion, imagine judges in conference on the typical drug case involving minority males: probably an all white mostly affluent group of men with power deciding what a reasonable African-American man would conclude about his power to consent in a tight interaction with two Southern white police officers. The demographics of the courts make the risk that decisions will be predicated on pluralistic ignorance substantial.¹⁴¹ Neither *Bostick* nor the courts' decisions on the abortion rights of poor women offer any real judicial constraint on executive exercises of power which may oppress minorities or women. Similar unreality runs throughout the current doctrines which are supposed to constrain prosecutors.

The two primary methods for challenging prosecutorial discretion in the courts are civil lawsuits and raising selective prosecution as a defense

138. This history began with the returning runaway slaves, was continued through police complicity with the Ku Klux Klan, and lives today in the savage beatings of Michael Stewart, Federico Pereira and Rodney King. In light of this history, a reasonable minority male simply would not, in the words of Justice Blackmun, feel "at liberty to ignore the police presence and go about his business." *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988). See, e.g., McKinley, *Police Cleared Officers on Their Word*, N.Y. Times, Mar. 21, 1991, at B6, col. 4 (discussing a suspicious police investigation which exonerated five police officers of all charges in connection with the choking death of Federico Pereira).

139. A feminist analogy may be elucidating. An encounter such as that in *Bostick* is like a woman's situation when confronted with the physical but unarticulated threat of rape by a man who verbally gives the woman a choice. Like a woman about to be raped, *Bostick* may have verbally been given a choice he didn't really have.

140. Aleinikoff, *supra* note 124, at 1069-71 (describing continuing power of race as a defining and controlling group classification).

141. Moreover, this circle of judicial ignorance is not often broken by the inclusion of minority judicial law clerks within the staffs of significant numbers of judges. (Here, given the typical interaction among law clerks for various judges, particularly at the appellate level, a few minority law clerks might go a long way). The hiring record of most judges is atrocious and the judges' excuses for their own employment patterns are weak. See, e.g., Sturgess, *Five Judges Won't Report on Clerks' Race, Gender; Affirmative-Action Rebellion in D.C. Circuit*, Legal Times, August 5, 1991, at 1. Nor is the circle broken through educative "translating" function of counsel, see Torres & Milun, *Translating Yonnonadio*, *supra* note 126, for the number of minority counsel in America's courts, especially federal criminal court, remains paltry.

in a criminal case. Civil lawsuits have been rendered all but useless by contemporary case or controversy requirements evolved by the Burger/Rehnquist court,¹⁴² as well as by official immunity doctrines.¹⁴³ Instituting civil rights suits against prosecutors for deprivation of fundamental rights during the charging phase of a criminal case¹⁴⁴ is also conceivable.¹⁴⁵ This is not, however, a very promising means of invoking judicial control and review of exercises of prosecutorial discretion given the limitation on damage actions,¹⁴⁶ and the case or controversy requirements evolved by the Burger/Rehnquist courts.¹⁴⁷

Raising the question of selective prosecution as a defense in a criminal case has greater theoretical promise,¹⁴⁸ but this too has been rendered

142. See *Rizzo v. Goode*, 423 U.S. 362, 372-73 (1976) (holding that even those previously mistreated by the police did not have the requisite "personal stake" in overhauling an allegedly racist police department to satisfy a present case or controversy requirement); *O'Shea v. Littleton*, 414 U.S. 488, 498 (1974) (holding that the lack of other imminent prosecutions against respondents defeated lawsuit alleging racially discriminatory administration of criminal justice system because case-or-controversy requirement is not met).

143. In the federal system this might be attempted under 42 U.S.C. §§ 1981-83, 1985 (1970), as well as directly under the Constitution. See also *O'Shea v. Littleton*, 414 U.S. 488, 490-91 (1974) (involving suit based on alleged deprivation of rights secured by the aforementioned sections of Title 42 of the U.S. Code). An aspect of this issue was recently decided by the United States Supreme Court. In the case of *Burns v. Reed*, the Supreme Court held that a state prosecuting attorney is absolutely immune for damages under § 1983 for participating in a probable cause hearing, but not for giving legal advice to the police. 111 S. Ct. 1934 (1991).

144. For the purposes of this article there is little need to consider exercises of prosecutorial discretion beyond the charging phases. While the treatment of drug-addicted mothers is also important at these other stages, the basic decision whether to prosecute raises all of this author's concerns with the mostly unlimited breadth of prosecutorial discretion and amply illustrates the need for reform.

145. In initiating such lawsuits, however, litigants must be mindful of potential Rule 11 sanctions for using repetitive or novel theories in hostile courts. See *Blue v. United States Dep't of the Army*, 914 F.2d 525 (4th Cir. 1990); *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188 (9th Cir. 1988).

146. Injunctive relief theoretically could be sought to prevent such rights deprivations. See *Smith v. Meese*, 821 F.2d 1484, 1488 (11th Cir. 1987) (holding that black voters had standing to challenge investigatory and prosecutorial policies as effectively depriving voters of constitutional rights to vote and to associate freely). *Contra Rizzo v. Goode*, 423 U.S. 362 (1976) (finding in part that individuals and organizations did not satisfy the case-or-controversy requirement in alleging patterns of police brutality). However, money damages could not be sought, at least under § 1983, given the immunity protections accorded to prosecutors. See *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976).

147. *Rizzo v. Goode*, 423 U.S. 362 (1976); see *Developments-Race and the Prosecutor's Charging Decision*, *supra* note 43, at 1532-35.

148. One equal protection argument might be that since courts are forbidden by the separation of powers doctrine from ordering prosecutors to act affirmatively and prosecute affluent white women who prenatally risk harm to their unborn by ingesting alcohol, cocaine or other chemicals, courts could prohibit prosecutors from initiating similar prosecutions against poor, minority, drug-addicted women.

anemic by judicially imposed proof requirements.¹⁴⁹ In actual criminal cases, the defendant usually argues that the government has violated Equal Protection under either the fourteenth or fifth amendments in selecting him or her for prosecution. Like many civil rights lawsuits, the selective prosecution doctrine is impotent under present case law.¹⁵⁰

Selective prosecution doctrine is presently controlled by *Wayte v. United States*.¹⁵¹ In *Wayte*, the Court held that opponents of the selective service draft could be targeted for prosecution for their refusal to register, notwithstanding their assertion of first amendment interests.¹⁵² Relying on the stringent discriminatory purpose requirement adopted in *Washington v. Davis*,¹⁵³ the Court concluded in *Wayte* that even where there is a disparate impact on a group with protected constitutional interests, facially neutral governmental action must be proven to have been intended to compromise a constitutionally protected interest. Statistical disparity by itself does not give rise to an inference of bad motive; direct proof of discriminatory purpose must be shown.¹⁵⁴

Courts have applied these onerous selective prosecution standards in the context of race-based claims.¹⁵⁵ Although there have been vigorous and persuasive dissents from this approach,¹⁵⁶ and even though the errant majority Justices might eventually mend their ways, the judicial hegemony of the Nixon, Reagan, and Bush courts appears committed to forcing outsider litigants to meet impossible and irrelevant burdens,¹⁵⁷ and perhaps to just abandon the courthouse altogether. In light of these and other recent holdings of the Rehnquist Court,¹⁵⁸ the demographics of the judiciary and the legal methodology of these courts, it does not

149. See, e.g., Vorenberg, *supra* note 38, at 1539-42, 1556.

150. For example, problems of proof are considerable. See Vorenberg, *supra* note 38, at 1539-42, 1556. A major caveat must be added: greater protection than is available under federal Constitutional standards can often be afforded under individual state constitutional provisions by state courts. This part of this article is not intended to discourage such efforts. Rather, the primary point here is that given the current doctrine and demographics of the appellate federal courts, they are *not* likely saviors.

151. 470 U.S. 598, 608-10 (1985).

152. *Id.* at 608-10.

153. 426 U.S. 229 (1976).

154. 470 U.S. 598, 608-10 (1985).

155. *Developments-Race and the Prosecutor's Charging Decision*, *supra* note 43, at 1542-44.

156. *Id.* at 1545-49.

157. Cf. Jones, *Unrightable Wrongs: The Rehnquist Court, Civil Rights, and an Elegy for Dreams*, 25 U.S.F. L. REV. 1 (1990) (arguing that the Rehnquist court's interpretative method and its usage of the "fault model" have produced barriers for civil rights litigants).

158. See R. BROOKS, *supra* note **, at 1 (suggesting that the Supreme Court's 1989 massacre of civil rights laws reflect an insensitive court majority that believes America does not currently have a social problem based on racism).

appear that the courts are forums to which poor minority women should look for relief from abuses of prosecutorial discretion, nor are these likely to in fact be fair.

Examining the complex, often resonating and elusive concept of choice¹⁵⁹ as applied to drug-addicted pregnant minority women illustrates the point. Poor African-American drug-addicted women do not have much by the way of choice in their lives.¹⁶⁰ The American dream defines the American judiciary's experiential reality, by virtue of their race, inherited privilege, hard work, and availed opportunity; those serving on United States courts have had choices not available to poor black women from Mississippi like Ms. Hardy. Little in these judges' backgrounds, or their life experiences, prepares them to sit in judgment of those whose lives have been the antithesis of their own.¹⁶¹

159. See L. WEINREB, *NATURAL LAW AND JUSTICE* 184-223 (1987).

160. Often these women are viewed as criminally responsible because it is argued that they "choose" to be pregnant and further "choose" to be addicted. The view expressed by the judge in a Florida case is typical:

The fact that the defendant was addicted to cocaine at the time of these offenses is not a defense. The choice to use or not use cocaine is just that — a choice. Once the defendant made that choice she assumed responsibility for the natural consequences of it. The defendant also made a choice to become pregnant and to allow those pregnancies to come to term. Upon making those choices the defendant assumed the responsibility to deliver children who were not being delivered cocaine or a derivative of it into their bodies. Children, like all persons, have the right to be free from having cocaine introduced into their systems by others.

People v. Johnson, No. E89-890-CFT, slip op. (Fla. 18th Dist. Ct. July 13, 1989), *aff'd* No. 89-1765, slip op. (Fla. Fifth Dist. Ct. App. April 18, 1991), *appeal docketed*.

For an examination of the role of choice in the situation of drug-addicted people, see Schmoke, *An Argument in Favor of Decriminalization*, 18 *HOFSTRA L. REV.* 501, 511 (1990). The effects of drugs in the lives and choices confronting drug-addicted pregnant women is an exceedingly complex subject. See Roberts, *supra* note 2, at 1445.

161. This is an acute problem because while pluralistic ignorance and race and gender-based prejudice are educable diseases, from whom will these men learn, each other? This is the quintessence of "pluralistic ignorance, shared group prejudices and stereotypes, confirmed and reinforced through verification with others similarly afflicted. See O'GORMAN, *supra* note 4.

Ordinarily the education of judges is the function of counsel in front of the bench, both through briefs and oral arguments. Behind the bench, judges are tutored by their law clerks and other judges. But given the demographics of the federal judiciary, the federal bar and the pool of judicial law clerks, (almost all of whom are white, affluent and male), who is there to break these circles of mutually reinforced ignorance, stereotypes and prejudice? None of the perspectives of the women being prosecuted are easily accessible for these judges. In a different context, Professor Torres has discussed a similar phenomenon in connection with the translation of Native American world views before American courts. Torres & Milun, *Translating Yonnonidio*, *supra* note 126. The contemporary federal judiciary is bereft of the outsider translating function; it cannot hear the outsider voice, and thus is not legitimate for all segments of America.

ii. **Legislative Constraint.** In theory, the legislature could exercise considerable control over prosecutorial discretion. First, the legislature could periodically prune criminal statutes, eliminating crimes for which there was no longer a public consensus. When rarely enforced laws are on the books they invite pernicious selection of defendants and prosecutorial abuse.¹⁶² Second, greater precision in statutory drafting could limit prosecutorial discretion. Third, the legislature could impose procedural limitations on how the prosecutorial function is executed by requiring written guidelines.¹⁶³ Finally, the legislature could limit prosecutors by controlling the funds available for different kinds of prosecutions and within constitutional limitations, through committee and staff oversight and control of the purse strings.¹⁶⁴

Yet notwithstanding the theoretical potential for legislative control, actual control is not particularly effective. This is so for several reasons. It is politically easier to make something a crime than to decriminalize behavior.¹⁶⁵ For example, while there are almost no prosecutions for adultery, politicians apparently sense that generally it is not politically feasible to decriminalize adultery.¹⁶⁶ Perhaps the difficulty is that while the behavior would not be criminalized if the legislature was starting on a blank sheet, when something is already criminal, legislators fear if they suggest decriminalizing the behavior the public might mistakenly believe the legislators are endorsing the behavior. Another reason for over-

162. Vorenberg, *supra* note 38, at 1531. See also Johnson, *supra* note 53 (reporting adultery prosecutions at spousal behest).

163. Illustrative of legislative restriction would be New York statutes which limit discretion in prosecutorial post-indictment pleas. N.Y. CRIM. PROC. LAW § 220.10 (McKinney 1982). Significantly, these statutes do not mandate specific charges be brought even where there is sufficient drug weight to warrant such charges. Thus, even under these legislative restrictions, prosecutors still maintain substantial and unreviewable pre-indictment charging discretion. For example, in any drug case where the prosecutor does not charge the highest level drug crime possible, no one, especially the defendant, will complain.

Another approach could be legislatively initiated studies and reviews of areas of potential abuse of prosecutorial discretion. The movement in New York and elsewhere in the late 1970s to limit potentially abusive prosecutorial behavior under the cloak of grand jury secrecy favorably illustrates the potential for legislative oversight. See, e.g., STAFF OF THE CODES COMMITTEE OF THE NEW YORK STATE ASSEMBLY, ABUSE OF POWER, 199th Sess. (1976) (on file with the author).

164. Cf. K.C. DAVIS, *supra* note 34, at 147 (comparing these theoretical legislative committees to the appropriations committee which exercises control over the S.E.C. by limiting funds available along with the expenditure of funds).

165. See generally Ifill, *Senate's Rule for Its Anti-Crime Bill: The Tougher the Provision, the Better*, N.Y. Times, July 8, 1991, at A6, col. 1 (noting that anti-crime bills in today's Congress gain support only if they are perceived as stiffening criminal penalties).

166. In an exceptional situation the Connecticut State Legislature refused to rely on prosecutorial discretion *not* to prosecute adultery, and instead statutorily voided the state's adultery law because of marital privacy interests. See *supra* note 53.

criminalization is that adding crimes and stiffening penalties provides legislators a quick and cheap public relations fix for a problem. In the war on drugs, this is illustrated by the biased and unduly harsh treatment of crack/cocaine as compared to cocaine.¹⁶⁷

Taking unused criminal statutes off the books would, however, be a significant reform to limit the scope of prosecutorial discretion. An easy method to assure that all criminal statutes still on the books cover behavior which is still considered criminal would be to have all criminal statutes include sunset provisions, whereby statutes expire on their own at the end of some stated period, perhaps five or ten years. This would require periodic reenactment or at least some expression of the public will. Although care would have to be exercised to avoid having criminal behavior slip through the system via statutory lapses, this method would limit the ability of prosecutors to use outdated laws to prosecute some for behavior no longer considered criminal by a majority.

Some legislative efforts to control prosecutorial discretion also fail to be particularly effective. Illustrative is the ease with which prosecutors can evade legislative efforts to restrict prosecutorial discretion with respect to plea bargaining by careful control of which charges are alleged and negotiated with defense counsel prior to filing charges. That is, prosecutors can do their plea negotiations at a stage earlier than the triggering event that limits their discretion, usually the filing of formal charges by way of indictment. This evasive prosecutorial dance can be witnessed particularly in connection with drug related crimes.¹⁶⁸

Most drafting techniques have not limited prosecutorial discretion.

167. Legislative differentiation between penalties for the possession of powdered cocaine versus crack/cocaine were declared unconstitutional by a Minnesota judge. This African-American woman, Judge Pamela Alexander, ruled that the state had made an insufficient showing with respect to the pharmacological differences between the two forms of cocaine to justify the disparate impact of criminal sanctions on African-Americans. At the intersection of race and gender, this judge perceived disparate treatment for similar offenses as being justified by stereotypes, not science. London, *Judge's Overruling of Crack Law Brings Turmoil*, N.Y. Times, Jan. 11, 1991, at B5, col. 3.

168. In New York, once an A-I felony drug indictment is filed, the prosecutor is statutorily restricted to offer no less than an A-II felony. N.Y. CRIM. PROC. LAW § 220.10(5) (McKinney 1990). Prior to the filing of a grand jury indictment, a defendant may waive prosecution by indictment and the prosecutor is essentially free to offer any charge. N.Y. CRIM. PROC. LAW § 195.10(2)(b). Even after indictments, prosecutors have permitted improper waivers in an effort to get witness cooperation against a defendant. By permitting these waivers, the prosecutors evade statutory restrictions and then are free to offer "illegal" plea bargains as inducements. See *People v. Thomasula*, 158 A.D.2d 126, 557 N.Y.S.2d 187 (N.Y.App. Div. 1990), *appeal granted*, 76 N.Y.2d 897, 561 N.Y.S.2d 559, 562 N.E.2d 884 (1990) *People v. Mays*, 567 N.Y.S.2d 316, (N.Y.App. Div. 1991). Beyond these restrictions, prosecutors may still offer more lenient sentences than those in the sentencing guides as inducements to cooperate with the permission of the court. N.Y. PENAL LAW § 70 (McKinney 1987).

Using the word "shall" in a criminal statute has not meant that the prosecutor affirmatively must do anything.¹⁶⁹ No outrage follows non-enforcement. No public, judicial or legislative scrutiny follows secret decisions made by prosecutors without publicly stated reasons or findings of fact to establish which criminal laws will be enforced and against whom.¹⁷⁰ Prosecutors have much discretion and little public accountability.

iii. **Electoral Accountability.** By and large electoral accountability with respect to prosecutors is farcical. To begin with, some of the most important prosecutors are appointed, not elected. This is particularly true with respect to federal prosecutors who are appointed by the President and confirmed by the Senate.¹⁷¹ Except for those United States Attorneys with local political ambitions,¹⁷² United States Attorneys are not accountable to the local electorate. This does not, however, mean that Justice Department appointments are free from politics. In at least some Justice Department appointments there is evidence that the process can become the captive of national political ideologues and not pay heed to the merits of criminal justice professionals.¹⁷³ In any event, except for President Carter, winning presidential politics since 1968 has not represented minorities, especially African-Americans.¹⁷⁴ And this has been reflected in the color and ideology of most regular appointments as United States Attorney.

With respect to most state prosecutors, while they are elected,¹⁷⁵ there is not much real accountability.¹⁷⁶ Many are nominated either in

169. K.C. DAVIS, *supra* note 34, at 188-89.

170. *Id.* at 189.

171. 28 U.S.C. § 541 (1988). It is probably true, however, that under the federal system there is some local input at least where the President and United States Senator(s) are of the same party.

172. See, e.g., Glaberson, *LAW: At The Bar; Prosecutors and Politics: A Feud Reopens the Debate on the Propriety of Such a Match*, N.Y. Times, Jan. 19, 1990, at B6, col. 1 (reporting on the trend of prosecutors using their positions as a stepping stone for political candidacy).

173. Johnson, *Washington at Work; Attorney General Calm Despite Storm at Justice*, N.Y. Times, June 8, 1990, at A12, col. 1 (reporting on Robert B. Fiske, Jr.'s withdrawal of his candidacy under pressure of Congressional conservatives).

174. Nixon voters in 1968, 1972 respectively: African-Americans ("AA") = 3%, 13%, Whites ("W") = 59%, 70% Females ("F") = 53%, 61%, Males ("M") = 55%, 68%; Carter 1976: AA = 95%, W = 47%, F = 51%, M = 51%; Reagan voters in 1980, 1984 respectively: AA = 7%, 9%, W = 63%, 63%, F = 53%, 55%, M = 60%, 62%. W. MILLER & S. TRAUGOTT, *AMERICAN NATIONAL ELECTION STUDIES DATA SOURCEBOOK 1952 - 1986* 316 (1989). Please note that figures for the 1968 election are only approximations. See *id.* at 313.

175. See *supra* note 90.

176. See K.C. DAVIS, *supra* note 34, at 207-08 n.20 (discussing electoral accountability and the ABA's Model Department of Justice Act).

one party jurisdictions or by both parties even where there is a viable two party system. In addition, the public is generally not very sophisticated about the prosecutor's role in the criminal justice system. Constant monitoring of prosecutors is difficult due to the low visibility of most prosecutorial decision-making and the expertise needed to evaluate it.¹⁷⁷

Due to the low visibility and technical nature of much of prosecutors' work, without an intermediating institution such as the Boards proposed in Part IV below, significant electoral accountability is illusory. The one major caveat is where the prosecutor himself orchestrates the public perception of his office through the media. This is sometimes done for appropriate law enforcement purposes, such as enhancing the deterrent effect of law enforcement.¹⁷⁸ Prosecutors, however, are capable of conducting their offices in ways designed to enhance their own political careers.¹⁷⁹ The manner in which Thomas E. Dewey did this on his journey from Assistant United States Attorney to Governor of New York, to almost President of the United States, is the commonly accepted model: a high profile, selectively hard working, incorruptible crusader for public morality and law and order.¹⁸⁰ Public accountability can be effective when prosecutors are politically ambitious and if done like Dewey, this need not be all bad. Yet such accountability depends on the happenstance of a politically ambitious prosecutor, and by definition it is biased towards majoritarian power and values.

Although prosecutors are political beasts,¹⁸¹ one reason American prosecutors are not effectively accountable to traditionally excluded minorities is because minority votes are submerged within large single representative election districts. For outsiders, the choices on election day are not choices. For the same reasons that there have been complaints of race discrimination against local legislative bodies¹⁸² and elected judicial-

177. Bubany & Skillern, *supra* note 43, at 488.

178. The annual ritual of initiating tax prosecutions with great media fanfare just before the tax filing date each year is an example of the media as a powerful law enforcement mechanism.

179. See *Weld For Governor*, Boston Globe, Nov. 1, 1990, (Editorial Page), at 22; DeStefano & Moses, *supra* note 77; see generally Vorenberg, *supra* note 38, at 1558-59.

180. See generally R. SMITH, THOMAS E. DEWEY AND HIS TIMES (1982) (chronicling Dewey's early days as Assistant United States Attorney in the Southern District of New York, his rise to Special Prosecutor in New York County to Governor of New York, and his nearly successful bid for President of the United States).

181. *Morgenthau for District Attorney*, N.Y. Times, Sept. 2, 1985, § 1, at 20, col. 1.

182. See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982) (affirming the lower courts' holdings that Burke County's at-large election system in Georgia violated the fourteenth and fifteenth amendments rights of their black citizens); see generally Berry & Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA. ST. L. REV. 85 (1979) (discussing the discriminatory effects of at-large districting in the election of local legislative bodies); Note, *Casting a Meaningful Ballot: Applying One-*

ies,¹⁸³ the lack of representative nature of local elected prosecutors could be challenged.¹⁸⁴

Thus, all three types of constraint on prosecutorial discretion, judicial, legislative, and electoral are inadequate to serve both as real and perceived constraints on potential abuse of prosecutorial discretion. Given this potential for abuse and the lack of effective constraints on prosecutors, the question remains whether (1) the prosecutions of drug-addicted mothers is the result of abusive exercises of discretion, or (2) the perception of bias is reasonable, even when bias cannot be proven.

III. PROSECUTORIAL DISCRETION AND DRUG-ADDICTED PREGNANT WOMEN: GENDER, COLOR AND CLASS: PERSPECTIVES ON THE POLITICS OF PROSECUTORIAL SUBORDINATION

*[Prosecutorial discretion is] the most dangerous power of the prosecutor [because it enables prosecutors] to pick people he thinks he should get rather than pick cases that need to be prosecuted.*¹⁸⁵

The early returns suggest that prosecutors are abusing their discretion.¹⁸⁶ And this should not be surprising since the executive is capable of exercising governmental power in arbitrary and capricious ways and violating other basic values such as antidiscrimination norms with respect to race and gender. Today prosecutors may choose literally at will

Person, One-Vote to Judicial Elections Involving Racial Discrimination, 98 YALE L.J. 1193 (1989) [hereinafter Note, *Casting a Meaningful Ballot*].

183. See *Chisom v. Roemer*, 111 S. Ct. 2354 (1991) (noting that the existing method of electing two Louisiana Supreme Court justices impermissibly diluted minority voting strength); *HLA v. Attorney General of Texas*, 111 S. Ct. 2376 (1991) (discussing a claim of vote dilution in Harris County, Texas). See generally *Butler & Murray, Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a Rainbow Coalition Claim the Protection of the Voting Rights Act*, 21 PAC. L.J. 619, 624-40 (1990).

184. Under *Chisom*, since judges qualified as "representatives" for the purposes of the Voting Rights Act, *Chisom*, 111 S. Ct. 2354, prosecutors also should qualify as representatives. Whether there is fertile ground for a litigative challenge to state elected prosecutors' offices because of the effect that single large district elections has on minorities protected by the Act is a more difficult question. Although state judicial election cases are in many respects different, for example, multiple judges versus single prosecutors, similar challenges might be made to state elections of district attorneys. *Chisom*, 111 S. Ct. 2354; *HLA*, 111 S. Ct. 2376; *Rogers*, 458 U.S. 613 (1982); *Berry & Dye, supra* note 182, at 85; Note, *Casting a Meaningful Ballot, supra* note 182, at 1193.

185. M. FREEDMAN, *supra* note 62, at 216 (quoting Justice Robert Jackson's Address to the Second Annual Conference of U.S. Attorneys, April 1940).

186. The combined effects of investigative bias, reporting bias, and prosecutors own biases, leads to the disproportionate targeting of poor black women. See *supra* notes 23, 28 and accompanying text. This would be less visible were it not for the monitoring and reporting function of the ACLU Reproductive Freedom Project. The Boards suggested in Part IV would serve similar functions.

to prosecute all, any or no drug-addicted mothers.¹⁸⁷ Prosecutorial discretion in this area, as in many others,¹⁸⁸ is virtually unbridled. Such uncontrolled and substantially unreviewable latitude is an invitation for abuse.¹⁸⁹

The result of discretion . . . has not been to select out the most dangerous criminals, . . . not the individuals or groups who are the greatest threat to the social order, but to select out those persons with less power and influence, persons who are perceived as the greatest nuisance or those who most offend against middle-class morality or who refuse to knuckle under.¹⁹⁰

The statistical evidence that prosecutors discriminate in the investigative, charging, plea, trial and penalty stages of criminal prosecutions is not conclusive.¹⁹¹ At every stage where there is prosecutorial discretion

187. A number of the prosecutions have been dismissed on legal grounds. See Paltrow & Shende, *supra* note 27, an ACLU report on written opinions dismissing prosecution of drug-addicted mothers. Some of these prosecutions have been dismissed on constitutional grounds, Phillips, *supra* note 25. Drug mother prosecutions have also been dismissed when they involved misinterpretations of statutes, *DA Will Not Fight Court's Dismissal of Indictment in Fetal Drug Case*, Boston Globe, Nov. 29, 1990, at 54, col. 4. See generally Roberts, *supra* note 2, at 1462 (arguing that on both constitutional privacy and equal protection grounds these prosecutions should be set aside).

188. See K.C. DAVIS, *supra* note 34, at 151-52.

189. Davis argues that all selective enforcement of the law is inherently unjust. See *id.* at 167, 169-177. Davis optimistically argues that such selectivity can be effectively limited as necessary to the ends of justice and equal treatment under law. *Id.* at 189.

190. AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 146-47 (1971).

191. It is extremely difficult to prove with social scientific certainty whether unarticulated and perhaps unconscious racism is a significant factor in prosecutions. As the majority in *McCleskey v. Kemp* points out, one can never quite know whether all of the variables in life have been factored out so as to prove with certainty that race has been a factor in decision-making. 481 U.S. 279, 311 (1987). This statement proves too much, however. Once natural scientific thought switched its claim from certain to probable truth, science was forced to acknowledge that all knowledge was tentative and required some leap of faith to believe. M. POLANYI, PERSONAL KNOWLEDGE: TOWARD A POST-CRITICAL PHILOSOPHY (1958). It follows that the social sciences can make no greater claim to certain knowledge than the natural sciences. Cf. P. WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 23-24, 127-28 (1963) (stressing the relation between social institutions and perceptions of reality).

Thus the point is not whether we ever know anything through statistical proof, maybe we do, maybe we do not. Rather, the question is why individuals or the courts choose to believe or disbelieve, act or not act, on certain facts but not others. Faigman, *Normative Constitutional Factfinding: Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991). For example, the Court frequently purports to know things on rather flimsy proof. See *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2488 (1990) (holding that little evidence of actual effectiveness of road checkpoints is required); *U.S. v. Sokolow*, 490 U.S. 1, 8 (1989) (holding that D.E.A. agents had reasonable suspicion to believe that defendant was transporting illegal drugs when he was stopped because, among other things, he paid \$2,100 in cash for plane tickets to Miami and spent only 48 hours there after 20 hours of travel); *Florida v. Royer*, 460 U.S. 491, 523 (1983) (Rehnquist, J., dissenting) (arguing that police officers had "reasonable" suspicion to believe that defendant was transporting narcotics when he was apprehended because he fit the "drug courier

there may be discrimination and abuse. What is known for sure is that at several critical stages the prosecutor's discretion is virtually without any formal constraints and prosecutors as a group are not presumptively any less prejudiced than other white Americans in respect to race, gender and class biases.¹⁹² Prosecutors have unchecked and, under current doctrine, effectively unreviewable power to select particular individuals or groups for prosecution on the basis of race or class, notwithstanding that the case would not ordinarily be criminally prosecuted at all or to the same degree.

As viewed from the bottom, gender, race and class appear to be combining to enhance the likelihood that drug-addicted women will be prosecuted. Whether one agrees with this depends upon the legal method adopted. As used here, legal method is that which "organizes the apprehension of truth; it determines what counts as evidence and defines what is taken as verification."¹⁹³ The legal method and the politics of criminal law enforcement, as applied to the discretionary selection of which crimes to investigate and prosecute, has received little attention. There has been insufficient focus upon the intersection of gender and race in the ideology of criminal prosecutions.¹⁹⁴ The prosecution of drug-addicted mothers is an opportunity to take a glimpse.

A. *The Perception of White Male Control, Racism and Classism*

For the most part prosecutors are a group of relatively privileged insider white males with few women and virtually no minorities in the top or senior position and little minority representation even at more junior levels.¹⁹⁵ Head prosecutors are selected either as a result of an ap-

profile"). The Supreme Court similarly does not know other things on strong proof. See *Richmond v. Croson*, 488 U.S. 469, 470 (1989) (holding that evidence of past discrimination in the construction industry is not enough to justify the use of racial "quota"); *McClesky v. Kemp*, 481 U.S. 279, 311 (1987) (citing and then discounting the "Baldus" death penalty study).

192. See, e.g., T. Smith, *supra* note 89, at 5; Bodenhauser & Wyer, *supra* note 113, at 268 (showing how stereotypes reinforce and enhance punishment given stigmatized group members when their behavior is viewed as consistent with the stereotype). See generally G. ALLPORT, *THE NATURE OF PREJUDICE* (1954).

193. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *SIGNS* 515, 527 (1982).

194. Both Professor Roberts and the Harvard Law Review *Developments* article are notable exceptions. Roberts, *supra* note 2; *Developments-Race and the Prosecutor's Charging Decision*, *supra* note 43, at 1520-56.

195. For example, while there are some junior level prosecutors of color in some prosecutors offices, the representation of women and especially minorities at senior levels is scant. Cf. Dreyfuss, *Harlem's Ardent Voice*, N.Y. Times, Jan 20, 1991, (Magazine) at 23 (reporting battle between African-American activist minister and prestigious local prosecutor over the lack of administrators from

pointive political process that relies on networks which have traditionally excluded women and minorities or as a result of a single district electoral process. The latter process is not likely to produce women or minorities in many locations throughout this country.¹⁹⁶ Once the head prosecutor has been selected, generally *he* has wide discretion in picking assistant and administrative prosecutors on any basis *he* wants. Frequently, the mirror test is employed, with the prosecutor picking those which look just like *he* does.¹⁹⁷ Almost never is someone who looks like the prosecutor's cook, maid, doorman, gardener or shoeshine "boy" picked for supervisory roles. There is little wonder that the perception in some quarters is that the prosecution of drug-addicted women and minority males for drug offenses is perniciously biased by those ignorant of and insensitive to outsiders.¹⁹⁸

As was the case with the judiciary, the likelihood that prosecutorial discretion is being exercised in a biased manner is increased under conditions of ingroup pluralistic ignorance.¹⁹⁹ To the extent that within the prosecutorial hegemony there is an ingroup mentality, and to the extent that the prosecutorial group has shared inaccurate views of others not in the group, like pregnant minority women, prosecutors may perniciously discriminate in the exercise of prosecutorial discretion with no internally generated reality check. Where power is exercised in ignorance, it hardly generates bliss for those under its control. Under such circumstances, the ingroup sets out in good faith to achieve an objective, for example, the prosecution of "crime" or the teaching of a lesson to those whom they perceive to be bad mothers. Yet the ingroup's pursuits are perni-

minority groups on the prosecutor's staff). Indeed a somewhat dated study of United States Attorneys concluded that "[m]iddle-aged white males clearly dominate the ranks of recent U.S. attorneys. No women served between 1961 and 1973. No information on the race of U.S. attorneys exists, but only a handful of blacks (very likely less than five) have ever received an appointment." J. EISENSTEIN, *supra* note 57, at 49 (footnote omitted). This author's impression is that there have been modest and inconsistent changes in the demographics of federal prosecutors' offices since Eisenstein's study. But the few exceptions today only serve to highlight the rule that prosecutors' offices, particularly at senior levels, are predominantly white male professional associations. *But see* James, *Aggressive Prosecutor: Reena Andrea Raggi*, N.Y. Times, Apr. 23, 1986, at B4, col. 6.

196. Although the state judicial election cases are in many respects different, e.g., multiple judges versus single prosecutors, in some of their aspects similar challenges might be made to state elections of district attorneys. *Chisom v. Roemer*, 111 S. Ct. 2354 (1991); *HLA v. Attorney General of Texas*, 111 S. Ct. 2376 (1991); *Rodgers v. Lodge*, 458 U.S. 613 (1982); *Berry & Dye, supra* note 182; *Note, Casting a Meaningful Ballot, supra* note 182.

197. For many of the reasons prosecutors are not able to screen minorities from petit juries, see *Batson v. Kentucky*, 476 U.S. 79 (1986) (minorities should be included in every other phase of any legitimate criminal justice system, including that of the police, prosecutors, and judges).

198. *Roberts, supra* note 2, at 1424. *See also* *Greene, supra* note 32.

199. *See* O'GORMAN, *supra* note 4 and accompanying text.

ciously, though unintentionally, subverted and shaped by the group's ignorance. The importance of counteracting this effect by including outgroup perspectives is essential. The process should incorporate different group understandings to help minimize the risk of pluralistic ignorance.

Other world views derived from different legal methods are certainly possible and could include those offered by current outsider approaches drawn from feminist and critical race scholars.²⁰⁰ Given the apparent biases involved in prosecuting drug-addicted mothers, including the perception that women of color are being unfairly and disparately affected, both feminist and critical race perspectives could provide some needed conceptual checks on exercises of prosecutorial discretion in this area.

B. *Shedding Prosecutorial Subordination: The Incorporation of Race and Gender Perspectives*

For the purposes of this article, incorporating feminist and race perspectives means at least acknowledging: (1) the centrality of gender and race/culture in the current American context, (2) that there is presently great economic, social and political inequality revolving around these categories, (3) that at some level *all* Americans are responsible for perpetuating this hegemony, and (4) therefore all must demonstrate a commitment to necessary fundamental transformation.²⁰¹ While the position avowedly adopted here is that both feminism and race/cultural perspectives are in part a function of who we are and what our experiences have been, they are also a function of *choosing* the outsider's perspective and considering it as a legitimate one from which to act.²⁰² Thus there is a claim for uniqueness, although to some extent self-consciously chosen.²⁰³

200. Gender and race may not be the only sources of outsider perspectives; there is no intent to erect a new minority/feminist/outsider intellectual hegemony. The intent is only to recognize feminist and critical race scholarship as among the currently promising sources for transformative insight into deep-seated values and goals which we all either share or publicly endorse, including equality, neutrality and tolerance. These deep-seated values should acknowledge the limits and unstated norms of our own points of view. See Minow, *Making All the Difference: Three Lessons in Equality, Neutrality, and Tolerance*, 39 DEPAUL L. REV. 1, 12 (1989). This article does not survey feminist or critical race scholarship. The goal here is limited to illustrating how including these sometimes excluded Weltanschauungs might improve democratic process.

201. E.g., Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, at n.8 (1990).

202. *Id.* at 833. See also M. MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION AND EXCLUSION IN AMERICAN LAW* 52, 60-65 (1990).

203. Experience is not the only component of this discourse. Certainly all people of good will, including white men, can examine the ways in which they or their group are privileged by the oppression of others, and contribute reason, learn different perspectives and choose to participate in social transformation. Each of us decides how important "freedom for all" is to us individually.

In part, the issue of regulating what drugs women can take can be viewed as a question of power.²⁰⁴ Should women because of their unique role in the reproductive process be subjected to increased regulation and control by the state? Is it appropriate to define women in terms of their unique reproductive function for the purpose of state regulation?²⁰⁵ This question has been addressed in an excellent Note in the Harvard Law Review.²⁰⁶

The Harvard Note pointed out the historical interrelationship between women's reproductive role and the subordination and control of women. In particular, the contemporary rights discourse which frames the issue in terms of the rights of the pregnant woman/mother versus those of the unborn, while useful in contexts where notions of equality are appropriate such as employment, may not be entirely appropriate in the context of regulating a woman's behavior during pregnancy. Rights discourse tends to atomize the relationship between women and their unborn in a way that makes that which is interdependent and connected, oppositional. While this serves the law's ends in making the controversy over women's and unborns' rights manageable within an adversarial, that is, oppositional, system, it denies the reality of pregnancy.²⁰⁷ Pregnancy is more accurately and better conceptualized as the occasion for greater recognition of the woman as the best decision-maker, rather than serving as an occasion for diminishing women's control over their bodies and that of the unborn.²⁰⁸

204. A more structural feminist argument could be made that for many women their poverty is directly related to a work-place implicitly supported by a structure that favors a conceptualization of the "ideal worker," one unimpeded by family responsibilities and childbearing. Given the distribution of family responsibility, this "ideal worker" favors men and structurally disadvantages women in the work-place. See J. Williams, *Deconstructing Gender*, 87 MICH.L.REV. 797, 801 (1989). Again Ms. Hardy illustrates Professor Williams's point; Ms. Hardy had to leave her factory job because of nausea related to pregnancy. This initial unemployment contributed to the spiral that lead to her poverty, addiction and some of her other unfortunate life circumstances. Hoffman, *supra* note 11, at 44, 53.

205. Cf. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L. J. 81, 140 (1987) (suggesting that both classic liberal and radical legalists have accepted Kantian human autonomy, thus denying the profoundly connected and relational nature of women's lives "because of [their] biological, reproductive role . . ."). The pertinent and possibly derivative question here is whether it is appropriate for women to be treated specially under the criminal law because of their reproductive biology. This is a necessary implication of West's work. To recognize difference for the purpose of inclusion and to remove barriers may be very different from the use of difference as a basis for criminally regulating the conduct of an historically dominated group.

206. Note, *Rethinking (M)otherhood*, *supra* note 24, at 1341.

207. *Id.*

208. The Harvard Note hedges on the question of whether addicted women should have the same decision-making power as other pregnant women. *Id.* at 1341-42. This is unfortunate for by

As a woman of color, Professor Roberts offers a rich perspective on the prosecution of drug-addicted women. The legal method she advances is deeply ingrained in the story of the American intersection of color and gender.²⁰⁹ From slavery to today, African-American women, by far the group most often targeted by prosecutors during pregnancy, have had their dignity as human beings denied and their significance reduced to their ability to produce healthy babies, historically the legal property of someone else.²¹⁰ Control of life style, and life itself, has often been dictated by their dual status as both gendered and raced people.²¹¹ Indeed, the legacy of history, cultural expectation and symbolism, all of which makes the prosecution of these women almost normal, inspires legal arguments uniquely shaped by the intersection of gender and race.²¹²

so doing this Note compromises its strongest argument: women should have greater, not less, decision-making power in this area, and society ought to support them in this role.

There is no compelling reason to compromise this essential position in the context of criminalizing pregnant women's behavior because a woman uses drugs, legal or illegal, during pregnancy, even in the case of women addicted to those drugs. First, there is substantial question as to whether criminalization of such behavior can serve to deter the behavior of addicted women. If deterrence is not society's goal, then what is? Certainly this is not an area where goals such as punishment or retribution are appropriate. See W. LAFAVE & A. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 1.5(a), at 31-36 (1986); see generally Duncan, "*Cradled on the Sea*": *Positive Images of Prison and Theories of Punishment*, 76 CALIF. L. REV. 1201, 1239-47 (1988); *The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303 (1988). Second, as a practical matter, given the nature of addiction, who else really can change pregnant women's behavior except the women themselves? Third, is the real problem consistent with the general position taken in the Note, that society needs to find a way to provide support for positive behavior by enhancing a woman's ability to make sound decisions and choices in this area. An obvious example might be providing treatment programs for addicted women who are excluded from current programs. Thus the solution would appear to be in supporting addicted women, not knocking them down a notch further with criminal law.

209. See, e.g., Bell Scott, *Debunking Sapphire: Toward a Non-Racist and Non-Sexist Social Science* in ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE 85 (1982).

210. Roberts, *supra* note 2, at 1438.

211. One is "raced" when exogenously placed in a racial category. F. FANON, *BLACK SKIN, WHITE MASKS* 109-140 (1967). A true story illustrates the phenomenon of being "raced." Some young men from the Dominican Republic, who had grown up in a largely Dominican area of New York City, were recruited to play baseball for a small town college in contemporary Georgia. These young Latinos were surprised to find that the townspeople regarded them simply as blacks. As one of the young men stated, "down there they kept referring to us as black . . . I've always thought of myself as Dominican." Rimer, *High School Heroes, After the Last Time Up*, N.Y. Times, June 19, 1991, at B3, col. 3.

212. I would supplement Roberts' constitutional arguments with reference to the growing body of feminist and race theory which looks directly to the thirteenth amendment. While the immediate prospects for doctrinal acceptance by the courts are probably not great, thirteenth amendment analysis does offer interesting possibilities for avoiding some of the pitfalls of fourteenth amendment doctrinal fixation on, and limitation to, formal and not substantive equality. Although Roberts argues primarily based on the Equal Protection Clause and Constitutional privacy doctrines, much of

Perhaps most illustrative of the power and enlightenment in Robert's method is her description of practices during slavery within the context of the current prosecutions of drug-addicted African-American mothers. Under slavery, the white male masters would punish black pregnant women by whipping them as they lay face down on the ground. The ground would have been prepared by digging a whole the approximate size of her belly. This hole was to protect the fetus - the master's future slave- while the mother was being whipped. Such punishment, Roberts asserts, is the "powerful metaphor for the evils of a fetal protection policy that denies the humanity of the mother."²¹³

Like the shaking of a kaleidoscope on one's world view, Professor Roberts draws upon the historical and continuing intersection of race and gender power relationships and the rationales used to support them to inform and contextualize our understanding of the value judgments reflected in the decisions to prosecute poor drug-addicted African-American mothers. These insights are particularly useful when the social differentiation, prestige and power of prosecutors are factored into the likelihood of prosecutor's misunderstanding both the phenomenon of addicted mothers and the symbolic and otherwise real significance of prosecuting these mothers of color.²¹⁴

Perspectives like those advanced by Roberts give more profound meaning to the situation of the poor drug-addicted mothers of color. Having a baby may address deep-seated needs of a person in the dispirited position of many addicted pregnant women. This phenomenon is reflected in a statement quoted by the recently retired Professor Gerda Lerner from an anonymous woman of color, apparently herself not a drug addict:

They came telling us not to have children. . . . There isn't anything they don't want to do to you, or tell you to do. They tell you you're bad, and worse than others, and your lazy. . . . Then they say we should look different, and eat different—use more of the protein. I tell them about the

the underlying premise of her arguments also appears to resonate in thirteenth amendment arguments with respect to both African-Americans, see, e.g., Aleinikoff, *supra* note 124, at 1118-20; Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990). For an example of gender-based thirteenth amendment argumentation, see generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 15-10 at 1353 (1988) (characterizing the denial of federal assistance for poor women seeking to exercise their constitutional right to abortion as a form of involuntary servitude).

213. Roberts, *supra* note 2, at 1438.

214. Cf. O'GORMAN, *supra* note 4, at 153 (noting the danger that where there is pluralistic ignorance, false beliefs will be validated against a common cultural background reflecting social differentiation, prestige and power).

prices, but they reply about "planning"—planning, planning. . . . The truth is, they don't want you to have any [kids], if they could help it.

To me, having a baby inside me is the only time I'm really alive. I know I can make something, do something, no matter what color my skin is, and what names people call me. . . . You can see the little one grow. . . and you feel there must be some hope. . . . [The birth control people are] not going to give us [the economic resources] they have. . . . They just want us to be a poor version of them, only without our children and our faith in God and our tasty fried food, or anything.

They'll tell you we are "neglectful"; we don't take proper care of the children. But's that a lie, because we do, until we can't any longer, because the time has come for the street to claim them.²¹⁵

To the extent these views accurately reflect the dissonance between well-intentioned state intervention and the perceptions of women and men of color, the prosecution of drug-addicted mothers of color is not likely to have the intended result. These prosecutions ignore the complexity of race and gender consciousness.²¹⁶ Such consciousness leads to the perception that these prosecutions reflect prosecutorial social engineering designed to force the targeted women to abort their babies or otherwise not have children.²¹⁷ The enforcement effort is seen as only serving to further alienate and create a hostile environment; it does not positively influence behavior. To minimize these risks, prosecutorial discretion should be reviewed by and exposed to some outsider voices in the chorus of justice.

This is not to suggest there is one essential and unitary voice. Within the veil of color or gender there are significant differences as well

215. *Having a Baby Inside Me Is the Only Time I'm Really Alive*, in *BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY* 313-14 (G. Lerner ed. 1973) (quoting R. COLES, *CHILDREN OF CRISIS* 368-69 (1964) (emphasis added)). Ms. Hardy expressed similar sentiments. With parents who are Jehovah's Witnesses, she felt a child "was the one thing in the world that was mine. He was part of me, my body." Hoffman, *supra* note 11, at 44, col. 5.

216. See generally P. Williams, *On Being the Object of Property*, 14 *SIGNS* 5, 7-11 (1988) (discussing how race consciousness is shaped by the complex history of master-slave relationships).

217. See, e.g., Lev, *Judge Is Firm on Forced Contraception, but Welcomes an Appeal*, *N.Y. Times*, Jan. 11, 1991, at A17, col.1 (reporting on California judge's order that Ms. Darlene Johnson, an African-American woman with four children who was then pregnant with a fifth who was a convicted child abuser, thief, and bad check writer, have a birth control device implanted in her arm). This is part of a long tradition in America, one that emanates from slavery and the idea that black women existed totally under the control of white men, having or not having babies or families subject to white will. These attempts by whites to control the childbearing of women of color has continued through to today. The current view is that if a woman does not have the economic resources, a husband to care for her, and the other accoutrements of the white middle-class standard of motherhood, she has not the right to have children. Yet this reduction of motherhood to economics, and the adverse impact on women of color, has existed from the time of controversy. See P. Williams, *supra* note 216, at 7-11.

as commonalities.²¹⁸ Women of color are *both* the same as and different from white women.²¹⁹ And men of color are not only different from (and the same as) white men (and women); they are also different from (and the same as) women of color.²²⁰ Similarly, women of color are the same as *and* different from men of color. But this virtually endless process of differentiation and identification, multiples of consciousness ever changing and doubling back upon themselves,²²¹ illuminates the need for respecting difference and not homogenizing it.²²² Yet we must also give recognition to the categories in which people are subordinated.²²³

Developing ways to include outsider voices provides the hope that transformation can be accomplished, or at least begun from within the present constitutional framework.²²⁴ But the insights that outsider jurisprudences offer suggest that we should not be joining these (mostly) white male prosecutors who want to dominate, punish and control drug-addicted pregnant women. Supporting the criminalization of behavior that draws more from the structural aspects of traditional gender, race and class oppression, rather than real criminality, has a tendency to divide those of us who should be allies.²²⁵ What then should be done about

218. Some of the complexity of sameness/difference along the intersection of race and gender is captured by Professor Judy Scales-Trent's essay on being a white/black women and raising a son. Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J. OF L. & FEMINISM 305 (1990).

219. See Harris, *supra* note 5, at 608-16 (recognizing that the notions of gender essentialism and coherent personhood expressed in white feminism denies women of color the complexity of their realities, which are not singular, coherent, and uniform).

220. This is probably one of the most underdeveloped areas of scholarship. Some sisters know what is wrong with brothers, but brothers have had little to say about being brothers in their own voice. *But see* D. BELL, *supra* note 7.

221. Cf. Thomas, *A House Divided Against Itself: A Comment on "Mastery, Slavery, and Emancipation,"* 10 CARDOZO L. REV. 1481, 1505-15 (1989).

222. Cf. Harris, *supra* note 5. Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 131. See generally M. MINOW, *supra* note 202. Similarly, this author does not suggest that the much maligned "undifferentiated white male" is any more a uniform reality than those of us who speak in different voices are uniform realities. For more than one reason, we too must be careful not to homogenize other people, including white men. At the same time, the reality in America is that white males are privileged by presumptions of intelligence, authority and normalcy in both real and symbolic ways. Straight white upper-middle class males still define the "neutral standard," the norm and control, the comparative center of political and social power, as well as individual and corporate wealth. Outsider voices constantly must be legitimized in relation to a white male standard.

223. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1776 (1990).

224. *But see* Parker, *The Past of Constitutional Theory - And Its Future*, 42 OHIO ST. L.J. 223, 258-59 (1981).

225. Scarlet lettering divides groups who would have common interests in creating safe harbors from life's rough seas for poor and minority addicted women. It separates those in need of support from their most likely allies, other law abiding women, minorities and others sensitive to the view

these abusive prosecutions?²²⁶

Whatever the positions representative outsiders would take, if the discretionary use of prosecutorial power is thoroughly exposed and informed by outsider perspectives, other features of democracy may take hold to reshape discretionary executive power. The result may more closely approximate and reflect the will of all of the people, a more complete informed composite citizenry, not just what some prosecutors think is best for society and in particular for poor and minority women and children. Thus new and improved prosecutorial democracy is this author's aspiration.²²⁷ The Boards proposed below are one means of proportionately incorporating minority and hopefully outsider perspectives in the evaluation of prosecutorial functions without denying majoritarian selection of prosecutors. Whether this inclusion of different perspectives will make a difference in part depends on whether including minorities in discussions which concern minorities may affect the discussion and outcome. Inclusion will affect the outcome to the extent that "pluralistic ignorance" and American racism in the later part of the twentieth century depends upon being able to maintain self-deluding neutrality, apparent fairness and the legal fiction of racial impartiality.²²⁸ I hope this sort of procedural reform will work.²²⁹

from down under and the dangers of unconstrained executive power. Exposing the potentially arbitrary, oppressive and divisive tendencies of these prosecutions through the prisms of outsider perspectives may enhance both individual and group consciousness of prosecutorial injustice through democratic process and provide a means of increased control over such injustice.

226. Arguments about whether the prosecution of addicted pregnant women should be treated specially must be made with great care so as not to fall into either of the traps discussed by Professor Williams. To the extent that the argument is that poor, pregnant, addicted women of color should be treated the same, the question becomes the same as whom? If the standard is the 19th century, desexualized domesticated Victorian women, then these sisters have been condemned before the charges are brought against them. See generally CLINTON, *supra* note 46. On the other hand, to the extent it is argued that poor, pregnant, addicted women of color should be treated differently, the risk is that these sisters will be so marginalized that they may be divested of responsibility for, and power over, their own decisions, dehumanized, and thus treated in the traditional ways women of color have been treated since slavery. Roberts, *supra* note 2, at 1455. The solution to this dilemma may lie in understanding "partializing social constructions," rather than ignoring them, and in recognizing the complexity of human uncertainty principles. See P. Williams, *supra* note 216, at 11.

227. I am mindful of Derrick Bell's admonition that reform is not transformation. See D. BELL, *supra* note 7, at 75. This notwithstanding, I too persist.

228. Lawrence, *supra* note 78.

229. Since, as Professor Tribe states, any procedure which entails the notion of protecting minorities is ultimately predicated upon a substantive vision, the success of these Boards would be measured by the degree to which it contributed to more prosecutorial justice, especially for outsiders. See Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1077 (1980) (protecting minorities through procedure requires substantive theory).

IV. NEW PERSPECTIVES ON REFORMING PROSECUTORIAL DISCRETION

*Combating the ossification of race discourse requires a concerted effort to inject into the discourse the voices of people too long ignored and the power of experiential knowledge too long discounted.*²³⁰

This part of the article moves beyond criticism to possibilities for reform, including the laying of an informational foundation for the transformation of oppressive prosecutorial discretion. Having already highlighted some of the ways in which the prosecutorial function can be arbitrary, capricious and biased especially along gender, class and race/cultural lines, this part of the article first reviews some suggested reforms and then suggests a community based vehicle to develop information for further reform and new transformative models of prosecutorial justice. The vehicle suggested by this author, Prosecutorial Research, Information and Reporting Boards, blends improved monitoring, oversight and review of the execution of the criminal law by prosecutors with the inclusion of gender, class and race/cultural perspectives on law enforcement found in outsider communities. These Boards' transformative potential would inhere in their capacity to raise consciousness and provide the factual seeds around which new majorities of progressive people might coalesce.

A. *Something Old: Checks, Balances and Reform*

The concept of checks and balances as applied to prosecutorial discretion is often limited to notions of invoking interbranch or separate governmental power bases to overrule or delegitimize an exercise of executive power. Yet as Davis points out, the concept need not be so limited.²³¹ Checking might also be employed by intrabranh checks, such as prosecutorial peer group review, perhaps pursuant to some written internal policy guidelines.²³² Similarly, one could institute an internal admin-

230. Bell, Higgins & Shu, *Racial Reflections: Dialogues in the Direction of Liberation*, 37 U.C.L.A. L.REV. 1037, 1043 (1990).

231. K.C. DAVIS, *supra* note 34, at 142.

232. Many United States Attorney's Offices and state prosecutors already use a variation on peer review by making it necessary to have assistant prosecutors at the same or slightly varying levels of seniority and authority within the prosecutor's office formally sign and approve any actual complaint or indictment authorization. See generally K.C. DAVIS, *supra* note 34, at 143-44. Davis gives extensive hypotheticals and examples of how an internal policy of situational rule-making might proceed. *Id.* at 219-222, 225; accord Vorenberg, *supra* note 38, at 1543-45 (discussing the UNITED STATES DEPARTMENT OF JUSTICE PRINCIPLES OF FEDERAL PROSECUTION (1980); and

istrative appellate tribunal.²³³ Legislative committee staffs could also exert pressure to check and constrain prosecutorial discretion,²³⁴ as could the press and official ombudsman.²³⁵

The proposal made by this author is reformatory in calling for independent non-judicial review of exercises of prosecutorial behavior.²³⁶ The Boards proposed by this author are, however, also transformative in emphasizing the inclusion of different voices in shaping the monitoring and reporting function of the Boards. Before detailing the features of my suggested Boards, a brief evaluative review of the reforms suggested by others is in order.

Professor Vorenberg in his provocative treatment of prosecutorial discretion first mentions the grand jury and judicial preliminary hearings as a potential but relatively ineffectual and infrequent external limit on prosecutorial charging discretion.²³⁷ While this author is not as pessimistic as some about the ability of good defense counsel to influence the outcome of the charging process before the grand jury,²³⁸ obviously the effectiveness of the grand jury as a potential check is for the most part limited to those cases where defense counsel are available and can be effective. This resource factor will disadvantage many, like the poor and minority women being prosecuted for delivering babies exposed to drugs. Poor drug-addicted minority women generally will not be able to mount an effective defense before grand juries or preliminary hearing judicial officers.

Similarly, Professor Vorenberg concludes that internal limitations

NATIONAL PRIORITIES FOR THE INVESTIGATION AND PROSECUTION OF WHITE COLLAR CRIMES (1980)).

233. See, e.g., K.C. DAVIS, *supra* note 34, at 144-46. While this proposal would help regularize the administration of prosecutorial discretion, it is not likely by itself to correct for gender, class or race/cultural biases. Such biases are likely to be shared among prosecutors, and their treatment requires both: 1) increased internal diversity among prosecutors, and 2) the external development of outsider perspectives which can be injected into mechanisms for reviewing and controlling prosecutorial discretion.

234. *Id.* at 146-50.

235. *Id.* at 150-51.

236. Significantly, one element that this author's proposal shares with Davis's idea of ombudsmen is that the proposed Boards would have no power to correct injustice or maladministration except by criticizing and persuading. *Id.* at 150. No direct constraint on prosecutorial discretion is suggested at this time. Often well-intentioned efforts to curb discretion in the criminal justice system merely results in shifts of the locus of discretion and no net improvement. Diverging from Davis's approach, this author would not make the Board a single officer or for that matter a part of the executive as Davis suggests for his proposed ombudsmen. *Id.* Rather, the Board would serve as an independent watchdog or monitoring agency.

237. Vorenberg, *supra* note 38, at 1537.

238. *Id.* at 1538.

on prosecutorial discretion, such as self-constraint, have some force in regularizing the administration of justice. These intraoffice controls essentially do little more than reallocate unreviewable power within the prosecutor's office to higher level decisionmakers.²³⁹ For example, where pre-charging conferences with the defendant and her counsel are provided, "screening conferences" do not limit the overall policy setting discretion of the prosecutor's office. Regularizing "screening conferences" might help in making prosecutorial decision-making more fair and consistent; but it would not eliminate the great discretion to set policy at higher levels within the prosecutor's offices. Moreover, effective "screening conferences" presupposes that the poor would have a meaningful right to counsel at this "critical stage" in the criminal proceedings.²⁴⁰

Vorenberg believes in direct limitations of prosecutorial power through guidelines.²⁴¹ While this author concurs in many of Professor Vorenberg's judgments and opinions about how guidelines could improve prosecutorial justice,²⁴² determining what guidelines would be appropriate is difficult without adequate data about current practices and policies. Similarly, without adequate independent information and evaluative study it is difficult to determine whether guidelines once implemented are adequate or effective in achieving their intended objectives.²⁴³ Thus, the enhanced information this author's proposed Boards could generate would be a precursor and complement to Vorenberg's proposal.

In light of these doctrinal, legislative, and democratic institutional limitations on prosecutorial discretion, "we must try to find [other] ways to minimize discretionary injustice."²⁴⁴ Some prosecutors argue that

239. *Id.* at 1544-45.

240. Compare *U.S. v. Wade*, 388 U.S. 218, 224, 237 (1967) (right to counsel attached at post-indictment line-up which was a "critical stage" because its results "may well [have] settle[d] the accused's fate and rendered the trial itself a mere formality"); *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (pre-indictment, preliminary hearing was a critical stage at which the right to counsel attached); with *U.S. v. Gouveia*, 467 U.S. 180, 187, 192 (1984) (administrative segregation of federal prisoners after disciplinary hearing was not a critical stage because it was before the initiation of advisory judicial process against defendants). While not likely to be judicially mandated by the Rehnquist Court, such a right could be provided by legislatures to fulfill their independent obligation to further constitutional values. Constitutional values need not be protected solely by the courts. Legislatures should be urged to provide counsel generously to all, including the lower middle class, so that all have access to criminal defense counsel as do the wealthy.

241. Vorenberg, *supra* note 38, at 1562-65. *Accord Developments - Race and the Prosecutor's Charging Decision*, *supra* note 43, at 1550-51.

242. See also UNITED STATES DEPARTMENT OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION 1 (1980) (supporting the desirability of having a general statement of principles which guide prosecutors in the discharge of their duties); W. SEYMOUR, *supra* note 40, at 228-239.

243. Cf. *Developments - Race and the Prosecutor's Charging Decision*, *supra* note 43, at 1551.

244. K.C. DAVIS, *supra* note 34, at 216. Davis limits his inquiry to individuals with

there should not be specific policies and guidelines set forth as to which cases will or will not be prosecuted. To do so, it is argued, would reduce the deterrent effect of the criminal law, for if potential criminals believe that they might be prosecuted even though in fact they will not, society still obtains some "free" deterrent effect from the unpredictability of criminal law enforcement.²⁴⁵ This claim of "free" deterrence depends upon two unproven assumptions: that potential criminals are (1) uninformed of the actual risks of prosecution and (2) rational decisionmakers. Both assumptions may not comport with reality. First, assume that the prosecutor's office is not the only source of information about the likelihood of getting caught and prosecuted for particular crimes. Potential criminals have access to fairly good anecdotal information on who is getting arrested and prosecuted for what. Street level experience may more accurately reflect what actual police and prosecutorial policies are than those arguing "free" deterrence are aware of or acknowledging.

Second, for many potential criminals, and especially drug addicts, many of the decisions are not rational in the sense required for there to be any possibility of "free" deterrence or perhaps any deterrence.²⁴⁶ Specifically with respect to drug addicts, it is not at all clear that general deterrence theories have much to tell us about their behavior.²⁴⁷

Moreover, beyond whether "free" deterrence even exists, the question remains as to the liberty cost of this "free" deterrence. If prosecutors choose who will and will not be prosecuted with no external check or accountability, then perhaps the cost for this "free" deterrence is too high a charge for equal treatment, fairness, and liberty.²⁴⁸ The burden should be on the government to show that the free deterrence versus liberty calculation balances in favor of the government.²⁴⁹ Prosecutors should have to publicly justify their prosecutorial decisions within this resource allocation framework.²⁵⁰

prosecutorial discretionary power. From the "outsiders'" perspective, this view is too restricted; some of the peculiar aspects of the prosecution of drug-addicted women may be due to hegemonic group considerations having to do with gender, race and class perspectives.

245. Vorenberg, *supra* note 38, at 1549-50.

246. Greene, *supra* note 32, at 463 n.17.

247. Schmoke, *supra* note 160, at 511.

248. Vorenberg, *supra* note 38, at 1555 (noting that the risk of unequal treatment created by standardless discretion is troubling not only on due process grounds but also because it invites arbitrary and capricious decision-making which will fall most harshly on racial and ethnic minorities, social outcasts, and the poor). See also J. ELY, *supra* note 97, at 135-79 (asserting that prosecutors in *low visibility* discretionary decision-making are likely to be sensitive to social station and other factors that should not bear on their decisions).

249. Vorenberg, *supra* note 38, at 1550.

250. Indeed, it can be argued that fairness requires lower class criminals to get the same regular-

The public should be aware of the costs of the incremental deterrence in connection with cases that the prosecutor is not going to prosecute. And the choice of how much deterrence is worth how much potential abuse and discretion is an appropriate subject for public disclosure, debate, and resolution in a democracy. For example, if the prosecutor decides that no addicted women are going to be prosecuted for exposing their un- or newly born children to marijuana or alcohol, a certain amount of deterrence probably would be lost. Yet what would be gained is that these woman could not be arrested, booked, and plea bargained, leveraged or bootstrapped into other domestic and family law consequences. This is a policy decision which is appropriately reviewed by some specialized body independent of the prosecutor's office; ultimately, it is a policy choice about which the people should be given the information and the opportunity to decide.

There also should be some level of consistency in prosecutorial strategies.²⁵¹ As now is the case, prosecutors do not even necessarily know whether individual decisions are being made consistently. The system depends on the chance that someone involved in today's decision remembers yesterday's decision and the reasons for it. While this may work at times, this is hardly a methodology for assuring justice in the sense of equal treatment for similarly situated addicted mothers on Monday and Friday.

And to the extent that such policies are articulated but just not public, this gives unfair advantage to those who regularly work with the same prosecutors. Such practitioners will have cumulative experience which will allow them to perceive and apprehend non-public policies and inconsistencies with such policies. This, of course, disadvantages those not represented by attorneys who are regulars in the collegial adversary process.²⁵²

ized decision-making and notice as do white collar criminals in the cases of tax law, antitrust and securities criminal enforcement. In all three of these areas and others, the "free deterrence" bought from potential violator ignorance is foregone in the interest of the positive benefits from complete and open governmental guidance. Cf. K.C. DAVIS, *supra* note 34, at 196-203, 205-07. Yet just because the society may not be willing to admit any positive benefit from the underlying activities in lower-class circumstances involving illegal drugs or gambling does not justify providing guidance to some but not to others. These value judgments are substantially class-based and not unanimous. In any event, there is no reason that the policy choices being made should not be openly and publicly discussed.

251. Prosecutors may not be legally compelled to be consistent from one case to another. *See, e.g., Newman v. U.S.*, 382 F.2d 479, 482 (D.C. Cir. 1967).

252. The most frequent institutional opponent is usually a legal aid or public defenders office. However, in those cases where lawyers are appointed or retained who do not regularly represent defendants in that jurisdiction, the potential for lapses is greater.

B. *Something New: The Prosecutorial Research Information and Reporting Boards - Study and Information as Predicates to Justice and Transformative Coalitions*

[Shug] say, Miss Celie. You better hush. God might hear you. . . .

Let'im hear me, I say. If he ever listened to poor colored women the world would be a different place. . . .

. . .

. . . [Shug] say: Tell me what your God look like, Celie. . . .

. . . .

. . . I say. He big and old and tall and graybearded and white. . . .

. . . Sort of bluish-gray [cool eyes]. . . .

. . . .

. . . I know white people never listen to colored, period. If they do, they only listen long enough to be able to tell you what to do. . . .

. . . [Shug say] . . . God is inside you and inside everybody else. You come into the world with [it]. . . .

. . . God ain't a he or a she, but a it. . . .

. . . .

. . . [and says Celie] it want to be loved, just like the bible say.²⁵³

Living at the intersection of categories of oppression can produce insights of socially transformative potential. Looking out from the vantage points of Shug, Celie or the real Kimberly Hardy, the prosecution of poor drug-addicted minority women reveals camouflaged social structures and tendencies. Yet to understand and include these truths, to apprehend "it," we must proceed carefully, learning new techniques for listening as we go. Interactions must be genuine and not patronize these different voices; these voices must be treated with respect and dignity. Moving from the insights of Shug, Celie, and Kimberly Hardy, to a transformed and less oppressive society will not be easy, since there is no predetermined path. To begin this process in the context of prosecutorial justice, this author suggests establishing Prosecutorial Research, Information and Reporting Boards.

These Boards would generate information for democracy. The information generated on the prosecutorial function would aim to improve democratic oversight of prosecutors and hear those on the other side of criminal prosecutions, disproportionately poor and minority victims, defendants and communities affected by crime. These Boards would tell the story of not only what prosecutors were doing but also what prosecu-

253. A. WALKER, *THE COLOR PURPLE* 164-68 (1982).

tors were not doing. By orchestrating in counterpoint to prosecutors' dominant voices, these Boards could enhance democracy.

The duties of the proposed Boards would include collecting the kinds of information about individual cases and decisions that Professor Vorenberg has suggested be maintained by the prosecutors' offices.²⁵⁴ Explanations for why individual cases were handled the way they were would be useful data in verifying that prosecutorial justice is administered fairly. Yet as a prelude to social transformation, the Board's function would go further.

Critical problems with prosecutorial discretion arise because no one systemically monitors the cumulative effect of prosecutorial decision-making as it affects groups of people.²⁵⁵ In this area and others, data needs to be systemically collected in order to discern and project realities of the underrepresented, realities not revealed by the current focus on individual cases.²⁵⁶ By reasons of demographics, pluralistic ignorance and doctrinal anemia, the judiciary is not itself a likely monitor. And the scarce efforts of the private or the public interest bars and the media are neither sufficient, democratically responsive nor systemic. As illustrated by the prosecution of drug-addicted mothers, the question of whether poor African-American women are being unfairly treated is known only because of the happenstance observations of a few committed lawyers and sensitive journalists keeping a watchful eye on prosecutors.

The Boards this author suggests would have the power not only to require the prosecutor to record why particular decisions were made, but

254. Vorenberg, *supra* note 38, at 1565.

255. Indeed, academic observers have characterized prosecutorial discretion as often haphazard or random vis-a-vis particular individuals. *E.g.*, Vorenberg, *supra* note 38, at 1548-49. These observations are, however, myopic. That which appears random or haphazard may actually reflect biases against individuals because of their status as members of disfavored groups. Ascendent white male dominated perspectives and the perspectives of many outsiders sharply disagree as to whether gender, class and race impacts are presumptively coincidental in an essentially individualistic society or whether disparate impact is a reflection of deep seated structural and attitudinal group-based American biases. Outsiders frequently do not trust the rhetoric of color-blind individualism, seeing it more as a device to obfuscate group-based realities. Indeed, from our outsider perspective it is insider white males who talk the most about a color-blind individual-based America. These ascendant white males invariably make such utterances in the process of denying the advantages which have accrued to them because of the color of their skin and their gender.

256. The Board should have authority to study policy and program alternatives to the use of the criminal justice system to solve social problems. Prosecutors and courts are simply not qualified to make these types of comparisons, which majority-controlled legislatures may not find politically expedient to undertake. For example, what are the economic costs of jailing mothers and breaking up families compared to treatment and family support costs. *Cf. Lee, supra* note 13 (describing a program being used as an alternative to jailing drug abusing mothers and taking away their children).

also to require other kinds of data be maintained which might be useful in discerning patterns of prosecutorial (in)justice.²⁵⁷ The EEOC now requires this sort of data collection of some employers.²⁵⁸ The Board's data collection process could be encoded in ways that would protect confidentiality and preserve the integrity of criminal law enforcement.²⁵⁹ Even in these cases information, however sanitized, eventually should be disclosed to the Boards. The Boards should have presumptive power to require the collection and review of any data they think useful.

The Boards would operate with the assistance of professional counsel and staff services from one or more independent criminal justice research agencies like the Vera Institute.²⁶⁰ With such expert assistance the Boards would study its local prosecutor's office, whether federal or state, and issue periodic reports on topics of its choice to the prosecutor, the legislature, the courts for possible admission into evidence,²⁶¹ and most importantly to the public, on the ways in which prosecutorial discretion is exercised.

The composition of these proposed Boards is instrumental to their intended missions. Each Board should consist of people from small community-based districts within the prosecutor's overall jurisdiction. The representation of districts on their respective Board should be in propor-

257. Even if Boards on which outsiders were the dominant voice concluded that there was no group-based patterns such Boards would serve a useful purpose by exploring why perceptions of oppressive prosecutorial tendencies persist within minority communities and amongst some whites.

258. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-8(c) (requiring every employer subject to EEOC reporting requirement make, keep and report to the EEOC records relevant to determinations of whether unlawful employment practices are being or have been committed).

259. Indeed, the prosecutor ought to be armed with the right to go to court to prevent the disclosure of any information which might compromise an ongoing investigation or any person identified before the appropriate Board.

260. The Board should have access to the professional services and advice of criminal justice system oversight professionals like those found in the Vera Institute of Criminal Justice. *See, e.g., STATUS REPORT: WORK OF THE VERA INSTITUTE OF JUSTICE PURSUANT TO A CONTRACT WITH THE NEW YORK CITY POLICE DEPARTMENT AND THE OFFICE OF THE DEPUTY MAYOR FOR PUBLIC SAFETY 1990* (on file with author). Such counsel to the Board might prove invaluable by preventing the Board from reinventing the wheel when structuring studies, collecting, and evaluating statistical data. This author, however, would disfavor reliance on criminal justice professionals in lieu of a Board because no matter how expert such professionals may be they are no substitute in theory or practice for community-level input and control of the oversight function. A Board drawn from the community might have avoided the rather tense situation which occurred in a case like Howard Beach by openly reporting and encouraging debate on local prosecutorial and police policies which discouraged victims of racist crimes from cooperating with police and prosecutors who had initially assumed that the black victims had been the perpetrators. *See HYNES, supra* note 125.

261. *See, e.g., FED. R. EVID. 803(8); Wilson v. Beebe*, 743 F.2d 342 (6th Cir. 1984) (stating that the district court did not err when it admitted into evidence a memorandum written by a State Trooper District Commander pursuant to Federal Rules of Evidence 803(8)(A) or 803(8)(C)).

tion to the number of crimes prosecuted within the last two or three years from that district.²⁶² Through this mechanism the representation of each Board should reflect the districts most directly affected by crime, generally the communities of minorities and the poor. This or some similar mechanism should help incorporate outsider perspectives into law enforcement in a manner similar to that used in community-based policing,²⁶³ in the sense that it inextricably links community input into an ongoing and dynamic process of reviewing law enforcement priorities.²⁶⁴ Yet given these Boards' purely informational functions, they could give deserved greater weight to outsider perspectives without compromising majoritarian control over prosecutorial selection.²⁶⁵

This goal of greater inclusion of outsider voices, hopefully including people with both feminist and critical race perspectives,²⁶⁶ while not curtailing majoritarian control, should offer opportunities for using outsider perspectives to help transform our system of prosecutorial justice. Femi-

262. Authentic representation of the perspective of the communities from which most crimes are prosecuted would be facilitated by weighing the perspective proportionately in favor of the target communities. This approach relies on the fact that those communities targeted for prosecution are connected through family, friends and community with those who are most often affected as victims and defendants.

Yet another alternative might be structured in much the way that the new Districting Commission in New York City was structured. This Commission expressly attempted to balance its composition in terms of the categories of race/ethnicity that are protected under the Federal Voting Rights Act. See NEW YORK, N.Y., CITY CHARTER ch. 2-A, § 50(7)(b)(1) (1989). The rationale is that since the Board does not serve a direct operational governmental function but provides perspectives and reports on the execution of the criminal law by prosecutors, the Board should include local perspectives of gender, race and class and at least in some jurisdictions, perspectives based on sexual orientation. The method of selection of Board members should reflect notions of strong not weak democracy. See B. BARBER, *supra* note 262. Methodologically it might be possible to avoid express gender/race/ethnicity-based selections by making representation reflect the degree to which particular areas are targeted and by relying on local electoral processes to be inclusive.

263. James, *Brown's Gospel: Community Policing*, N.Y. Times, Aug. 14, 1991, at B1, col. 2 (discussing the values and dynamics of community policing); Blumenthal, *Putting Cops on the Beat: Easier Theory Than Practice*, N.Y. Times, Feb. 24, 1991, at E5, col. 1.

264. See, e.g., Blumenthal, *A Special Patrol Hacks at the Roots of Crime*, N.Y. Times, Feb. 15, 1991, at A1, col. 2 (reporting on minority community patrol officer's sensitive execution of the law with an eye towards prevention, not prosecution).

265. One of the long-term benefits from this community-based Board might be to serve as a consciousness-raising forum on the effects of and alternatives to law enforcement. This elevated awareness might in turn catalyze a new majority coalition to create and support alternatives to our current overreliance on the criminal law to solve all social maladies.

266. The mechanism prescribed would not assure representation of feminists or critical race theorists. The inclusion, however, of more politically active outsiders on the Board ought to infuse those perspectives into the Board insofar as they affect the thinking of these outsiders. Moreover, Board members could seek the expertise of legal, social science and other experts as warranted. Presumably some of this expertise would reflect the scholarship of feminists and critical race theorists.

nist perspectives on male domination, when joined with critical race perspectives reflecting the slave and other experiences of people of color, offer transformative coalition possibilities. The union and reunion of feminists and colored perspectives hold great promise in revealing more of the spectrum of life that generally should be brought to bear on prosecutorial discretion, and in particular, on prosecuting drug-addicted mothers. Part of the promise of some outsider perspectives is their ability to raise new questions when traditional patterns of oppression reappear, but to do so without substituting a new *single* standard of either the unitary woman or the unitary minority. These perspectives allow the possibility of including human differences without creating a new, single-perspectived normative hegemony.

The proposed Boards might have great utility to prosecutors, to courts, to the legislature in its oversight function, to the media and ultimately to the public by creating an informed public with the facts to act.²⁶⁷ The ways in which this information might be helpful in bringing *prima facie* cases based on race or gender discrimination even under current judicial doctrine are obvious.²⁶⁸ What is suggested here, however, is primarily a non-judicial method for developing and utilizing information with a different perspective on prosecutors, the legislatures and in public discourse.

Successful Boards would serve as a two-way mirror in front of the prosecutor. On the reflective side of the mirror, the prosecutor may better see his own actions and institute reforms. And on the other side, the see-through side of the two-way mirror, the legislature and the interested public can examine the prosecutor's patterns of behavior.²⁶⁹

267. The term "citizen" is intentionally avoided because of its exclusive characteristics, particularly in respect of undocumented persons. The aim of this author's proposal is to include as many underrepresented people as possible on the Boards. Being part of a high crime community is sufficient to qualify for participation on the proposed Boards.

268. Boards could generate at least the statistical components of antidiscrimination attacks. See *Washington v. Davis*, 426 U.S. 229, 240 (1976); cf. Vorenberg, *supra* note 38, at 1568-72 (inferring that a substantive review of prosecutorial charging and bargaining decisions would aid defendants in proving an unjustifiable deviation from stated policies). Information generated by the Board might also be used to combat judicial pluralistic ignorance and otherwise to assist transforming the judiciary.

269. While the proposed Board may invite comparison to the much maligned New York City Police Department Civilian Complaint and Review Board (CCRB), the two could not be more different. Unlike the CCRB, the proposed Board would be structurally independent of the particular prosecutor's office and would not have *any* direct power over the prosecutor's office except to require the collection and production of information as requested. Indeed, the only power of the Board is to study and review the prosecutor's performance and report to the prosecutor and, more importantly, to the legislature and the public. Whatever effect the Board may have will depend upon other demo-

As mirrors, the Boards could help prosecutors see their own behavior as those most affected see it. Hopefully the demographics of prosecutors' offices will come to reflect the demographics of the people governed. In the interim, there is no need to assume that all white male prosecutors in charge of offices, and certainly not all prosecutors within offices, are monolithic and uneducable. Even most white male prosecutors are not consciously or intentionally biased. These are not the mechanisms through which bias operates in most of contemporary American society. Racism, for example, is now more often in the norms, the symbolic and economic grain and structure of society. Virtually no one even admits to herself, let alone others, that she or he may be a racist.²⁷⁰ Far more typical today are patterns of racist opinions and attitudes which are shared and reinforced by groups, what this author calls the circle of racist ignorance. In such circles of ignorance, where pluralistic ignorance may account for more good faith evil than intentional race or gender discrimination, it makes sense to use the prosecutor's inevitable denial of individual racism as a segue to education. The Boards could serve as a permeable mirror and sensitize prosecutors to outsider methods and perspectives on prosecutorial justice.

Such education might include reviews and contributions of outsider perspectives at every stage of prosecution. For example, under the process described in Part I(B) above, if Board members included significant outsider perspectives amongst their ranks, the Boards could review from nontraditional vantage points prosecutorial interpretations of general statutes, in order to ensure that untoward assumptions or stereotypes about minorities and women would not go unchallenged.²⁷¹ Racist stereotypes, such as the belief that minorities are lazy and would rather steal than work, or that minority mothers care less (than white mothers) for the well-being of their children and need added state incentives like the threat of criminal sanctions to force them to be good mothers, would

cratic processes. For an example of the criticism levelled at the CCRB, see *Review Board Has Had Critics Since Its Start*, N.Y. Times, Apr. 28, 1985, at L34, col. 1

270. Lawrence, *supra* note 78.

271. This could be accomplished through direct contacts with prosecutors and by serving as *amicus curiae* in judicial proceedings, issuing reports to legislative bodies, the media and potentially interested public. Legislative bodies in particular could benefit from this different law enforcement perspective to help it fashion alternatives to the quick fix of more and more criminal law enforcement as the solution to all of society's ills. Cf. Vorenberg, *supra* note 38, at 1566-68. Some legislatures are becoming more representative of minorities and women. E.g., Toner, *Women in Politics Gain, But Road Is A Long One*, N.Y. Times, Feb. 25, 1991, at A6, col. 5; Holguin, *Latino Officeholders Increase by 6% Across U.S. in Year— to 4,004*, L.A. Times, Dec. 20, 1990, (Nuestro Tiempo), at 2, col. 5.

not go unchallenged. Study, review and reporting by Boards with outsider perspectives might similarly affect prosecutorial views of the sufficiency of evidence (or at least assure somewhat greater evenhandedness), and tailor the criminal justice system to the individual defendant and different groups in society. Yet appeals to prosecutors for informed self-correction probably will not by itself suffice. Some prosecutors will look at the Board's mirror and like the wicked step-mother in Snow White, see themselves as the fairest of all.

Attempts must also be made to educate and otherwise influence legislatures. The proposed Boards can be particularly helpful at this too. These Boards can serve as forums to avoid and bridge divisions among peoples with allied interests through a medium which does not use white male normative standards. The prosecution of drug-addicted minority mothers is illustrative.

These prosecutions separate women from women and minorities from minorities, all in the name of the "war on drugs." They leave the white male prosecutor's viewpoint in the middle as the "neutral" arbiter, deciding when criminal accusatory labels are appropriate tools of social policy. The Board's outsider feminist and critical race perspectives as derived from members of the affected communities ought to provide alternative visions of justice. Given the Boards' composition, members would probably have relatives, friends or neighbors touched by criminal law enforcement, and in particular, these members might view drug-addicted mothers and their children as integral and connected parts of their communities. For these Board members the drug-addicted mother might not be an evil other but the member's child or parent, relative or neighbor; that is, some one connected to networks of people from which the Boards themselves are drawn. The Boards' composition raises interesting possibilities for viewing the problem of socially deleterious behavior as not the acts of disconnected others but as problems within a community of connected people. Such outsider perspectives on the Boards might allow them to serve as the forums for outsiders to coalesce and then remind legislators and the public that justice entails kindness as well as punishment. These outsider views on prosecutorial justice would not only benefit women and minorities.

As alluded to by Kimberly Hardy when she referred to the prosecution of the thirty-six year old white lawyer, the "war" on illegal drugs may be a slippery slope leading to the diminution of civil rights and liberties for all Americans.²⁷² Hopefully the Boards, or at least a significant

272. Note, *Drug Couriers and the Fourth Amendment: Vanishing Privacy Rights for Commercial*

number of its members, would be sensitive to these general issues and also represent the interests of even those Americans not yet affected by the sweep of prosecutorial power.

This raises the Boards' potential to act as a catalyst for change and to transform politics beyond outsider perspectives. The Boards could serve as a forum for developing and articulating alternative views on the proper methods, scope and role of governmental power. They could serve as a point of origin for a different conversation about American democracy, one that sought to build coalitions predicated on respect for all, even poor drug-addicted African-American women.

V. CONCLUSIONS

*Small groups of people coming together to engage in feminist discussion . . . can be extended to include politicalization of the self that focuses on creating understanding of the ways sex, race, and class together determine our individual lot and our collective experience When women and men understand that working together to eradicate . . . domination is a struggle rooted in the longing to make a world where everyone can live fully and freely, then we know our work to be a gesture of love. Let us draw upon that love to heighten our awareness, deepen our compassion, intensify our courage, and strengthen our commitment.*²⁷³

Prosecutors have tremendous discretion, particularly at the precharging stage of the criminal justice process. This discretion is virtually unconstrained and unchecked by the courts, the legislature, and the electorate. Under such conditions there is great potential for this power to be used in unjust ways, particularly when prosecutors' powers are applied against some of the least powerful in society: drug-addicted poor minority women. The demographics, pluralistic ignorance, and ideology of courts do not make them likely centurions to check prosecutorial dis-

Passengers, 43 VAND. L. REV. 1311 (1990); cf. Note, *Government Drug Testing: A Question of Reasonableness*, 43 VAND. L. REV. 1343 (1990); Schmoke, *supra* note 160; Schuler & McBride, *Notes From The Front: A Dissident Law Enforcement Perspective On Drug Prohibition*, 18 HOFSTRA L. REV. 893 (1990); Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 J. MARSHALL L. REV. 825 (1989); see e.g., Belkin, *Airport Drug Efforts Snaring Innocents Who Fit 'Profiles'*, N.Y. Times, Mar. 20, 1990, at A1, col. 5.

Regardless of whether these observers are correct in singling out drugs as an excuse, they are certainly correct in noting that there is in some segments a perception that this is so. Indeed, one observer has suggested that during the rather numerous periods fairly called "wars" involving the United States, civil liberties are often among the first casualties. The challenge is to prevent the unnecessary and unjustified loss of civil liberties during these periods of crisis. M. LINFIELD, *FREEDOM UNDER FIRE passim* (1990).

273. Hooks, *Feminism: A Transformational Politic*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 185 (D. Rhode ed. 1990).

cretion or to inspire corrective justice. Although somewhat more representative, legislatures are not likely to be much more effective monitors and checks on prosecutorial discretion. Prosecutors, legislatures and courts could all greatly benefit from a new and different source of information about prosecutors. The Boards proposed in this article could provide that information and include the perspectives of different voices, those from prosecuted communities.

How these Boards might enhance democracy has been illustrated through the paradigm of the prosecution of poor and minority drug-addicted mothers. If actual but unremedied injustice is occurring, as appears to be the case in connection with the prosecution of drug-addicted women, then at the very least there ought to be orchestrated counterpoint to prosecutors' voices. These different voices regarding drug-addicted mothers are more likely to be forthcoming from those who have connections through community and life with those prosecuted.

Through the Boards proposed in this article, perhaps new visions of prosecutorial justice might be seen and reform engendered. The Boards, with their outsider perspectives and illumination of prosecutorial practices, would not necessarily assure better prosecutorial justice. They would enhance the likelihood that different voices would also be heard, voices which are hearing a different drum beat than the current relentless call for more jail, more jail, more jail. Perhaps the Boards can be one of Bell Hooks' small groups and catalyze a transformation away from prosecutorial control and towards self-control, more democracy and societal justice.²⁷⁴

274. See B. BARBER, *supra* note 262, at 307-09.