

# NEITHER INTENT NOR IMPACT: A CRITIQUE OF THE RACIALLY BASED SELECTIVE PROSECUTION JURISPRUDENCE AND A REFORM PROPOSAL

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*The doctrine controlling equal protection challenges of racially based selective prosecution is far from being satisfactory. It is hardly ever the case that a defendant can prove that a prosecutor had an invidious motive in her prosecution. Even if we generally accept the discriminatory intent as the heart of equal protection challenges, we should reject it in the specific context of racially based selective prosecutions. Special features of criminal law, of race issues, of prosecutorial discretion, and especially the combination of the three, mandate a new standard that forgoes the intent requirement. Yet the alternative that is usually presented—a standard based on proof of disparate impact—is no less problematic, because it might render the criminal justice system dysfunctional. This Article suggests a new double-stage standard that will transcend the pitfalls of the intent requirement without running the risks of a pure impact standard. In the first stage, a defendant, who claims that she was singled out for prosecution on the basis of her race, will have to show that a similarly situated individual from a different race was not prosecuted. In the second stage, the prosecution will have the opportunity to prove that there is no correlation between race and the decision to prosecute by presenting statistical evidence. If applied, this standard will best serve the idea of equal protection understood as the prohibition of unequal treatment.*

The prosecutor has more control over life, liberty, and reputation than any other person in America.

—Attorney General, Robert Jackson, 1940<sup>1</sup>

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1. Attorney General Robert Jackson, *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), 24 J. AM. JUDICATURE SOC'Y 18, 19 (1940).

The prejudices of centuries die hard, and even when they wane, the institutional frameworks that sustained them are bound to linger.

—Orlando Patterson, 1997<sup>2</sup>

## I. INTRODUCTION

It is not new that race and ethnicity play a major role in law enforcement. The unequal treatment of people of Middle-Eastern descent in the wake of September 11 attacks<sup>3</sup> and the commutation of all death sentences by Illinois Governor Ryan<sup>4</sup> are just current reminders of this disturbing phenomenon. Does the legal system try hard enough to ameliorate this problem? I argue that, in the field of prosecutorial discretion, it does not, although it can. The purpose of this Article is to suggest an alternative standard to the existing one for examining equal protection challenges of selective prosecution, in which the defendant argues that she was singled out for prosecution on the basis of her race or ethnic origin.

The existing jurisprudence of equal protection challenges is held captive in a discourse of *intent versus impact*, in which intent prevails. My primary assertion is that the current test that is used by the courts, according to which the defendant has to prove intent to discriminate against her on the basis of her race or ethnic origin, is far from being satisfactory. Yet, other suggestions to adopt a test that will focus on disparate impact have proven to be no less problematic. Thus, it seems that the jurisprudence of equal protection in criminal prosecutions has reached a deadlock. On one hand, the requirement to prove discriminatory intent has rendered equal protection challenges almost impossible. It is hardly ever the case that a defendant can prove that a prosecutor had an actual intent to discriminate against her on the basis of her race. On the other hand, it seems that the Court fears that waiving the intent requirement and being satisfied by a showing of disproportionate impact will paralyze the criminal justice system altogether, since almost every rule has some sort of disparate impact. In other words, while intent is nowhere, impact is everywhere.

This deadlock could be witnessed in the results of recent Supreme Court decisions. In the past seven years two cases that raised the issue of racially based selective prosecution came up to the Supreme Court. Each

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2. ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS* 15 (1997).

3. For a detailed description of the unequal treatment of mostly (but not only) immigrants on the basis of their national origin by law enforcement authorities in the wake of September 11, and for a compelling critique of that response, see David Cole, *Enemy Aliens*, 54 *STAN. L. REV.* 953 (2002). For the role of racism in that response see Mari Matsuda, *A Dangerous Place: A Response to David Cole's "Their Liberties, Our Security,"* *B. REV.*, Dec. 2002-Jan. 2003, at 20. For its relation to racial profiling, see Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 *COLUM. L. REV.* 1413 (2002).

4. The death penalty was handed out differently, Ryan said, depending on where people lived in Illinois, who their prosecutor was, who their defense lawyer was, how poor they were and what race they were. See Maurice Possley & Steve Mills, *Clemency for All*, *CHI. TRIB.*, Jan. 12, 2003 at C1.

of these cases involved a separate area of criminal justice frequently charged of being implicated with racial biases—the first being the “war on drugs” and specifically the prosecution of crack-cocaine offenders<sup>5</sup> and the second being the administration of the death penalty.<sup>6</sup> However, the defendants in both cases did not even prevail in their motions for discovery that would have possibly enabled them to prove a stronger case of discrimination. In both cases the Supreme Court reversed the decisions of the courts of appeals, which granted the discovery motions.

I will suggest a way out of this impasse by questioning the desirability of the intent doctrine in the area of selective prosecution and by proposing an alternative standard. Although there is a massive body of scholarship on equal protection, on race issues, and on selective prosecution claims, there has not been much criticism of the desirability of the intent doctrine in the specific field of racially based selective prosecution. I will point out the uniqueness of this field and the need to isolate it from other equal protection issues. Thus, I will bracket the general issue of intent versus impact in equal protection claims in favor of a concrete scrutiny of the intent test as it is applied to a specific area. Finally, I will introduce a proposal for a new double-stage test—similarly situated individuals and comprehensive statistics—and argue that this proposal overcomes the deficiencies of the intent requirement, while avoiding the risks and pitfalls of a “pure” disparate impact test.

#### A. *Preliminary Clarifications*

In this Article, I consider the problem of unequal treatment from the defendants’ perspective—that is, when defendants claim they were singled out for prosecution on the basis of their race. Another problem in the criminal justice system is discrimination based upon the race of the victim. This phenomenon raises different questions that are beyond the scope of this Article. In addition, since my focus is on the criminal defense of “selective prosecution,” I will not address here the possible remedies achievable through other proceedings like civil rights actions.<sup>7</sup> I mainly discuss one form of unequal treatment in prosecutorial discretion, in which charges are brought against some people but not against others. I do not discuss other forms of discrimination, such as unequal treatment in plea-bargaining and in exercising the prosecutorial discretion whether to seek the death penalty, whether to grant immunity, what charges to bring, or whether to prosecute juveniles as adults, as well as whether to prosecute some people in federal courts and others in state courts. Nonetheless, I believe that, although these other modes of discrimination raise some additional questions, the model I develop in this Article can form the basis for similar, adjusted models applicable to these other modes of unequal treatment.

The most infamous unequal treatment by the criminal justice system of the United States is the discrimination against African American peo-

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5. *United States v. Armstrong*, 517 U.S. 456 (1996).

6. *United States v. Bass*, 536 U.S. 862 (2002).

7. Angela Davis is addressing both these issues in *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13 (1998).

ple compared to white people. For this reason, I often use the words “black” and “white” in this Article. However, I certainly mean for the discussion to apply to discrimination against other racial or ethnic minorities as well.

A final clarification regards the scope and aim of this Article. When we look at the “bottom line” of the criminal justice system, we see that more than half of the U.S. prison population is black, though blacks make up only about thirteen percent of the general U.S. population. This Article is certainly *motivated* by these alarming statistics, but it does not pretend to propose a solution that will solve the problem of race in the criminal justice system. Race and law enforcement are completely intertwined. It is difficult to tell at what stage race is most significant or influential. Is it racial profiling by the police? Is it prosecutorial discretion? Jury selection? Sentencing? My proposal is only intended to suggest a reform that will reduce the phenomena of unequal treatment by focusing on the charging decision. It does not pretend to remedy (though it may to some extent) many law enforcement costs inflicted disproportionately on minorities, such as stops, frisks, searches, arrests, and police brutality, as well as the disproportionate impact of substantive criminal law.

#### *B. Race and Prosecutorial Discretion: Empirical Evidence of the Problem*

Bearing in mind the other forms of discrimination in the criminal justice system, is prosecutorial discretion an area worth focusing on? In Part II, I point out the uniqueness of racially based selective prosecution, and I provide explanations for the need to relinquish the discriminatory intent requirement in this field and to adopt an alternative standard that is more sensitive to the problem of unequal treatment. One of my arguments is that discrimination and unequal treatment are at least as likely to occur in prosecutorial discretion as in other stages of the criminal process. Here, I support the theoretical argument by presenting several examples of empirical studies supporting the claim that there is a real problem of racial bias in the specific field of prosecutorial discretion in the United States.<sup>8</sup> The studies suggest that racial bias is present in every stage of prosecutorial discretion, including the decision to investigate, the initial assessment of the severity of the offense, the charging decision, and the decision whether to seek the death penalty in homicide cases.

A few studies examined racial bias in prosecutorial discretion in Florida homicide cases. William Bowers and Glenn Pierce conducted a study of indictments for first-degree murders between 1972 and 1977 in selected Florida counties. According to the study, the probability of being indicted for first degree murder for a black person who kills a white person was 0.925, while the probability of being indicted for first degree murder for a white person killing a black person was less than half—only 0.429. Furthermore, homicide cases characterized by the police as involving no felony circumstances, or only suspected felony circumstances, were most likely to be upgraded by the prosecutor to felony murder if the defendant was black and the victim was white. In cases in which the po-

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8. For reasons of brevity, I mainly present the conclusions of the different studies and not their methodologies or the different variables they control for. The interested reader can refer to the actual sources cited below.

lice reports indicated felony circumstances and the victim was white, white defendants had a much better chance than did black defendants to have their charge downgraded by the prosecutor. This selectivity, according to Bowers and Pierce, was the key reason for the high proportion of blacks on death row who had killed whites. In addition, the authors concluded that in light of the data on relative likelihood of convictions, there is an indication that blacks who killed whites were overcharged.<sup>9</sup>

Another study by Bowers, Pierce, and John McDevitt examined murder indictments in twenty Florida counties between 1976 and 1977. The data suggested that racial considerations lead prosecutors to “upgrade” some cases by alleging aggravating felony circumstances or charging the defendant with an accompanying felony, and to “downgrade” others by ignoring evidence in police reports or withholding an accompanying charge, depending on the race of the offender and the victim. The authors further conducted a multiple regression analysis to determine how the indictment decisions in first-degree murder cases were influenced by extralegal factors. The data indicated that the race of both the defendant and the victim affected the probability that the prosecutor would obtain a first-degree murder indictment. The authors concluded that, since the decision to seek a first-degree murder indictment is almost exclusively under the discretion of the prosecution, the data indicated racial discrimination on the part of prosecutors.<sup>10</sup>

Finally, in a comprehensive study examining 1017 homicide defendants in Florida, Michael Radelet and Pierce reached similar conclusions. The study focused on cases that differ in their police and prosecutorial classifications. According to the findings both the race of the defendant and the race of the victim affected prosecutorial discretion. It was found, for example, that in cases in which the victim was white and the police classified the circumstances as non-felony, 63.6% of the cases remained without the suggestion of an accompanying felony in the court data when the defendants were blacks, but 93.3% of the cases remained without such suggestion when the defendants were whites. After controlling for the initial police determination, cases involving blacks accused of killing whites were found to be the most likely to be “upgraded,” and cases involving whites accused of killing blacks were the least likely to be upgraded. The final conclusion following a multivariate analysis controlling for eight other possibly influential factors was that race, in effect, functions as an implicit aggravating factor in homicide cases.<sup>11</sup>

Race was also found to be influential on prosecutorial discretion in other places in the country and in other types of offences. In 1980, Gary Lafree published the results of a study that examined screening decisions and charging decisions in 881 sexual assault cases in a large midwestern city. The study showed that black men who assaulted white women were more likely to have their cases filed as felonies and to receive more seri-

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9. William Bowers & Glenn Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 *CRIME & DELINQ.* 563, 611–14 (1980).

10. WILLIAM J. BOWERS, GLENN L. PIERCE & JOHN F. MCDEVITT, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982*, 340–44 (1984).

11. Michael Radelet & Glenn Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 *LAW & SOC'Y REV.* 587, 601–05, 615 (1985).

ous charges. Thus, for example, black men accused of assaulting white women accounted for 23% of all reported rapes, but accounted for 45% of all men sent to a state penitentiary and for 50% of those who were imprisoned for six years or more. LaFree concluded that racial composition influenced both the screening and the determination of the seriousness of the charge.<sup>12</sup>

A study performed by Cassia Spohn, John Gruhl, and Susan Welch examined the prosecutor's initial decision whether to prosecute and the decision to dismiss a felony charge after formally filing it. The data revealed that, in Los Angeles, while 59% of whites had their charges rejected, only 40% of blacks and 37% of Hispanics had their charges rejected. The authors concluded that it "is also apparent that Hispanics are prosecuted more often than blacks who are prosecuted more often than Anglos."<sup>13</sup>

Another Los Angeles study examined data regarding the decision whether to prosecute crack cocaine defendants in state courts or in the federal courts, in which they face much harsher mandatory minimums. It was found that, in state prosecutions, there were 222 whites and 4410 blacks. In federal prosecutions, there was not even a single white defendant, but there were 36 black defendants and 7 defendants from other minority groups.<sup>14</sup>

Racial bias in prosecutorial discretion crosses the lines of class, and affects not only the poor, but also the prominent and the powerful. A 1990 study showed that fourteen percent of public corruption investigations conducted in the past five years was against black public officials, whereas only two percent of national elected officials are blacks. In the South, the numbers were even more striking: forty percent of the investigations were against black public officials, while only three percent of the elected public officials were blacks. Out of five United States District Court judges indicted within the last decade, three were blacks, although the overall occupation of district judicial position by blacks is only one half of one percent. Julius Chambers, the director of the NAACP Legal Defense Fund in New York City, said that "black leaders are being investigated more frequently than their white counterparts simply because of their race."<sup>15</sup>

Finally, in a recent case, the Court of Appeals for the Sixth Circuit affirmed the ruling of the district court—that stark discriminatory effect of federal death penalty protocol, when coupled with official statements of members of the Department of Justice, constituted at least some evidence that tended to show that race played a role in deciding what defendants to charge with death-eligible offences. The respondent, a black person who claimed that the Government had determined to seek the death penalty against him because of his race, has presented statistical

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12. Gary LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. 842 (1980).

13. Cassia Spohn, John Gruhl & Susan Welch, *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175, 184 (1987).

14. Richard Berk & Alec Campbell, *Preliminary Data on Race Crack Charging Practices in Los Angeles*, 6 FED. SENTENCING REP. 37 (1993).

15. Julius Chambers *quoted in* Mark Curriden, *Selective Prosecution—Are Black Officials Investigative Targets?*, A.B.A. J. Feb. 1992, at 54, 55.

evidence, relying heavily on a 2000 Department of Justice report.<sup>16</sup> The Court of Appeals found that

[T]he evidence shows that although whites make up the majority of all federal prisoners, they are only one-fifth of those charged by the United States with death-eligible offenses. The United States charges blacks with a death-eligible offense more than twice as often as it charges whites . . . . In addition, the United States charges blacks with racketeering murder one-and-a-half times as often as it charges whites, and with firearms murder (Bass's charge) more than twice as often as it charges blacks. Among death penalty defendants, the United States enters plea bargains with whites almost twice as often as it does with blacks.<sup>17</sup>

### C. *Washington v. Davis* and Its Critiques

In *Washington v. Davis*,<sup>18</sup> black applicants challenged the constitutionality of an admission test to a police officers' training program. The failure rate for blacks in this test was four times as high as for whites. In rejecting the equal protection claim of racial discrimination, the Supreme Court held that a law is not unconstitutional simply because it has a racially disproportionate impact. Rather, in order for such a claim to be successful, one must show that the law reflects a racially discriminatory purpose. Thus, *Davis*, which is by now a well-established precedent, not only sustained the distinction between intent and impact, but also declared the defeat of impact as the standard for violation of the Equal Protection Clause.

The intent requirement of *Davis* was criticized on various grounds. Most importantly, it was argued that the intent doctrine failed to capture social inequalities that exist regardless of intentions;<sup>19</sup> that it ignored the

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16. U.S. DEP'T OF JUSTICE, THE FED. DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988–2000) (Sept. 12, 2000), available at <http://www.usdoj.gov/dag/pubdoc/dpsurvey.htm>. The Department of Justice denies the claim that the data indicates racial bias. See U.S. DEP'T OF JUSTICE, THE FED. DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (June 6, 2001), available at <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm>.

17. *United States v. Bass*, 266 F.3d 532, 538 (6th Cir. 2001). According to the Department of Justice survey, firearms murder, racketeering murder, and continuing criminal enterprise murder (the three charges brought most frequently against death-eligible blacks) "can be charged in a wide array of circumstances, and [are] therefore more likely to be available as a charging option in a given case than more narrowly defined offenses such as kidnapping-related murder." *Supra* note 16. The Court of Appeals' ruling to affirm the ruling of the District Court, granting the discovery request of the defendant, was reversed by the Supreme Court. Regarding the statistical evidence, the Court said: "Even assuming that the *Armstrong* requirement can be satisfied by a nationwide showing (as opposed to a showing regarding the record of the decision-makers in respondent's case), raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*. And the statistics regarding plea bargains are even less relevant, since respondent *was* offered a plea bargain but declined it." *Bass*, *supra* note 6.

18. 426 U.S. 229 (1976).

19. See Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977). See also Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of the Su-*

existence of unconscious racism in American society;<sup>20</sup> and that even in cases where there is discriminatory intent, it is impossible to prove it.<sup>21</sup>

#### D. *The Application of Davis to Selective Prosecution*

Despite the critiques, *Davis's* rejection of the disparate impact test in favor of a discriminatory intent test permeated almost every particular branch of equal protection doctrine. Thus, *Davis* was adopted also in criminal cases with regard to both racially based and non-racially based selective prosecution claims.

In *Wayte v. United States*,<sup>22</sup> the claim was against the Government's "passive enforcement" policy, according to which only those who reported themselves or were reported by others to have violated the law requiring draft registration were prosecuted. Only thirteen out of an estimated 674,000 people who failed to register for the draft were prosecuted. The petitioner argued that the impact of that policy was that only "vocal" opponents of the law were prosecuted, and that therefore it was a violation of the First and the Fifth Amendments. The Supreme Court held that "it is appropriate to judge selective prosecution claims according to ordinary equal protection standards."<sup>23</sup> The "ordinary equal protection standard" was, naturally, the *Davis* standard. The Court explained that this standard required the petitioner to show not only that the passive enforcement policy had a discriminatory effect, but also that it was motivated by a discriminatory purpose. The petitioner's claim was dismissed because he failed to show that the Government prosecuted him *because* of his protest activity. The Court noted that discriminatory intent "implies more than . . . intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."<sup>24</sup>

In *United States v. Armstrong*,<sup>25</sup> the respondents claimed that they were singled out for prosecution because of their race. In this case, the Court considered the question of what proof was necessary for a defendant to show in order to be entitled to discovery on such a claim. Although not the main issue to determine in this case, the Court said that the requirements for a selective prosecution claim draw on an "ordinary equal protection standard," and that the claimants had to show both that the prosecutorial policy had a discriminatory effect and that this policy was motivated by a discriminatory purpose.<sup>26</sup>

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*preme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978) (Freeman argued that the intent requirement focuses on the "perpetuator perspective" which faultily sees discrimination as wrong conduct of one actor rather than as a social phenomenon).

20. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

21. See, e.g., Kenneth Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978).

22. 470 U.S. 598 (1985).

23. *Id.* at 608.

24. *Id.* at 610.

25. *Supra* note 5.

26. *Id.* at 465. On the discovery issue, the court considered what evidence constituted "some evidence tending to show the existence of the discriminatory effect element," and held that the defendant must produce credible evidence that passes a threshold



*Wayte* and *Armstrong* thus applied the intent requirement to equal protection challenges of selective prosecution. Although numerous critiques of the general intent requirement followed *Davis* during the late 1970s and early 1980s, hardly any academic work was done on the application of this doctrine to the field of selective prosecution. One gets the feeling that a frustration has developed among the scholars of the 1990s from trying to attack the well-entrenched status of the intent doctrine in equal protection jurisprudence. Instead, writers focused on other aspects of the selective prosecution doctrine, such as remedies, procedures, and discovery. Their assumption was probably either that everything has already been said about the intent versus impact dilemma, or that there was simply no chance to convince the Court (at least not the current one) to overturn *Davis* and its applications.<sup>27</sup> While the theoretical critiques of the general intent doctrine rarely referred to the specific problem of selective prosecution and race, the current writings on selective prosecution and race seldom discuss the desirability of the intent requirement, and they seem to assume it to be unquestionable. This Article addresses this void by arguing that regardless of our position on general equal protection challenges—intent, impact, or otherwise—with regard to racially based selective prosecution cases, the doctrine of discriminatory intent should be discarded in favor of a test that is based on neither intent nor impact.

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showing that similarly situated individuals of a different race could have been prosecuted but were not. *Id.* at 469. Although it is somewhat ambiguous from the plain language of *Armstrong*, in a recent decision the Supreme Court referred to *Armstrong* as holding that defendant must also show some evidence of discriminatory intent. The Supreme Court thus applied both the intent requirement and the effect requirement to the discovery stage. See *Bass*, *supra* note 6; see also *United States v. Jones*, 159 F.3d 969, 978 (6th Cir. 1998) (applying this standard and concluding that appellant is entitled to discovery. The intent prong was satisfied by proof of the arresting police officers' behavior in taunting defendant by the mailing of a racially charged postcard, and the wearing of custom-made T-shirts with inappropriate personalized language and pictures of defendant and his wife. Obviously, this kind of behavior is very rare.); *U.S. v. James*, 257 F.3d 1173 (10th Cir. 2001) (denying the motion for discovery on the basis of inability to show similarly situated individuals who were not prosecuted).

27. A few examples might be useful. Pamela Karlan, for instance, discusses selective prosecution and *Armstrong*, but focuses on the remedy question. The need to show discriminatory intent is neither questioned nor criticized. See Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2003 (1998). Similarly, Andrew Leopold briefly summarizes some of the critiques of the intent requirements, and then proceeds: "Whether we *should* require proof of a discriminatory intent is an important, but at the moment, not a very practical question." Andrew D. Leopold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 563 (1998) (emphasis added). Instead, he chooses to focus on pretrial and trial practices and the ways in which they prevent defendants from raising discriminatory prosecution claims. *Id.* In an article that is a critique of *Armstrong*, Richard McAdams assumes "the correctness of basic equal protection doctrine," and forgoes "relying on criticism of Supreme Court precedent requiring, as an element of equal protection claims, proof that governmental officials act with a discriminatory purpose." Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 606 n.7 (1998). McAdams concentrates only on the discovery issue of *Armstrong*. *Id.*

## II. THE UNIQUENESS OF RACIALLY BASED SELECTIVE PROSECUTION

Although I agree with many of the general critiques of *Davis*, this Article is limited to a suggestion to change the doctrine with regard to racially based selective prosecutions. I will therefore show that, even if we assume *Davis* to be justified as the general equal protection doctrine, it is not desirable as the standard for racially based challenges of selective prosecution. I will first challenge the position that “coherence” requires unified equal protection jurisprudence throughout the different fields of law. Next, I will show that the subject of this Article—racially based selective prosecution—is different than other equal protection challenges, and argue that these differences demand the rejection of the intent requirement. The uniqueness of this topic is threefold: it involves *criminal law*, *prosecutorial discretion*, and *race*.

### A. Coherence and Universalism in Equal Protection Law

The Court’s adoption of the “ordinary equal protection standards” in *Wayte* and in *Armstrong* seems to be based on the assumption that a unified test for all equal protection challenges is desirable. I would like to call this assumption into question, and suggest an approach that takes into account the specificity of different fields of law.

In his article on sentencing in crack-cocaine cases,<sup>28</sup> David Sklansky opposes the “universalist approach” of the Court. He mentions that this approach started even earlier than the intent requirement of *Davis* and that the Court committed itself to promulgating a single, globally applicable set of equal protection rules as early as 1970 in *Dandridge v. Williams*.<sup>29</sup> Sklansky criticizes the aspiration for a unified test, indicating the special character of the Equal Protection Clause and especially the uniqueness of crack sentencing. He then suggests a test for federal sentencing laws, which have disproportionate impact on different populations. Adopting Sklansky’s methodology, I will examine the area of racially based selective prosecution. However, I will first consider the coherence argument further.

One of the major tenets of Legal Realism was that generalizations and categorizations could be misleading. The Realists emphasized the need to look at the particular situation, and called for narrower categories that would be more attentive to particularity and sensitive to context. One should not apply the same rule automatically for the same artificially constructed category, but instead check whether the rationales and policy arguments that support the rule in one case are also applicable to the other.<sup>30</sup> But one does not have to go as far as Realist skepticism to reject the universalistic approach adopted by the Court with regard to equal protection jurisprudence. Even Ronald Dworkin, a major proponent of co-

28. David Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995).

29. 397 U.S. 471 (1970).

30. Llewellyn, for example, called for a “narrower, more concrete study.” See Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 457 (1930) (“Here as throughout we run into the need for reexamining the majestic categories of the romantic period of jurisprudence. The old categories are imposing in their purple, but they are all too big to handle. They hold too many heterogeneous items to be of any use.”).

herence, rejects the crude understanding of coherence as an automatic global application of rules. Instead, he introduces the notion of “local priority”<sup>31</sup> that must be taken into account by the judge together with “fit” as part of “coherence.”<sup>32</sup>

### B. *Special Features of Criminal Law*

(1) The first special characteristic of criminal law is that the implications of discrimination in criminal law are usually much more severe than in any other area of the law. This is true both from an individualistic point of view and from a group-oriented perspective. Criminal prosecution might entail deprivation of liberty, property, or even life. Even in cases that do not result in conviction and punishment, the criminal process has far-reaching influences on the individual, such as stigmatization, restriction of liberty, and emotional suffering. As to the collective point of view, reinforcing stereotypes and associating a certain race with crime is a way of perpetuating social inequalities. Therefore, under-detection of discrimination, which is most likely to occur under the current equal protection standard, is arguably worse in the criminal justice context than in others. In order to increase the chances of detection, the standard should be more favorable to the defendant. It should also be directed at protecting individual rights as well as fighting group stigmatization.

(2) The criminal justice system suffers from a major problem of legitimacy.<sup>33</sup> Many subjects to the system believe that they are being discriminated against, and large segments of the population distrust the system. This stems partially from the history of criminal law as an oppressive tool used against minority groups,<sup>34</sup> a history from which American society has not fully recovered. The community’s distrust of the criminal justice system, as David Cole points out, has heavy costs in terms of obstructing law enforcement, encouraging crime, and deepening societal divisions.<sup>35</sup> The intent standard for equal protection challenges does not help this situation. On the contrary, as Steven Reiss explains, “[W]hen the prose-

31. RONALD DWORKIN, *LAW’S EMPIRE* 250–54 (1986).

32. The coherence rhetoric can be seen in a different light when looking closely at the doctrine and discovering how “incoherent” it is in fact. Thus, for example, the test for peremptory challenges is different and less rigid than the discriminatory intent test of *Davis*. See *Baston v. Kentucky*, 476 U.S. 79 (1986). Sheila Foster argues that “despite the equal protection doctrine universalistic ambitions, the Court’s application of the discriminatory intent requirement has been far from coherent.” See Sheila Foster, *Intent and Incoherence*, 72 *TUL. L. REV.* 1066, 1069 (1998). See also the view of DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 33–34, 233 (1997) (“the method of coherence permits the judge to do ideological work when he furthers a particular legal regime by developing it in the face of a gap, conflict or ambiguity,” and “constitutional law today is no more coherent than is the common law. However the textual provisions may have seemed at the start, the process of interpretation has turned them into a hodgepodge, with some built into particular liberal or conservative agendas, others deployed in alteration by liberals and conservatives, depending on which domain of ideological controversy is in question.”)

33. For a survey of public opinion polls on that issue see William J. Stuntz, *Race, Class and Drugs*, 98 *COLUM. L. REV.* 1795, 1797 n.6 (1998).

34. See generally RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 29–136 (1997).

35. DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 169–80 (1999).

cutor's mental state is the fulcrum of the constitutional restrictions on her actions . . . a defendant will believe that her fate is largely tied to the prosecutor's subjective feelings towards her."<sup>36</sup> A non intent-based objective test is likely to reduce the level of skepticism of minority groups toward the criminal justice system.

(3) An equal protection challenger in criminal cases usually seeks to avoid the charges, whereas in many other non-criminal cases she seeks to positively attain some benefits.<sup>37</sup> Providing benefits to a group of people that has been discriminated against can be very expensive. This could be an argument—although a highly contested one—for maintaining the high hurdle for equal protection challenges. By contrast, in the criminal justice context, assuming that the remedy for a successful equal protection challenge is dismissal of charges, these costs are avoided.

One may argue that, although dismissal of charges does not involve financial costs, it involves other costs to society, namely, the cost of having guilty defendants go free. Karlan is only partially right when explaining that here, unlike other cases of dismissal, the unpleasant feeling of providing a windfall to a guilty defendant that could have been prosecuted but for the "mistake," is avoided. According to her, the assumption is that the defendant was singled out, and would not have been prosecuted save for the equal protection violation.<sup>38</sup> But this is only a partial response. In some cases, absent the equal protection violation, both the defendant and others who were not prosecuted would have been prosecuted.

The other part of my response to the cost argument is normative. These costs are part of the price society has to pay for equality. It is not a noble idea that society ought to be willing to pay some price for guaranteeing constitutional rights. Many of the criminal law constitutional and procedural guarantees are based on the assumption that some values, like human liberty and human dignity, have to be secured even at the expense of freeing some guilty people. The most obvious example is the exclusionary rule. Equality is not a lesser value than other values for which we are willing to pay this cost. Furthermore, as I argued before, unequal treatment by the criminal justice system has its own costs in terms of legitimacy. These costs outweigh the cost of not prosecuting some guilty people.

### C. *Special Features of Prosecutorial Discretion*

James Vorenberg raised the concern that broad and almost unchecked discretion of prosecutors will result in a situation in which "society's most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community—racial and ethnic mi-

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36. Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1431 (1987).

37. Karlan mentions this difference in her discussion of the possible remedies for selective prosecution. The Court in *Armstrong* left the remedy question undecided. Karlan's discussion convincingly concludes that dismissal of the charges is the only plausible remedy. See Karlan, *supra* note 27, at 2027–30.

38. *Id.*

norities, social outcasts, [and] the poor—will be treated most harshly.”<sup>39</sup> Indeed, the breadth of prosecutorial discretion and the fact that courts are very reluctant to second-guess this discretion is incompatible with the far-reaching implications of this discretion. One would expect that the more power an administrative agent has to affect people’s lives, liberty, and property, the more this power will be confined by clear guidelines and checked by judicial review. This is, however, not the case with prosecutorial discretion. Applying the requirement of proof of discriminatory intent to selective prosecution exacerbates the dangers of under-reviewed prosecutorial powers.

A comparison between prosecutorial discretion and decisions of other governmental bodies (mainly those of legislatures) that are subject to the discriminatory intention equal protection standard suggests that there are several features of prosecutorial discretion that support adopting an altered standard for equal protection challenges in this context.

(1) Prosecutors usually operate away from the public eye. In comparison to the legislative process, prosecutorial decision-making is also much less well-documented. Identifying discriminatory intent under these conditions is more difficult.<sup>40</sup>

(2) While legislation usually uses general terms (e.g., “the federal punishment for crack traffickers is a minimum of x years imprisonment”), prosecutorial work, in many cases, involves particular decisions with no generalization (e.g., “x will be charged with crack trafficking in a federal court”). Thus, it would generally be easier to track discriminatory intent in legislation, based on the generalizations it uses, than in the particular decisions of a prosecutor.<sup>41</sup>

(3) In contrast to the legislation process, individuals often make prosecutorial decisions. Presuming that the majority of the population is not racist, the probability that a single prosecutor will be racist is higher than the probability that there will be a racist majority among a group of legislators. In addition, the dynamics of group decision might reduce the risk of invidious decisions. This is another reason to suspect that prosecutorial discretion is more prone to yield discriminatory decisions.

(4) In the criminal justice system in the United States, the prosecutor is the defendant’s adversary. This might result in over-zealousness and

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39. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1555. (1981).

40. It is true, however, that attributing intentions to legislative bodies and identifying these intentions invoke complex theoretical questions. See, e.g., Jeremy Waldron, *Legislators’ Intentions and Unintentional Legislation*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 329 (Andrei Marmor ed., 1995).

41. It is true that prosecutorial decisions are not of a uniform character, and while some are “particular,” others are more “general.” The target of an equal protection challenge can be, for example, a *prima facie* neutral prosecutorial policy (e.g., to charge only inner cities’ residents with crack trafficking). Indeed, in some cases the work of the prosecution resembles that of the legislature, and in those cases it might be true that the above argument is less convincing, and therefore the same standard of equal protection should apply. However, most daily prosecutorial decisions, e.g., whether to charge someone with a petty offence or to drop the charge, are of the “particular” kind, and therefore more susceptible to unidentified discriminatory intent than legislative ones.

vigor on the part of prosecutors, who, while trying to fulfill their vocation, might not be critical enough toward their own or their colleagues' decisions. Once a decision to charge someone is taken, a prosecutor might be too focused on how to win the case, or how to "achieve" the maximum punishment, and less aware of problems like unconscious racism. Other administrative agents, who are not rivals of the claimant, may be more open to hear her claims of discrimination and to double-check their own decisions. Again, this argument suggests that discrimination may occur more often in the course of exercising prosecutorial discretion.

A possible objection to the proposed analysis is that prosecutors are more trustworthy and respectable than other administrative agents, and that it is reasonable to believe that discrimination is less likely to take place when they exercise their discretion. Furthermore, it could be argued that, because of institutional competence and separation of powers considerations, it is better to keep in place the intent requirement, rather than replace it with a test that would entail more judicial intervention into prosecutorial decision-making. These objections should be rejected, for the following reasons:

(i) As demonstrated in Part I.B, empirical studies affirm the suspicion that prosecutors do discriminate.<sup>42</sup> These results are not surprising. McAdams elaborates on two reasons that might motivate prosecutors to discriminate. The first is pure racism. There is no logic in assuming that this widespread social disease will skip prosecutors, and the principal-agent problem might prevent the detection of a racist prosecutor. The second reason is that prosecutors can increase their win rate by targeting racial minorities. The prospect of jury discrimination, for example, might be a motivation for conviction-maximizing prosecutors to selectively prosecute racial minorities.<sup>43</sup> Other reasons that could lead to the unequal treatment of cases include politics, public opinion, and bureaucracy. As Radelet and Pierce note:

If a murder of a white has different effect on the bureaucratic and political situation than the murder of a black, as it would if murders of white victims are more publicized than murders with black victims or perceived as more threatening by politically powerful groups, racism will enter the legal system through the prosecutor's office even if the prosecutor never explicitly attends to race.

Similar considerations can obviously involve the race of the defendants.<sup>44</sup>

To these structural reasons, which mostly relate to the prosecutors' interests, we should add the problem of unconscious racism, which is another reason to believe that prosecutors exercise discrimination. It is likely that

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42. See also *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1525–31 (1988); P. S. Kane, Comment, *Why Have You Singled Me Out? The Use of Prosecutorial Discretion for Selective Prosecution*, 67 TUL. L. REV. 2293, 2295–2300 (1993).

43. See McAdams, *supra* note 27, at 642–52. Back in the 1970s, Myers and Hagan concluded that in a process they labeled "strong case typification" prosecutors allocate resources "so as to maximize the ration of convictions (and sometime harsh sentences) to manpower invested" See Martha A. Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439 (1979).

44. Radelet & Pierce, *supra* note 11, at 617.

unconscious racism influences a prosecutor even more than it affects others: since prosecutors are often involved with criminals who are members of minority groups, they are more prone to develop prejudices that would unconsciously effect their decisions.

(ii) Separation of powers considerations support a relatively independent prosecution. However, prosecutors are not free to violate the Constitution. If we are convinced that violations of the Equal Protection Clause will be more detectable by changing the current standard for equal protection challenges, or that equality demands a different standard, separation of powers considerations cannot prevail. This is the justification for a structure of checks and balances. Providing the courts with an effective tool to ensure that the prosecution is not violating the Constitution is not contradictory to the American version of separation of powers. Moreover, the democratic majoritarian argument that calls for restrained judicial activism is stronger when the judiciary reviews legislation than when it reviews administrative decisions. When the question is the application of a law by prosecutors, the democratic argument would support intervention of the courts in order to make sure that it is equally applied, which is presumably what the democratically elected legislature intended.

As Reiss notes, the court is no less competent to regulate the prosecution than it is competent to regulate the police, as it does occasionally under the current legal regime. More importantly, shifting the equal protection standard from an intent-based one to a more objective one does not necessarily mean more intrusive intervention in the work of the prosecution.<sup>45</sup> The question is what does “prosecutorial independence” mean? It is clear that my proposal will draw some limits on prosecutorial discretion, but one might argue that the need to inquire into inner motives and intentions under the discriminatory intent standard is more intrusive than is a check of objective measures like the ones I am about to suggest.

For all these reasons it is questionable whether the Court was right in stating that “the decision to prosecute is particularly ill suited to judicial review.”<sup>46</sup> However, it is unquestionable that the judiciary has a responsibility to protect individuals from being selectively prosecuted, and that the current protection comes very close to no protection at all.

#### *D. Special Features of Race Issues*

(1) Racism in the United States is a phenomenon that one cannot overlook. But although racism exists, it is surely not something of which people are proud. Presently, it is very hard to find someone who will admit that she is racist, or who will openly say, “I think black people are criminals.” A racist prosecutor will most probably conceal her views, leaving no evidence of the fact that her decisions have anything to do with race. It is therefore probable that evidence which shows that a prosecution was motivated by an intention to discriminate against people who exercised their First Amendment rights, for example, will be found more easily than evidence of racially based discriminatory intent. While the intent requirement will not prevent some people from proving their non-racially based

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45. Reiss, *supra* note 36, at 1441.

46. Wayte, *supra* note 22, at 607.

equal protection challenge, it will probably be an insurmountable obstacle for the vast majority of race discrimination challenges.

(2) In his comprehensive classic work on unconscious racism, Charles Lawrence explained that the dichotomy between intentional-and-unconstitutional actions and unintentional-and-constitutional actions is a false one. In his words:

Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decision maker’s beliefs, desires, and wishes.

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.<sup>47</sup>

Thus, there is a need to transcend the intent requirement in issues of race.

(3) Because races are large groups of people, it is possible to conduct empirical studies and to collect enough data that will show disparate racial impact in a relatively accurate way. There has been some indication that the courts might be willing to consider complete statistical analyses to show evidence of discriminatory impact that can be used to infer discriminatory intent.<sup>48</sup> This supports the idea that there are plausible alternatives to the intent requirement, at least in this context.

#### *E. Conclusion of Part II*

The intent requirement in equal protection jurisprudence has deficiencies that many others have discussed before. In this Part, I have tried to show that, in the specific context of race and selective prosecutions, this requirement is even more problematic than it is in general.

The special features of race and criminal law combined are more than the sum of the features of criminal law separately and race separately. In the United States, the very combination of race and criminal law carries with it an additional special meaning—a meaning of subjugation. When criticizing the intent requirement, Professor Laurence Tribe has called for adopting an “anti-subjugation” principle instead of the “anti-discrimina-

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47. Lawrence, *supra* note 20, at 322.

48. See Developments in the Law, *supra* note 42, at 1543.



tion” principle that governs equal protection jurisprudence.<sup>49</sup> Under the anti-subjugation principle, the focus is not on the perpetuator but on the legal order and the victims. According to Tribe, this principle is the correct interpretation of the Equal Protection Clause in light of its purpose and history. If Tribe is right with regard to only one area of equal protection, this area must be where race and criminal law intersect.

When prosecutorial discretion with all its unique features is added to this *mélange* of race and criminal law, the conclusion must be that we should relinquish the intent requirement in favor of a test that will supply the desired protection.

### III. THE ALTERNATIVES—“PURE IMPACT” AND “UNEQUAL TREATMENT”

#### A. Rejecting “Pure Impact”

The main reason that the Court holds on to the intent requirement, despite the critiques, is most probably the lack of practical alternatives. The alternative that is usually presented as the only possible one is “disproportionate impact.”<sup>50</sup> According to this standard, the mere showing that a law or an administrative action, racially neutral on its face, has a disparate impact on a protected group would be enough to subject it to strict scrutiny, and therefore most likely to count as a violation of the Equal Protection Clause. According to this rule intents are irrelevant. This was indeed the test that was rejected by the Court in *Washington v. Davis*. If it were applied the mere fact that blacks had a significantly higher failure rate than whites would have counted as racial discrimination. Similarly, in the criminal law context, a pure impact test would have enabled any black defendant to establish an equal protection claim by showing that the likelihood of blacks to be accused of a specific offence is higher than the likelihood of whites to be accused of the same offence.

The Court’s fear of such a “pure impact” standard is understandable. As I previously mentioned, impact is everywhere. This is as true of American society as it is of every other society. The unfortunate reality of our historical conditions is that segments of the population—certainly minority groups, but also other groups, such as women—are disadvantaged. Financial, educational and other gaps are sufficient reasons to suspect that many rules and administrative decisions run the risk of having a disproportionate impact. As Tribe notes, “In *Washington v. Davis* the Supreme Court feared that adoption of a disparate impact test for equal protection analysis would threaten a whole panoply of socioeconomic and fiscal measures that inevitably burden the average poor black more than the average affluent white.”<sup>51</sup>

Criminal law is no exception. If, for example, it were enough to prove that more blacks than whites were being charged under a certain law in order to declare that law unconstitutional, too many laws would have been declared void, and the criminal justice system could no longer func-

49. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1502–21 (2d ed. 1988).

50. *See, e.g., id.*; ERWIN CHEMERINSKI, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 644–45 (2 ed. 2002).

51. Tribe, *supra* note 49, at 1519.

tion. The famous sarcastic comment by Justice Brennan in his dissent in *McCleskey v. Kemp*, that the opinion of the Court suggests “a fear from too much justice”<sup>52</sup> is probably somewhat unfair. The fear of the Court is not of too much justice, but of a situation in which the criminal justice system is not functioning. The pure impact test would have been adequate only if the presumption of the Court of Appeals in *Armstrong* that “people from all races commit all type of crimes”<sup>53</sup> were correct, and if they were committing all the crimes at equal rates. The Supreme Court in *Armstrong* justifiably rejected this presumption.<sup>54</sup> There are many reasons to assume that there will be disparity in crime rates between different groups. The most obvious one is that poor people commit more “street crimes” while rich people commit more “white-collar” crimes. Since there is a correlation between poverty and racial minority groups, there will be a disproportionate racial impact.

The disparate impact test is not only impractical, but it is also unable to accurately detect unequal treatment. Indeed, the disparate impact standard would have been a good litmus test for discrimination only if the “racial irrelevance thesis,” which posits that race is unrelated to criminality, were true. However, the racial irrelevance thesis is probably wrong. Recent scholarly work successfully discredits it, and the conclusions drawn from empirical data on which it is based.<sup>55</sup> If we acknowledge that there are different crime rates among different races, we should agree that disparate impact—for example the fact that people of one race are prosecuted at a higher rate than people of another race—is not proof of discrimination.<sup>56</sup>

#### B. Unequal Treatment and Similarly Situated Individuals

Is pure impact the only alternative to the intent requirement? I believe that it is not. In fact, the Court in *Armstrong* held that a different kind of “effect” test—the similarly situated individuals [hereinafter, SSI] test—is one of the two necessary prongs of the selective prosecution standard (the other prong being the discriminatory intent requirement). My claim is that this first prong, modified in ways I will describe later, should be the standard that a defendant must meet in order to prove her selective prosecution claim, without the need to show intent at all. A black defendant will need to show that at least one other similarly situated white individual was not prosecuted. The prosecution will, of course, have the

52. 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

53. See *Armstrong* 517 U.S. at 469.

54. *Id.* at 470.

55. See most recently R. Richard Banks, *Racial Profiling and the (Ir)relevance of Race*, 55 STAN. L. REV. (showing the flaws in the claim that “equal hit rates” in law enforcement stop-and-search practices prove equal crime rates and therefore support the racial irrelevance thesis, and claiming that the empirical studies are more consistent with the hypothesis of a race-criminality link) (forthcoming June 2003).

56. This, of course, does not mean that such a situation is satisfactory. One could claim that the criminal prohibitions that have such disparate impact are problematic and should be abolished. In addition, or alternatively, one could express dissatisfaction with the social conditions that create such disparity. However, as I explained before, these issues are beyond the scope of this Article, which deals with the problem of unequal treatment by prosecutors.

opportunity to dispute the fact that those who were not prosecuted were similarly situated. If the defendant succeeds in demonstrating that a SSI from a different race was not prosecuted, she will prevail (unless the prosecution can demonstrate by statistical evidence, as I will describe in the next part, that there is no correlation between the decision to prosecute and the race of the defendant). The SSI standard is different from the pure impact standard because it does not focus on the general likelihood of blacks and of whites to be prosecuted, but on whether blacks and whites who are *similarly situated* are treated similarly. Unlike the pure impact test, which disregards the question whether the different populations are similarly situated (i.e., commit the same crimes), this SSI standard posits this question at the heart of the examination. The SSI standard however shares with the disparate impact test its regard of intentions as irrelevant, and in this sense it is radically different from the discriminatory intent standard.

The SSI standard overcomes the main deficiencies of both the pure impact and the discriminatory intention tests by putting emphasis on the values of equality and anti-discrimination, understood as anti-unequal-treatment.<sup>57</sup>

As previously mentioned, the pure impact test is inadequate because there can be many reasons, which are considered to be legitimate, that create such impacts. This is not true for the situations that the SSI standard captures. We might accept a situation in which 90% of the charges according to a certain statute are brought against blacks, because it might be the case that 90% of the offenders are blacks.<sup>58</sup> But we should certainly not accept this situation if all black offenders are being charged, while other similarly situated white individuals are not. Simply put, this latter situation is an *unequal treatment* or *discrimination* in its most obvious form, and, therefore, it should be regarded as an Equal Protection violation.

Furthermore, as opposed to the pure impact test, the SSI test should not raise the fear that the criminal justice system will collapse. It is unlikely that a situation in which some are prosecuted, but not others who are similarly situated and are of a different race, is as common as the phenomenon of disparate impact. In any event, in those cases which are proven to be discriminatory under the SSI test, it is better that the discrimination be exposed and amended than that it be swept under the rug for the sake of the appearance of justice and legitimacy.

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57. I will use the term “discrimination” from this point on to indicate a different understanding from the Court’s understanding of discrimination as a concept that requires intent. In my opinion, as I will further explain, discrimination occurs in situations in which there is unequal treatment of equal persons. Therefore, the anti-discrimination principle I am calling for, is not the anti-discrimination principle that Prof. Tribe criticized, but it is more similar to the “anti-subjugation” principle that he proposed. See *supra* text accompanying note 49.

58. I intentionally use the words “might accept” as I bracket, for the purpose of this Article, the problem of criminalization of “black behavior.” For examples of good discussions of this problem, see Sklansky, *supra* note 28; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV L. REV. 1419 (1991); Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938 (1997).

The SSI standard also does not suffer from the main three disadvantages of the intent requirement:

(1) It does not fail to capture inequalities and biases that exist regardless of discriminatory intentions. The SSI test directly focuses on material reality rather than on consciousness, and is aimed at ameliorating inequalities and structural biases that subsist in the criminal justice system, independently of any inquiry into a state of mind.

My proposal is different from other suggestions, according to which, after a *prima facie* showing by the defendant, the burden shifts to the Government to show that there was no discriminatory intention.<sup>59</sup> I propose to entirely depart from intentions. The burden under my proposal may shift to the prosecution only to prove that the other individuals are not similarly situated (e.g., they committed a less severe crime). In the second stage of the SSI standard, the prosecution will also be able to introduce statistical evidence that will show that, actually, there is no unequal treatment. Intentions will remain irrelevant. This might have many implications. For instance, if the prosecution can show that the suspects from the other race were negligently not prosecuted, although they were similarly situated, according to my suggestion, there is a *prima facie* violation of the Equal Protection Clause. The emphasis here is on the inequality that was caused. From the defendant's point of view, and from other people of her race's point of view, it is of little difference whether the prosecutor was racist or negligent.

(2) The SSI standard does not ignore the phenomenon of unconscious racism. Because of the focus on real world inequalities, cases of unconscious racism will be addressed and amended. If, for example, a charge were brought against a black defendant for a petty offence, and the same charge is dropped when similarly situated white suspects are involved in a similar conduct, it would be enough to pass the first stage of the equal protection claim, regardless of the fact that the prosecutor's action was not consciously driven by a racist motivation.

(3) As I will show in Part VI, after describing the standard in detail, meeting the SSI standard is not an impossible mission. Clearly, it is an easier task than proving discriminatory intent.

At this point, one might raise various material questions regarding the SSI standard, which remain to be answered. The rest of this Article, which

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59. Thus, for example, the complicated rules controlling Title VII litigation still maintain the intent element. Plaintiff must identify a particular employment practice that has a disparate impact and the employer bears the burden of persuading the fact finder that the employment practice that has a disparate impact is justified by a legitimate, independent, and nondiscriminatory business reason. In other words, that there is no discriminatory intention. See 42 U.S.C. § 2000e-2(k) (2003); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804–05 (1973). Similarly, under the standard for examining discrimination in peremptory challenges in jury selection, although different from the conventional Equal Protection discriminatory intent standard, the intent requirement is not completely abandoned. Defendant must establish a *prima facie* case of race discrimination. After defendant shows that circumstances raise an inference of discrimination, the burden shifts to the prosecution to offer a race-neutral justification for its peremptory challenge. The trial judge then determines whether the state's proffered reason is race-based and improper. See *Batson v. Kentucky*, 476 U.S. 79, 94–98 (1986).

raises and addresses these possible questions, unfolds in the following way: In the next part, I will refine the proposed SSI standard. I will address the question of what number of SSIs a defendant must show in order to move to the second stage of her selective prosecution claim. I will also explain the need for and the nature of the second stage in which the prosecution would be able to present statistical evidence. In Part V, I will answer the question: who is “similarly situated?” In other words, what characteristics and what level of similarity will suffice to conclude that two individuals are “similarly situated?” What differences between individuals will be considered as relevant and, therefore, will be enough to refute the claim that an individual is similarly situated? In Part VI, before concluding, I will argue that under the SSI standard, selective prosecution claims will be possible to prove, and I explain the reasons for this proposition.

One would expect to find an abundance of legal literature and court decisions regarding these questions. The SSI is not a new concept. Quite the contrary; as previously indicated, it is one of the two prongs of the existing legal standard for a claim of selective prosecution, and it is also one of the conditions a defendant should meet in order to obtain discovery on this issue. Yet, the existence of the second prong—the discriminatory intent—and the courts’ insistence on its strict interpretation and application have precluded a robust discussion of these issues. Almost every selective prosecution claim that was brought to the courts has been dismissed on the grounds of lack of proof of discriminatory intent. Giving up this last requirement, as I suggest, will place the prescribed questions center stage. Although the questions presented above are intertwined, I will try to discuss them separately, in the order presented, while indicating their mutual influences when appropriate.

#### IV. REFINING THE SSI STANDARD: GROUPS, INDIVIDUALS, AND STATISTICAL EVIDENCE

The standard I am advocating is a twofold test. At the first stage, a defendant will have to show that a *single* SSI was not prosecuted. Such a showing by the defendant (that was not refuted by the prosecution) will shift the burden to the prosecution to disclose the full data with regard to people who were involved in conduct similar to the defendant’s conduct, including racial profiles of suspects who were and were not prosecuted. The prosecution will have to show, using these data, that there has been no discriminatory practice. I will later explain what will be considered as a full disclosure of the relevant data. A failure to disclose all relevant data, or a failure of the data to demonstrate that there is no correlation between the race of the defendant and the decision to prosecute, will result in victory for the defendant.

Each one of the two proposed stages might at first glance appear to be surprising. I will explain the policy arguments that support this twofold standard, show that the two stages together create a logical structure, and argue that the proposed test is compatible with the theoretical critiques that have been launched against the discriminatory intent standard.

A. *The First Stage—A Single SSI*

A situation where a black defendant was prosecuted, while a white person similarly situated to her was not prosecuted, calls for our suspicion. Allegedly, it is exactly what the proposed standard is aimed at mending, i.e., *unequal treatment* by the criminal justice system. We are no longer interested in the state of mind of the prosecutor. It could be that there was intentional discrimination, unconscious discrimination, or neither of these two. What needs to be remedied is the *de facto* situation in which individuals from different races are treated differently. One who thinks historically and contextually about criminal justice in the United States cannot ignore the singularity of racial discrimination. Therefore, despite the fact that a situation in which only one SSI *was not* prosecuted might be explained as a “mistake” or as a reasonable decision based on legitimate grounds, it is enough to trigger ample legal litigation, which will benefit not only the particular defendant, but also the whole system.

There is one court decision that might look at first glance to be in opposition to the idea that a single SSI is enough. This decision is in fact sometimes cited as a source for denial of selective prosecution claims on the grounds that a showing of only a small number of offenders who were not prosecuted is meaningless.<sup>60</sup> This understanding of the case is mistaken.

In *United States Labor Party v. Oremus*,<sup>61</sup> the Labor Party claimed that the Illinois statute prohibiting solicitation in intersections was discriminatorily enforced. In support of its claim, an affiant asserted that he observed members of the Lions Club soliciting in the same intersection as the Labor Party did. The Court of Appeals for the Seventh Circuit rejected the equal protection claim, indicating that “the isolated incident of another group briefly soliciting in the intersection is too insignificant and isolated to raise an equal protection claim.”<sup>62</sup> This sentence is probably the cause for the misunderstanding of *United States Labor Party* as attributing no significance to a showing of a single case of an SSI who was not prosecuted.

A close reading of the case reveals that in fact this was not the basis for the rejection of the equal protection claim. The court did not hold that a showing of only one incident of SSI is not enough. Rather, the single incident that was presented was not of the same kind as the Labor Party incident. As the court explained:

The plaintiffs [the Labor Party] at least had the advantage of intersection solicitation, although illegal, for several weeks whereas the Lions Club group was observed in the intersection only for a single hour period. Perhaps, if anyone might have cause to complain in those circumstances it would be the Lions Club . . . .<sup>63</sup>

Thus, the Court held that the Lions Club was not similarly situated to the Labor Party, and distinguished between them on the basis of the extent of their illegal activity.<sup>64</sup> Therefore, *The Labor Party* cannot stand for

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60. See, e.g., Reiss, *supra* note 36 at 1371–72 n.21.

61. 619 F. 2d 683 (7th Cir. 1980).

62. *Id.* at 691.

63. *Id.*

64. See discussion regarding classifications related to the criminal conduct in part V(D).

the proposition that one has always to show more than one SSI. In any case, my argument is that indeed a single SSI is not enough to *win* the equal protection claim, but that it is enough to trigger a more thorough investigation of the matter.<sup>65</sup>

*B. The Second Stage—Prosecution’s Burden To Provide Complete Statistical Data*

A showing of a similarly situated individual who was not prosecuted reveals that, *prima facie*, something went wrong. Still, further inquiry is needed because a showing of a single SSI does not necessarily represent a situation in which there is a correlation between the race of the defendant and the decision to prosecute. In a system such as the criminal justice system, a single case could be a mistake, one that does not represent such a correlation. In fact, if we are interested in changing the de facto situations in which one racial group is treated differently than another (be it because of intentional discrimination, unconscious discrimination, structural bias, or any other reason), we must formulate a statistical picture that will include four variables: the number of SSI white people who were prosecuted, the number of SSI white people who were not prosecuted, the number of SSI black people who were prosecuted, and the number of SSI black people who were not prosecuted.<sup>66</sup> As I will demonstrate below, if one or more of the four variables are missing, there is a danger of arriving at an incorrect conclusion.

The danger in presenting a partial statistical picture has, at times, been ignored by the courts. There are two paradigmatic cases that can demonstrate this danger. In each of these cases, one might erroneously conclude that a partial showing by the prosecution is enough to dismiss the black defendant’s claim of selective prosecution, and to regard as meaningless her showing that a similarly situated white individual was not prosecuted. The two paradigmatic cases are: (1) When there are other similarly situated people, not of the defendant’s race, who *were* prosecuted; and (2) When there are other similarly situated people, of the defendant’s race, who *were not* prosecuted.

(1) An example for the first paradigmatic case can be found in *State v. Holloway*.<sup>67</sup> The defendant was indicted on two counts of evasion of personal state income tax and two counts of filing false statements. He filed a motion to dismiss on the grounds of selective prosecution, arguing that

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65. Other cases that might support the position that a showing of only one SSI is meaningless are: *Dawson v. City of New York*, No. CIV.97-5347-TPG, 1999 WL 46624, at \*1 (S.D.N.Y. Feb. 02, 1999) (holding that to prevail on a selective prosecution claim, a plaintiff must establish that others similarly situated were “generally” treated differently due to an improper consideration such as race), vacated by 199 F.3d 1321 (2nd Cir. 1999) (citing *United States v. White*, 972 F.2d 16, 19–20 (2d Cir. 1992)). Requiring the defendant to prove that “generally” SSIs were treated differently is unreasonable, because it is hard to imagine how someone can ever prove such a generality. Requiring the prosecution to present comprehensive data, as does the second stage of my proposal, is a way to address the generality concern.

66. See *McAdams*, *supra* note 27, at 627–28. The structure of the Tables that I will use is borrowed from *McAdams*.

67. 460 A.2d 976 (Del. Super. Ct. 1983).

he was a target for prosecution because of his racial and political status as a black Representative in the General Assembly of the State of Delaware. The defendant further argued that he is the first and only one to be prosecuted under these kinds of accounts, separate from other alleged criminal conduct. The state in response cited five other cases in which individuals were prosecuted on the same charges.<sup>68</sup> Rejecting the defendant's claim, the Court stated: "Inasmuch as a showing of as few as two or three other prosecutions will negate the assertion that defendant has been singled out for prosecution, the court holds that the first prong of the Berrios test [requiring proof of SSI] has not been satisfied."<sup>69</sup> [Footnote omitted].

What underlies the decision in *Holloway* is the fact that the added data (two or three individuals that were prosecuted) changes the probabilities of prosecutions, and, therefore, it might affect the conclusion regarding the question of whether there is a correlation between the race of the defendant and the decision to prosecute. Take as an example a case in which a black defendant claims she was singled out for prosecution on the basis of her race, and supports her claim in a showing of a white SSI who was not prosecuted. If this is all the data we have, one may assume that the probability of a black person to be prosecuted is 1 while the probability of a white person to be prosecuted is 0. Assuming the prosecution can show that there were 10 other whites similarly situated, who were prosecuted, the total picture would change and will look as follows:

	Blacks	Whites
Prosecuted	(A) 1	(C) 10
Not Prosecuted	(B) 0	(D) 1

The probability that a black person will be prosecuted is the number of blacks who were prosecuted (cell A) divided by the sum of cell A plus the number of blacks not prosecuted (cell B). The probability of a white person to be prosecuted is the number of whites prosecuted (cell C) divided by the sum of cell C plus the number of whites not prosecuted (cell D). With the above hypothetical data, the probability of a black person to be prosecuted is:  $A / (A+B) = 1 / (1+0) = 1$ , and the probability of a white person to be prosecuted is:  $C / (C+D) = 10 / (10+1) = \sim 0.909$ . The additional data have changed the picture dramatically in a way that, to say the least, weakens the black defendant's claim.

It is clear, then, that a showing of a single SSI by the defendant should not be the final step in proving unequal treatment. As the example indicates, a showing of other individuals, outside of the defendant's protected group, and who were prosecuted, can change the picture. But still, the holding of the court in *Holloway* that "a showing of as few as two or three

68. An important question here is, are these five "similarly situated?" The defendant claimed that they are not similarly situated because their indictments contained additional charges. The court rejected this argument. For a discussion and a critique of the way the courts determine similarities and dissimilarities see *infra* Part V. See especially Part V.D, in which I discuss this aspect of *Holloway*.

69. *Holloway* 460 A.2d at 979.



other prosecutions will negate the assertion that defendant has been singled out for prosecution" is clearly wrong if that means denial of the equal protection claim. Why two or three? Why not one or four? Indeed, any such number is arbitrary and meaningless, unless it is accompanied by the rest of the data regarding the numbers of blacks and whites who were prosecuted, and who were not prosecuted.

Another example might be useful here. Let us assume that after a showing by a black defendant, that a similarly situated white person *was not* prosecuted, the prosecution shows that five other similarly situated white individuals *were* prosecuted. According to the opinion of the court in *Holloway*, this showing will negate the defendant's claim of selective prosecution. The problem with this conclusion is that it relies on incomplete data (exactly as any conclusion drawn from the defendant's showing of a single SSI). Taking this new data into account, the probability of a white individual to be prosecuted is 5/6, and one may argue that it is not significantly different than the probability of blacks to be prosecuted (1/1). But what if there were, for example, 50 other white people who *were not* prosecuted? In this case the statistical picture will be:

	Blacks	Whites
Prosecuted	(A) 1	(C) 5
Not Prosecuted	(B) 0	(D) 51

The probability of a black person to be prosecuted is:  $1 / (1+0) = 1$ , and the probability of a white person to be prosecuted is:  $5 / (5+51) = \sim 0.089$ . This means that a black person has more than ten times the chance to be prosecuted than a white person has. This is undeniably and considerably different from the difference between 1 and 5/6, and might change our final conclusion regarding the merits of the selective prosecution claim.

(2) Similar difficulties arise in the second paradigmatic case, i.e., when other members of the protected group of the defendant were not prosecuted. Here, too, some courts fell into a logical trap similar to the one into which the court in *Holloway* fell.<sup>70</sup> If we go back to our example (in which one black was prosecuted and one white was not), and add to it a showing by the prosecution of 10 blacks who were not prosecuted, it will change the picture to be as follows:

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70. In *United States v. Olvis*, 97 F.3d 739 (4th Cir. 1996), the Court of Appeals for the 4th Circuit reversed a dismissal of indictment by the district court on the grounds of refusal of the prosecution to comply with the court's discovery order. The court of appeals found that there was no merit to the defendants' contention that they were singled out for prosecution, while other similarly situated whites were not prosecuted. One of the reasons mentioned by the court of appeals for the lack of merit to defendants' claim was that there were also fifty black conspirators who were not prosecuted. *Id.* at 745

	Blacks	Whites
Prosecuted	(A) 1	(C) 0
Not Prosecuted	(B) 10	(D) 1

The difference between the probabilities of a black person to be prosecuted (1/11) and a white person to be prosecuted (0/1) is not as dramatic as it was before the added data.

But this showing of 10 blacks that were not prosecuted should not necessarily be the end of the story. Again, the picture as a whole can be totally different. Such will be the case if, for example, there are 100 more blacks who were prosecuted:

	Blacks	Whites
Prosecuted	(A) 101	(C) 0
Not Prosecuted	(B) 10	(D) 1

Under the new set of data, the probability of a black person to be prosecuted has increased to  $101/111 = \sim 0.91$ , while the probability of a white to be prosecuted has remained 0. The difference between the probabilities is again substantial.

Some cases might involve a combination of the two paradigmatic cases. It might be that the prosecution would be able to demonstrate both that there were some blacks who *were not* prosecuted and that there were some whites who *were* prosecuted. Again, if these showings are intended to prove that there is no correlation between the decision to prosecute and the race of the defendant, it is important to understand that such a conclusion might be flipped by adding more data, such as that more blacks *were* prosecuted.

All these examples show that the similarly situated individual should only be a first stage—a trigger that calls for presenting the *statistical picture as a whole*. It is important not to be misled by the limited available figures. As opposed to what the courts held or hinted in some cases,<sup>71</sup> “disparate treatment” is not necessarily negated by a showing of members of the protected group who *were not* prosecuted, or by a showing of individuals who are not members of the protected group who *were* prosecuted. If we open the gate for usage of partial data, we also open it for manipulation. The prosecution, for example, could use some rare cases, in which whites were prosecuted, as a fig leaf that covers and legitimizes

71. See the description of *Holloway*, *supra* text accompanying note 67; *Olvis* 97 F.3d at 745; See also *People v. Goodman*, 290 N.E.2d 139, 143 (1972) (“Even though the defendant asserts that certain other offenders have not been prosecuted, the record discloses that on the day he was sentenced, three other persons were convicted under the same ordinance”); *National Railroad Passenger v. Harris*, 490 F.2d 572, 574 n.1 (10th Cir., 1974) (In its reasoning for rejection of the defendants’ claim of selective prosecution, the court mentions the fact that there were approximately thirty-four other similar prosecutions in the same county during the nine-month period preceding that case).

unequal treatment. Immunizing the prosecution against equal protection challenges because they can show that some whites were prosecuted, or that some blacks were not, is a clear mistake. As we have seen above, such showings by the prosecution can present a distorted picture of reality.

We cannot know if there is a correlation between the race of the defendant and the decision whether to prosecute, unless we have the full picture—that is, the four variables represented in the four cells of the tables (A, B, C, D). Only the whole picture can reveal the real situation of the enforcement of different statutes in relation to different racial groups.

Let us now demonstrate the application of the formula to real data. I will use the data regarding the state and federal prosecution of blacks and whites for crack cocaine offences in Los Angeles. The question at stake is: are blacks treated unequally in the sense that there is a correlation between their race and the decision to prosecute them in federal courts? Accordingly, I will substitute in the table “prosecuted in federal court” for “prosecuted” and “prosecuted in state court” for “not prosecuted.” Using the data that I mentioned before,<sup>72</sup> the picture will look as follows:

	Blacks	Whites
Federal	(A) 36	(C) 0
State	(B) 4410	(D) 222

Assuming that these numbers represent similarly situated individuals, the probabilities to be prosecuted in federal court are:

For blacks— $36 / (36 + 4410) = \sim 0.008$

For whites— $0 / (0 + 222) = 0^{73}$

Whatever the reason, the very situation of *unequal treatment* should be regarded as a violation of the Equal Protection Clause. However, the complete statistical data that are necessary to prove unequal treatment are usually unattainable for the defendant. The prosecution, on the other hand, has the ability to acquire such information. For that reason, and for the reason that a showing of one SSI already renders the situation suspicious, the burden of providing this data should rest on the prosecution.

To sum up, my suggestion is as follows: after a black defendant has demonstrated that there is at least one similarly situated white individual who was not prosecuted, the prosecution can contradict her claim of selective prosecution only by providing complete data of the numbers of blacks similarly situated who were prosecuted, blacks similarly situated who were not prosecuted, whites similarly situated who were prosecuted,

72. See *supra* text accompanying note 14.

73. It is beyond the scope of this Article to address the question of what kind of difference between the probabilities should be regarded as a strong enough correlation between race and the decision to prosecute. Such a determination has to be based on a more sophisticated statistical model that will take into consideration other factors such as standard deviations and the amount of the data. My aim here is only to present the basic model and to demonstrate its ability to detect situations of unequal treatment.

and whites similarly situated who were not prosecuted. Having all these data, an accurate determination of whether there is a correlation between the decision to prosecute and the race of the defendant can be made. If the data provides a positive answer to that question, and thus affirms the suspicion that was raised by the showing of a single SSI who was not prosecuted, the defendant should prevail in her selective prosecution claim. If the prosecution fails to provide the data, the suspicion remains intact and the defendant should also prevail.

### C. *Scope of the Data: Limits of Jurisdiction and Time*

A question that has to be considered is what are the limits of the prosecution's duty to provide data in terms of time and location? In both of these aspects, it is impossible and undesirable to compel the prosecution to provide data that is unlimited. Like many other criteria of measurement, here too, the exact point at which we draw the line is somewhat arbitrary. Nevertheless, it should be determined.<sup>74</sup> I will not propose here a clear rule, because such a rule depends on circumstances that may change from one place to another. However, I will point out policy considerations that should be taken into account in designing such rules.

#### 1. *Jurisdiction*

When dealing with the evidence to be presented in order to prevail in a discovery motion in a selective prosecution claim, the Supreme Court has left open the question of whether a nationwide showing (as opposed to a showing regarding the record of the particular decision makers) is sufficient.<sup>75</sup>

My opinion is that each prosecution office, which usually overlaps with a county, should provide data regarding its own jurisdiction. This will create incentives for each prosecution office to act in a non-discriminatory way, and to collect the data efficiently. If we take a broader pool of data (e.g., nationwide or statewide data), there will be a problem of externalization of the "costs" of an inadequate behavior. In the Law and Economics literature, this problem is referred to as "the common pool problem," which is a specific case of "the collective action problem."<sup>76</sup> The in-

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74. In Jewish law, there is a fascinating discussion regarding such "standards and measures"—their arbitrariness on the one hand but the necessity to have them on the other hand: "A fledgling bird that is found within fifty cubits [of a dovecote] belongs to the owner of the dovecote; [if it is found] beyond fifty cubits, it belongs to its finder . . . Rabbi Jeremiah asked 'What is the law if one foot [of the bird] is within fifty cubits and the other foot is beyond fifty cubits?' On account of this, they excluded Rabi Jeremiah from the study-hall." Babylonian Talmud, Tractate Bava Batra 23b. Rashi explained: "for he caused them bothersome and annoyance." And the Talmud explains: "This is the character of all measurements established by the Sages. A ritual bath must contain forty *se'ah* of water to be fit for immersion; if it contains forty *se'ah* less one *kurtov* [a very small liquid measure], it cannot be used for immersion." Babylonian Talmud, Tractate Ketubbot 104a.

75. *Bass*, 536 U.S. 862.

76. A classic article discussing this problem is Garrett Hardin, *The Tragedy of Commons*, 162 *SCIENCE* 1243 (1968). See also Elinor Ostrom, *Self-Governance of Common Pool Resources*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW*, vol. 3, 424 (Peter Newman ed., 1998).

centive to act adequately in a situation of “common pool” is reduced because each actor’s (or institution’s) behavior does not exclusively determine its own future, but only a part of it. The prosecution office in Bronx County, New York will have an incentive to not engage in unequal treatment so that if a defendant raises an equal protection claim and shows an SSI who was not prosecuted, the office will be able to refute the claim by providing data kept by the office. However, if the prosecution office in the Bronx could be easily affected by the misbehavior of the prosecution office of, say, Harris County (Houston), Texas, or even by another prosecution office in an upstate New York county, the incentive for the Bronx office to keep its own record “clean” will be reduced. Furthermore, a small prosecution office might not have the incentive to act adequately, because under the common pool of data its racist or negligent behavior might be insignificant. The best incentive will be supplied by holding each office accountable for its own behavior.<sup>77</sup> An office within a county makes sense as a common pool, as it could be reasonably expected that an office, through its senior staff, could ensure equal treatment by generating policies, by supervising, and by taking adequate hiring decisions.<sup>78</sup>

## 2. Time

On the one hand, the time limit should provide enough duration to enable a relatively wide perspective. Data regarding the last couple of months, for example, can be biased and not representative of real practices. On the other hand, the time to which the data refer should be limited in such a way that the prosecution will have a chance and an incentive to “improve” and change discriminatory practices. This will be achieved only if the time limit chosen will be short enough to allow new improvements to significantly affect the complete picture that ought to be presented.

In *Armstrong* the discovery order granted by the district court required information regarding three years,<sup>79</sup> in *Jones* the motion was for five years,<sup>80</sup> and in another decision, which granted a discovery order in a selective prosecution claim, the demand was for information regarding three and a half years.<sup>81</sup> Such periods of time are reasonable and are compatible with the above considerations.

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77. In some cases, the issue is such that it must involve several prosecution offices. For example, this is the case when there is a behavior that is criminalized both by state and federal laws, and the discrimination claim is that the defendant was prosecuted in federal court while other SSI were prosecuted in state courts.

78. The extent to which different prosecutors in different counties can have different attitudes and policies is exemplified in the disparity between counties with regard to the decision to seek the death penalty. See Richard Willing & Gary Fields, *Geography of the Death Penalty*, USA TODAY, Dec. 20, 1999, at 1A; Richard Willing, *Prosecutor Often Determines Which Way Case Will Go*, USA TODAY, Dec. 20, 1999, at 6A. The “geographical discrimination” evidenced in these newspaper articles is an issue well worthy of another article.

79. *Armstrong*, 517 U.S. 456 at 459.

80. *Jones*, 159 F.3d at 975. The case was remanded to the district court to compel discovery.

81. See *United States v. Tuitt*, 68 F.Supp.2d 4 (D. Mass. 1999).

#### D. Possible Objections

An immediate objection that comes to mind regarding the proposed twofold standard could be that it will be relatively easy for a defendant to pass the first stage by finding only one SSI, and thus to impose on the prosecution an unbearable burden in almost every case. My response to this objection is that it is true that in comparison to the standard of discriminatory intent the SSI standard will be easy to prove, but it is not true that in every case a defendant will be able to meet this standard. As I will explain in the next Part, the prosecution, before having to provide the data, could claim that the defendant is not similarly situated to the other individual who was not prosecuted, specifically, that their criminal behaviors should be distinguished. I definitely do not view the criminal justice system through rose-colored glasses, especially when it comes to race issues, but I am not so pessimistic as to think that in so many cases, under the jurisdiction of so many different prosecution offices, in so many different contexts, the same pattern of SSIs who were treated differently will recur.

However, in cases where there is an SSI from a different race who was treated differently, it is justifiable to demand an explanation from the prosecution for what looks like unequal treatment. The fact that the prosecution will have to engage in collecting and presenting statistical data should be welcomed, rather than feared. There are many benefits in encouraging the prosecution to conduct studies regarding racial impact, apart from the obvious need to amend the specific cases in which unequal treatment would be revealed. Awareness of the possibility that in some cases statistical information will be required will have a positive effect on the general daily attitudes of prosecutors regarding the problem of racial disparity, and thus might reduce the chances of unconscious racism. Moreover, the submission of such empirical studies to the courts will make this data available through the media to the public. The prosecutors will thus be publicly accountable, and the public will be able to express its satisfaction or discontent. In jurisdictions in which prosecutors are elected, the public will be able to express its views through the electoral process.<sup>82</sup>

It might be argued that the prosecution simply does not have the relevant data in many cases. After the next part, it will be clear that the data that are required to be presented under the proposed standard are not complicated to collect. Personal circumstances of the different offenders, for example, will not be part of this data. But one may argue that even the necessary basic data, namely the racial profile and the criminal activity of the offenders, are not attainable because the prosecution simply does not keep such records. These kinds of claims were raised by the government in *United States v. Olvis*. The court rejected these arguments:

Assistant United States Attorney Robert J. Seidel, Chief of the Norfolk and Newport News Criminal Division, submitted an affidavit to the Court in which he indicated to the Court that the United States Attorney cannot provide any data on the race of defendants prosecuted. The Court certainly cannot ignore that racial data may be retrieved from defendant information sheets, which AUSA

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82. See Davis, *supra* note 7, at 54–67.

Comstock acknowledged existed, rap sheets, criminal records, case agents or sources other than those called to the Court's attention by AUSA Seidel. The Court only can assume that these records are maintained by the United States Attorney, although the numbers may not appear in an easily produced chart or database.<sup>83</sup>

Even if the court in *Olvis* was wrong and the government was right regarding the current situation, this situation must be changed. The problem of unequal treatment in the criminal justice system is grave enough to require prosecution offices all over the country, to keep relevant records and to be able to access them, if it is not presently the case.

The aspect that seems more problematic in the requirement to provide data is that the data should include not only the individuals who were prosecuted, but also those who were not prosecuted. This might be more difficult to comply with, because it may be that some of those who were not prosecuted were not even arrested, and there is no file on them. Again, if this is the situation, it calls for a change. It is reasonable to require the prosecution to have a record that indicates each suspect's behavior and her race. If the reason for not having prosecuted a suspect is insufficiency of evidence, this individual will not be taken into account. It is worth stressing, however, that this proposal is not revolutionary in terms of the data the prosecution should keep. In cases in which the court granted a discovery order under the current legal regime, the data that were required were not less comprehensive than the data that will be required to be presented under the new standard.<sup>84</sup>

Another possible objection to my proposal is that the first stage of showing SSI will be a hurdle that only a few defendants will be able to pass. Thus, practically, the adoption of the new standard will not create a real change in the system, and will not be helpful for improving the situation of racial minorities. At the outset, it is somewhat reassuring that the proposed standard could be reasonably expected to be challenged by two opposing camps.<sup>85</sup> The fact that I can expect contradictory objections to my proposal—one claiming that too many people will be able to show SSI, and the other claiming that too few will be able to do so—is a signal that the proposed standard is actually a balanced one. It will not create a collapse of the criminal justice system or the prosecution, but it will require some changes of practice aimed at a more egalitarian system. However, since I am deeply concerned by the latter objection, I will address it at length in Part VI. Before that, I will discuss in Part V the definition of "SSI," which will have implications for the question of the ability or inability to meet the standard.

## V. SIMILARITIES AND DISSIMILARITIES—WHO IS SIMILARLY SITUATED?

The idea that equality concerns the "similarly situated individual" relies on the Aristotelian understanding of equality as equal treatment for

83. *United States v. Olvis* 913 F. Supp. 451, 456 (E.D. Va. 1995), *rev'd on other grounds*, *Olvis*, 97 F.3d 739.

84. See *Armstrong*, 517 U.S. 456; *Tuitt*, 68 F. Supp. 2d 4.

85. In talking with friends and colleagues about this proposal, I indeed received those two critiques.

equals.<sup>86</sup> If persons are not equals (or not “similarly situated”), it may be just to treat them unequally. The accredited notion of “substantive equality” as opposed to “formal equality” is derived from this understanding, and it is the basis of the Equal Protection Clause of the United States Constitution, as interpreted by the Supreme Court and by scholars.<sup>87</sup>

The question I am confronting in this Part is who will be considered as similarly situated in the specific context of a claim of racially based selective prosecution? No factual situation is equal in all senses to another, and no individual is equal in all senses to another. Indeed, the ways to distinguish between a black defendant and a white person who is allegedly similarly situated and was treated differently could be infinite. Hence, the requirement is not to show someone “identically situated” but only “similarly situated.” An “identically situated” standard is not only impossible as a matter of proof, but it is in fact an ontological impossibility.

The challenge here is to define “similarity” in a way that will on the one hand be sensitive to the need to treat different people differently, i.e., to provide a definition that will allow the prosecution to distinguish between individuals on the basis of legitimate considerations, but that on the other hand will not be too narrow so that any form of unequal treatment could be justified as treating dissimilar people differently. Two questions seek answers: what will be considered as a difference? And what similarity will the defendant have to prove in order to shift the burden to the prosecution to prove such a difference? I will start with the former question, which is primarily a substantive one, and will then proceed to the latter, which is more procedural-evidentiary.<sup>88</sup>

Examination of court decisions in which the question of similarity arose in the context of selective persecution confirms that there could indeed be dozens of claims of differences between individuals. Hence, it seems necessary to categorize these claims in a way that will encompass all foreseeable attempts of distinction. The four categories that I find useful for

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86. ARISTOTLE, *NICOMACHEAN ETHICS* 71 (Terence Irwin trans., Hackett Publishing 2d ed. 1999) (1985) (“Equality for the people involved will be the same as for the things involved, since [in a just arrangement] the relation between the people will be the same as the relation between the things involved. For if the people involved are not equal, they will not [justly] receive equal shares; indeed, whenever equals receive unequal shares, or unequals equal shares, in a distribution, that is the source of quarrels and accusations.”)

87. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.”); 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE AND PROCEDURE* (3d ed. 1999) 209 (“Equal protection is the guarantee that similar people will be dealt with a similar manner and that people of different circumstances will not be treated as if they were the same”).

88. As one can see from the second question, the stage of showing a single similarly situated individual will actually be composed of two sub-stages: the showing by the defendant and the possibility of it being refuted by the prosecution. To be clear, these two sub-stages together are only the first of a twofold process in the selective prosecution claim. The second stage, the statistical evidence one, will be triggered only if the defendant succeeded in his showing of a similarly situated individual, and the prosecution did not succeed in refuting this showing. This part deals with the first stage (including both sub-stages).



this purpose are: (a) distinctions that refer to the individual's being a part of a protected group (or a group that should be protected); (b) class distinctions; (c) other personal circumstances; and (d) circumstances and distinctions that are related to the criminal conduct. I will argue that, while differences of the fourth category might justifiably deny a claim that two individuals are "similarly situated," differences of the first, the second, and the third groups should not be regarded as "differences that make a difference" in the limited context of the first stage of the proposed standard. Nevertheless, there are important distinctions between the first, the second, and the third categories that I will explore below.

*A. Suspect Classifications (and Classifications That Should Be Suspected)*

*1. (Race), Religion, Ethnicity, National Origin and Exercise of Constitutional Rights*

This category is the easiest one to determine. An individual will be considered "similarly situated" to another regardless of the fact that they have different religious beliefs or different countries of origin, and regardless of the fact that one of them exercised a constitutional right while the other did not. The strict protection of the Constitution against discrimination on the basis of these grounds is well established. A claim that two individuals are not similarly situated because they differ in one of these characteristics is simply inconceivable to anybody who is familiar with American constitutional law and history.<sup>89</sup> With regard to prosecution, the Supreme Court and States' courts have stated many times that selectivity, based upon one of the above criteria, is unjustifiable and impermissible.<sup>90</sup> Therefore, it is clear that, in our context, a distinction cannot be drawn between individuals along the lines of such "suspect" classifications. For example, a claim that a black defendant is not similarly situated to a white person who committed the same crime and was not prosecuted, because the white is of a different religion or a different ethnicity, should be unequivocally rejected.

*2. Gender and Sexual Orientation*

Two classifications that are no less arbitrary when it comes to selective prosecution than the previous categories are classifications based on gen-

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89. The importance of protecting people who exercise fundamental constitutional rights and "discrete and insular minorities" from discrimination was recognized in the famous footnote, no. 4, of Justice Stone in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

90. *See, e.g., Oyler v. Boles*, 368 U.S. 448 (1962) (selectivity based upon "an unjustifiable standard such as race, religion or other arbitrary classification" is impermissible); *People v. Serna* 139 Cal. Rptr. 426 (1977) (The allegations that defendants were singled out for prosecution solely because of their vigorous use of their First Amendment rights to protest the policies of the school and the school system, if proved, would constitute the defense of invidious prosecution); *United States v. Smith* 354 A.2d 510 (D.C. 1976) (a policy intended to deter defendants from exercising their legal rights could not be tolerated). *Murgia v. Municipal Court for Bakersfield Judicial Dist.*, 540 P2d 44 (Cal. 1975) (A selective enforcement policy directed against members or supporters of a labor organization is prima facie discriminatory and invalid under the Equal Protection Clause).

der and sexual orientation. Yet, in general, the courts have not regarded these classifications, and have not scrutinized them, under the same level of suspicion that they have regarded classifications along the lines of race, ethnicity, or religion. I will briefly claim that neither gender nor sexual orientation should ever be taken into account in the decision whether to prosecute or not. More important to the discussion here, I will argue that even if one thinks that in some cases distinctions along these lines are permissible, they should not be recognized as a distinction in our context—i.e., when a black defendant argues that a white who was not prosecuted is similarly situated.

The Court regards gender classifications as less suspicious than racial or religious classifications. Gender classifications are not subject to the “strict scrutiny” standard of review that requires the government to show that it is pursuing a “compelling interest.” On the other hand, gender classifications are also not subject to the “rational relationship” test, according to which the court only checks if it is conceivable that the classification bears a rational relationship to an end of government that is not constitutionally prohibited. The court adopted instead the “intermediate” test, according to which the gender classification will be upheld only if the court finds it is “substantially related” to “an important government interest.”<sup>91</sup>

This difference in the general Equal Protection jurisprudence between the protection granted to racial, religious, or ethnic groups and the protection granted to women (or men) has permeated the field of selective prosecution. Although the courts have usually stated that selectivity based on gender is impermissible,<sup>92</sup> they have not been as clear and unambiguous about it as they were in cases related to racial classifications. In fact, one cannot speak of “the courts” in this context, since they were divided. Some courts even held explicitly that there is no constitutional prohibition against selectivity based on sex.<sup>93</sup>

The under-protection from gender discrimination is subject to solid critiques. It seems to me that the same reasons that justify strict scrutiny of race, religion, and national origin classifications—namely, the long history of stereotyping and subjugation of such groups—apply and should justify heightened scrutiny of gender classification. Even if we accept the

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91. See generally, ROTUNDA & NOWAK, *supra* note 87, at 216–26.

92. See, e.g., *People v. Superior Court of Alameda County*, 562 P.2d 1315 (Cal. 1977) (held that sex was an arbitrary classification for the purposes of a discriminatory enforcement claim); *State v. Maldonado* 578 P.2d 296 (Mont. 1978) (stating that the conscious exercise of some selectivity in enforcement was not in itself a federal constitutional violation absent an allegation and a showing that the selection was deliberately based upon an unjustifiable standard or arbitrary classification such as sex); *State v. Evans*, 326 S.E.2d 303 (N.C. Ct. App. 1985) (defendant failed to prove discriminatory enforcement of the law based on sex, but the court regarded the claim, if proven, as a valid one). *But see* *Boys Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that applying New Jersey’s public accommodations law to require Boy Scouts to admit plaintiff, Assistant Scoutmaster who was expelled after he publicly declared he was homosexual, violated Boy Scouts’ First Amendment right of expressive association).

93. *Minneapolis v. Buschette*, 240 N.W.2d 500 (Minn. 1976) (held that, as a matter of constitutional interpretation, sex had not been declared an invidious or arbitrary basis for discrimination).

view that “biological differences” in some instances justify different treatment of men and women in certain areas of the law, in the context of criminal prosecution it is hard to think of reasons that will justify drawing a distinction on the basis of gender. Gender is no less arbitrary in this context than race, creed, or national origin.

The constitutional protection of gay people (or lack thereof) is even more complex. Formally, it is not a “suspect classification,” nor is it “quasi suspect” as gender, although recent developments might suggest that this approach is likely to change.<sup>94</sup> However, in my proposal this classification is in the same category as religion, national origin, and gender because it is as arbitrary. In the current social context and in light of history, sexual orientation is susceptible to being a basis for discrimination, and classifications on such a basis justify strict scrutiny. In the context of criminal law, any distinction or selectivity drawn on the basis of sexual orientation is irrational.

The narrow question that has to be answered in this Article is whether a claim of a black defendant, in the first stage of her selective prosecution challenge, that a white similarly situated to her was treated unequally, can be dismissed on the basis that the white persons’ gender or sexual orientation was different? The answer to this question should be negative. If there is no rationale for distinguishing between potential defendants on the basis of their gender or sexual orientation, there is also no rationale for accepting gender or sexual orientation as a distinction under the proposal of this Article.

#### B. *Class*

Let us assume man to be man, and his relations to the world to be a human one. Then love can only be exchanged for love, trust for trust, etc. If you wish to enjoy art you must be [an] artistically cultivated person; if you wish to influence other people, you must be a person who really has a stimulating and encouraging effect upon others . . . . If you love evoking love in return, i.e., if you are not able, by the manifestation of yourself as a loving person, to make yourself a beloved person—then your love is impotent and a misfortune.

—Karl Marx, 1844<sup>95</sup>

Mostly, however, dominance is a more elaborate social creation, the work of many hands, mixing reality and symbol. Physical

94. Especially important is the Supreme Court decision in *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating Colorado’s Amendment 2 that had forbidden sexual orientation anti-discrimination legislation on the grounds that it did not pass the rational basis review). This decision is a sign of hope, after the infamous decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a Georgia sodomy statute on the ground that there is no fundamental right to private, consensual homosexual sodomy under the Due Process Clause). See also Courtney G. Joslin, *Recent Development: Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of Bowers v. Hardwick*, 32 HARV. C.R.-C.L. L. REV. 225 (1997).

95. KARL MARX, *Economic and Philosophical Manuscripts*, in EARLY WRITINGS 193–94 (T. B. Bottomore ed., 1963).

strength, familial reputation, religious or political office, landed wealth, capital, technical knowledge: each of these, in different historical periods, has been dominant; and each of them has been monopolized by some group of men and women. And then all good things come to those who have the one best thing. Possess that one, and the others come in train. Or, to change the metaphor, a dominant good is converted into another good, into many others, in accordance with what often appears to be natural process but is in fact magical, a kind of social alchemy.

—Michael Walzer, 1983<sup>96</sup>

In Marx's utopia, different social goods have their own "spheres" of operation. This is not the world in which we are living. We live in a world in which, as in Walzer's depiction, people dominate all spheres if they have *the* one social good. In our times, as both Walzer and Marx aguishly described, this social good is money. Money controls all spheres. If you have enough money, you will be able to enjoy the arts, you will have more political influence, your chances to be "in love" are higher and you will probably get more "justice."

When it comes to law, we feel strongly that equal protection for poor and rich alike is an essential condition for a just system. In Walzerian terms, the sphere of law is ideally insulated and impenetrable to the influences of money, political positions, familial ties, and so forth. As Justice Jackson put it:

We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. "Indigence" in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color.<sup>97</sup>

But the Court did not stand behind this ideal vision, and, in fact, regarded class, unlike race, creed or color, as relevant to people's rights. Like gender classifications, class classifications have not been recognized by the Court as "suspect" and therefore are not subject to strict scrutiny. Even the egalitarian-minded Warren Court did not recognize explicitly poor people as a "suspect" group for the purposes of equal protection claims. As Professor Tribe describes it critically, the courts were willing to provide "minimal protection" for the poor but not "equal protection."<sup>98</sup> I subscribe to Tribe's critique, which is extracted in the following Walzer-inspired paragraph:

Personal qualities and social goods have their own spheres of operation, which are governed by different principles of distribution: welfare to the needy, health care to the infirm, honors to the deserving, political influence to the persuasive, salvation to the pi-

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96. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 11 (1983).

97. *Edwards v. California*, 314 U.S. 160, 184–85 (1941).

98. TRIBE, *supra* note 49, at 1626–72.

ous, luxuries to those inclined and able to pay for them. Injustice may result, however when the distribution principle of one sphere, such as material wealth, is allowed to invade the spheres of other social goods and determine who gets what. The end result may be not just an inequitable distribution of social goods, but the subjugation of those people who do not possess that particular item by which all other social goods are valued.<sup>99</sup>

We would like to think that in criminal law, money cannot buy justice. But it seems that, apart from the obvious way money penetrates the criminal justice system through the quality of defense that money can and actually does buy, money also exerts influence through selective law enforcement policies. By focusing enforcement resources and efforts, especially in regard to consensual crimes (like drug-related offences), on certain neighborhoods, the poor are discriminated against. Money, thus, penetrates to the sphere of criminal justice in which the determination of whether people are arrested and punished should be according to their obedience or disobedience to the law and not according to their wealth.

Drawing on recent legal scholarship, I identify three main arguments that can be used to support selectivity in law enforcement that is based on class. The first argument builds on the view expressed by Randall Kennedy regarding the controversy over the disparate impact of the crack-cocaine/powder-cocaine distinction.<sup>100</sup> The powerful claim Kennedy makes contests the assumption of many critics of the crack-cocaine/powder-cocaine distinction, according to which the harsher punishments regularly imposed on black crack offenders are necessarily a burden upon blacks.<sup>101</sup> In some cases, according to Kennedy's view, the law enforcement in black communities should actually be viewed as a "subsidy" rather than discrimination, because it is advantageous to the law-abiding black people who are the main sufferers from criminal activity within the black neighborhoods. The application of this argument to class would be the contention that focusing law enforcement on poor neighborhoods is actually beneficial for the poor.

The second and third arguments in support of a heightened level of law enforcement in poor neighborhoods are predominantly related to consensual crimes, and they are presented and discussed in detail in a 1998 article by William Stuntz.<sup>102</sup> The second argument is that, from the perspective of retributive justice, a crime that occurs in a low-class neighborhood (e.g., selling drugs in street markets) is worse than the same

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99. *Id.* at 1659.

100. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. This act provided harsh minimum sentences for drug trafficking in general, but it also distinguished between crack-cocaine and powder-cocaine. The prescribed sentence for crack-cocaine trafficking was set to be dramatically harsher. It is uncontroversial that the much harsher penalties for trafficking of crack-cocaine, as opposed to powder-cocaine, are imposed almost exclusively on black defendants.

101. Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994). See also Kate Stith, *The Government Interest in Criminal Law: Whose Interest Is It, Anyway?*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 137, 153 (Stephan E. Gottlieb, ed., 1993).

102. William J. Stuntz, *supra* note 33.

crime that occurs in upscale neighborhoods. Street crimes are often connected with violence and other crimes, they cause fear among the population, and they create disorder that in turn causes, at least according to the “broken windows” theory,<sup>103</sup> more criminality. If a crime committed by a poor person in a poor neighborhood has worse implications than the same crime committed by a rich person in an upper class area, so the argument goes, it is justifiable for law enforcement agencies to target poor offenders rather than wealthy ones.

The third argument is about the cost of policing. Simply put, it seems to be much easier, cheaper, and productive for the police to look for drugs in poor neighborhoods where people sell them on the streets. In a world of limited resources, is it not legitimate to use the resources in a more cost-effective way? The logic of this type of argument can be taken further, to a point Stuntz has not mentioned, but it is of particular relevance to the question of selective prosecution. It is probable that in many cases, the *prosecution* of a rich offender will be much more expensive than that of a poor one, mainly because of the ability of the rich to put on a defense that will be far more expensive for the prosecution to cope with. Is it, for example, illegitimate for the prosecution, under these assumptions, to make a decision to use its limited resources to prosecute ten poor defendants instead of prosecuting one rich defendant?

These are powerful arguments, but there are counter-arguments that are no less convincing. I find the argument that law enforcement in poor neighborhoods is actually good for the poor very hard to agree or disagree with. It is difficult to tell what “the poor population” favors. Like any other attempt to speak on behalf of a group, speaking for the poor is a risky task. There are many voices within any group and one should be careful not to generalize and thus silence some of the voices. However, it is important to note that Kennedy’s view in regard to black communities was an exception. Other scholars who wrote about this issue opposed the policies that Kennedy supported, and rejected his arguments.<sup>104</sup> Partially borrowing from the critiques of Kennedy’s work, I will offer several critiques of the possible contention that unequal treatment by the law enforcement agencies based on class is actually good for the law-abiding poor. First, the dichotomy of “criminals” and “law-abiding people” is problematic on several levels.<sup>105</sup> Second, it is not clear whether such une-

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103. According to the Broken Windows Theory, crime can be reduced by addressing visible signs of community disorder. See James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 31 (“If a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken . . . . One unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing . . . . We suggest that ‘untended’ behavior also leads to the breakdown of community controls.”). For a brilliant critique of this theory and the policing policies emanating from it, see BERNARD E. HARCOURT, *ILLUSIONS OF ORDER* (2001).

104. Janai S. Nelson, *Disparate Effects in the Criminal Justice System: a Response to Randall Kennedy’s Comment and Its Legacy*, 14 NAT’L BLACK L.J. 222 (1997); David Cole, *The Paradox of Race and Crime: A comment on Randall Kennedy’s ‘Politics of Distinction,’* 83 GEO. L.J. 2547 (1995); Skalansky, *supra* note 28; Dorothy E. Roberts, *Race Vagueness, and the Social Meaning of Order Maintenance Policing*, J. CRIM. L. & CRIMINOLOGY 775.

105. (a) Charles J. Ogletree Jr., *The Burdens and Benefits of Race in America*, 25 HASTINGS CONST. L.Q. 219, 245 (1998) pointed out that there is no such sharp disconnection

qual law enforcement policies indeed reduce the level of criminality. Third, increased law enforcement carries with it increasing opportunities for abuse of power from which the whole population suffers. Fourth, sending a large number of a community's members to prison creates other difficulties within those communities. Fifth, the above argument ignores and exacerbates other class inequalities that exist anyhow in the criminal justice system (like the quality of representation). Sixth, it disregards other better and less violent ways to try to solve the crime problem in poor neighborhoods (education, housing, rehabilitative programs, etc.).

The argument that a crime committed in a lower-class area is worse from a retributive perspective is challenged by two counter-arguments. First, the additional harm caused by the fact that the crime is committed in a lower-scale market usually constitutes separate punishable offences. Second and more important, normally the poor do not choose to be poor and they are unable to elect committing the crimes in a place where the crime will cause less harm than in their own neighborhoods.

Finally, the argument that law enforcement in a poor neighborhood is cheaper raises the question "cheaper for whom?" It might be cheaper for the law enforcement agencies, but it carries with it a host of costs to the population.

In addition to the above-mentioned problems, class classifications are harmful because of the way class and race are intertwined. In the United States, there is a strong correlation between poverty and racial minorities. This is especially true with regard to poverty in urban neighborhoods.<sup>106</sup> As Stuntz says:

[W]e might easily have seen the same law enforcement patterns we have seen over the past dozen years in a society where racial divisions did not exist. But in a society where racial divisions are all too real, decisions that have no racial *cause* may still have a very powerful racial *meaning*.<sup>107</sup>

Prohibiting racial classifications in criminal law enforcement, but allowing class consideration to be taken into account, is like kicking race discrimination out through the main door but inviting it to reenter through the window.

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between law abiders and lawbreakers. Many people are both victims of crime and victims of law enforcement; (b) The distinction ignores the constitutive effect of criminal law. By adopting certain laws, policies, and punishment practices we define and construct people as criminals. This is Bernard Harcourt's critic of the Broken Windows theory, New York style policing, and other policies targeting the "disorderly" See HARCOURT, *supra* note 103, at 127–84; (c) The problem is not only with the distinction itself, but also with allying with the law abiders against the interest of the lawbreakers who are often the weakest part of the community. Sheri Lynn Johnson launched a similar critique on Kennedy's "politics of respectability." See Sheri Lynn Johnson *Respectability, Race Neutrality, and Truth*, 107 YALE L.J. 2619 (1998).

106. Stuntz, *supra* note 33, at 1810; John D. Kasarda, *Inner-City Concentrated Poverty and Neighborhood Distress: 1970 to 1990*, 4 HOUSING POL'Y DEBATE 253, 263 (1993) (the population of extremely poor neighborhoods in America's 100 largest cities consisted of 57% blacks, 24% Hispanic, and 16% white).

107. Stuntz, *supra* note 33, at 1825.

I have been arguing that class classifications are bad. Now it is time to return to the key question of this Part of this Article: when a black defendant argues that a white similarly situated to her was not prosecuted, can a difference in their class or wealth negate the claim that they are similarly situated? My assertion is that, even if one maintains that in some cases it is permitted for law enforcement agencies to distinguish between individuals along class lines, the above question should be answered negatively.

The context in which a black defendant shows a white, allegedly similarly situated to her, who was not prosecuted, is already a suspect situation. Allowing prosecutors to distinguish between the two on the basis that one is rich and the other is poor increases the suspicion that such an approach is nothing more than a disguise for race discrimination. Even if there is no intentional racial discrimination, the racially unequal treatment in which this kind of distinction might result is a matter of concern.

This is not to say that according to my proposal the wealth of the defendant should never be taken into account. It is just to suggest that it should not be considered as a difference between allegedly black and white similarly situated individuals. Such a distinction, in other words, should not exempt the prosecution from moving to the second stage of this proposal—the presentation of statistical evidence.

The following hypothetical situation might help clarify my position. A prosecution office has a limited amount of money. There are eleven potential defendants accused of the same crime, say crack trafficking. One of the potential defendants is a rich white person and the other ten are poor black people. The prosecution knows that prosecuting the white will cost \$10,000 because of her ability to pay for a high quality defense, and that prosecuting each of the black suspects will have an average cost of \$1,000. Suppose that the budget for crack-trafficking prosecution at this time is \$10,000. The prosecution makes the calculation and decides to not prosecute the white suspect and thus to be able to prosecute ten other (black) offenders. The black defendants raise the claim of racially based selective prosecution. As part of the first stage of proving their claim, they point to the white suspect who was not prosecuted, and claim that she is similarly situated to them. In this case, the fact that the white is rich and the black defendants are poor, should not, according to my proposal, negate the claim for similarity. The state will have to present the whole statistical picture of the numbers of blacks and whites who were and were not prosecuted for similar conduct. If the statistics demonstrate that there is no general correlation between race and the decision to prosecute, the black defendants will lose their claim. If the statistics show a correlation between race and the decision to prosecute for this kind of behavior, the black defendants will win their selective prosecution claim. Thus, even if one agrees that, in some cases, the prosecution can take into account class classifications (a position that I, for the reasons stated above, tend to disagree with), these classifications will be prohibited if, in a particular case, the distinction also carries racial meaning, and the general statistics show that blacks are treated unequally. This proposal is responsive to the danger of letting race discrimination “reenter through the window,” as well as to the need to amend situations of *de facto* unequal treatment.



### C. *Other Personal Circumstances*

The fact that no person is identically situated to another raises the question of where to draw the line of distinction. A set of questions arises in connection to personal circumstances other than those already mentioned. Is it legitimate for law enforcement agencies to distinguish between individuals on the basis of their familial status (e.g., married-single, parent-not parent)? Is it legitimate to make such distinctions on the basis of medical condition (e.g., not to prosecute someone who is terminally ill)? What about distinctions on the grounds of people's past (e.g., criminal record, arrest record or benevolent histories like excellence in community service)?<sup>108</sup> As opposed to the position I expressed regarding religion, national origin, gender, and class, I do not think that all these kinds of classifications are inherently bad. One could easily imagine circumstances in which a decision whether to prosecute that takes into account such consideration is a legitimate one. For example, the decision not to prosecute a terminally ill person and to prosecute a healthy person who is otherwise similarly situated might be regarded as justifiable use of prosecutorial discretion. The reason is that we usually do not think of healthy people as a group that is being discriminated against, and the classification seems not to be arbitrary but rather rational.

As one might expect, there is no clear ruling by the courts on the permissibility of all such classifications based on "personal circumstances." In fact, there are very few cases that address this issue. The probable explanations for the lack of decisions are that it is taken for granted that such classifications are within the scope of prosecutorial discretion, and that in many cases, nobody except the prosecution is aware of the fact that such distinctions have been made. In the several cases in which the question arose, the courts were divided, but the general tendency was toward upholding the distinctions. Thus, for example, in some cases it was held that defendants' occupations were not an unjustifiable basis for their selection for prosecution,<sup>109</sup> while in other

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108. Cooperation with the police and prosecution is another issue that might justify unequal treatment in certain circumstances. This issue raises myriad problems that are beyond the scope of this Article. Most notable is the problem of reliability of snitch testimony. *See, e.g., BARRY SCHECK ET AL., ACTUAL INNOCENCE* 126–57 (2000). For the purpose of the problem presented in this Article, the arguments and conclusion in the text regarding "personal circumstances" apply also to cooperation.

109. *United States v. Wiley*, 503 F.2d 106 (8th Cir. 1974) (The claim was that the government purposefully prosecuted attorneys for tax offences. Held that reasonable prosecutorial discretion was permissible so long as the prosecutor did not discriminate between persons based upon an unjustifiable standard.); *United States v. Swanson*, 509 F.2d 1205 (8th Cir. 1975) (Again, the claim was that a project giving special priority to the prosecution of tax crimes by attorneys and certified public accountants was not unconstitutional discrimination. The court held that defendant failed to satisfy the showing of invidious prosecution, that is, prosecution based upon impermissible consideration). *See also United States v. Kearney*, 436 F. Supp. 1108 (S.D.N.Y. 1970) (held that defendant, a former FBI agent, had not shown that his selection for prosecution was invidious, where he sought discovery of decisions by the Department of Justice not to prosecute present agent of the FBI or the CIA).

cases the courts said that such distinctions constituted unconstitutional discrimination.<sup>110</sup>

Public prominence of the defendant was another personal characteristic that was raised by defendants in their claim for selective prosecution. Generally, it was held that the defendants' prominence did not constitute an invidious or arbitrary basis for selection of the defendant for prosecution.<sup>111</sup>

Some distinctions based on personal circumstances are more rational than others. It depends extensively on the particular circumstances of a specific case. I do not intend to make a general statement here regarding the desirability of allowing the prosecution to make such distinctions. However, I do believe that when it comes to the question of whether to recognize such circumstances as a difference under the proposed SSI standard, the answer—as in religion, national origin, gender, or class classifications—should be a negative one. That is, the response should be negative even if it is assumed that taking such considerations into account is sometimes a legitimate exercise of prosecutorial discretion.

The rationale of this position is the risk of racial discrimination embedded in permitting such considerations to be taken into account. The risk stems from three reasons. First, there are infinite ways of distinguishing between individuals. If there are racist elements within the criminal justice system, these elements would be able to justify almost any racist decision by citing racially neutral differences between black defendants and white ones. Second, some personal circumstances classifications could be correlated with race. Not only class, but also criminal record, for example, is biased criteria in the sense that, although they are formulated in racially neutral phrases, they actually have a racial meaning.<sup>112</sup> The third reason is a more elusive one. It is related to the concept of unconscious racism, but my acknowledgment of it is related to my personal experience as a public defender in Israel.

One shameful phenomenon that Israel shares with the United States is the inferior situation of minorities in the criminal justice system. In Israel,

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110. *United States v. Robinson*, 311 F. Supp. 1063 (DC Mo. 1969). *See also* *People v. Kail*, 150 Ill. App. 3d 75, 501 N.E.2d 979 (Ill. App. 4th Dist. 1986), *appeal denied*, 508 N.E.2d 732 (Ill. 1987) and *cert. denied*, 484 U.S. 827 (Police department's policy of enforcing ordinances against prostitutes, but not against other persons, constituted discriminatory enforcement as applied to arrest of defendant for failure to equip her bicycle with a bell).

111. *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975), *cert. denied*, 429 U.S. 818; *United States v. Ojala*, F.2d 940 (8th Cir. 1976); *Commonwealth v. Beneficial Finance Co.* 360 Mass. 188, 275 N.E.2d 33, 52 A.L.R.3d 1143 (1971), *cert. denied*, 407 U.S. 910; *People v. Barnwell* 143 Misc. 2d 922, 541 N.Y.S. 2d 664 (1989) (Prosecution of high school principal for criminal possession of controlled substance was not selective under county's formal policy of considering defendant's position in community as relevant factor in plea negotiations where there is no constitutional right to plea bargain.)

112. In a study regarding the influence of factors such as citizenship, home ownership, marital status, substance abuse, employment status, criminal history, time in the area, and education, on bail decisions, it was found that "substantial differences between whites, African-Americans and Hispanics/Latinos were evident; For many of these factors, differences were also evident for Asian-Americans" Report of the Working Committee to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, 1997 ANN. SURV. AM. L. 117, 311-20 (1997).

the most troubling disparity in the criminal justice system is the ethnic one, namely, the disparity between Arabs and Jews.<sup>113</sup> As a public defender, I represented many Arab and Jewish defendants in criminal trials. I realized that one explanation for the disparity could be the way “personal circumstances” of Arabs and Jews are perceived by the different actors in the criminal justice system. In general, I found it much easier to convince a judge or a prosecutor that a Jewish defendant had “personal circumstances” or a life story that justified mitigation or leniency. At times, I felt that Arab defendants were treated as faceless. They had no personal circumstances, no biographies; they were all the same—simply criminals. The fact that they came from a broken family, suffered from drug addiction, or had mental or physical disability was not of much interest to anybody. The experience was not racism—at least not conscious racism. I felt that people could not identify with and feel compassion towards the personal complexities of “the Other.” It is much easier for a Jewish prosecutor or judge to empathize with a Jewish defendant whose life story was often closer to her own.

Similarly, in the American criminal justice system, white prosecutors<sup>114</sup> can identify with, or at least can more easily understand, white defendants.<sup>115</sup> The danger of classifications based upon personal circumstances is that blacks’ personal circumstances will be invisible or at least less visible than those of whites in the eyes of usually white prosecutors.

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113. See ARYE RATTNER & GIDEON FISHMAN, *JUSTICE FOR ALL?: JEWS AND ARABS IN THE ISRAELI CRIMINAL JUSTICE SYSTEM* 45–61 (1998) (dealing specifically with the prosecutorial decision to bring charges); Muhamad Salim Haj Yihye et al., *The Magistrate Court and its Functioning with the Minorities in Israel*, 4 *PELILM* 157 (1994) [Hebrew] (finding, among other things, that the prosecution’s petitions to aggravate the punishment caused an increase in the average punishment of Arabs and a widening of the gap between the average punishments of Jews and of Arabs); Yael Hassin, *Minority Juvenile Delinquents in Israel and the Social Response to Them*, 17 *SOC’Y & WELFARE Q. FOR SOC. WORK* 283 (1997) [Hebrew] (finding that there has been a double standard in the adjudication and punishment of minors in the 1980s and 1990s in Israel: a severe standard for Arabs and a more lenient one for Jews).

114. In a study regarding state prosecutors in death penalty states, it was found that “the prosecutors with ultimate charging discretion in death penalty states are almost entirely white. Of the 1838 total prosecutors in death penalty states, 1794 are white (97.5%), 22 are black (1.2%), and 22 are Hispanic (1.2%). In fact, in 18 of the 38 death penalty states, whites constituted 100% of the prosecutors. In contrast, 1538 of the 3269 people on death row are white (47.1%), 1340 are black (41.0%), and 227 are Latino (6.9%).” Jeffrey J. Pokorak, *Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors*, 83 *CORNELL L. REV.* 1811, 1818 (1998). In Orange County, California, which ranks high among the death penalty counties in the country, the decision whether to seek the death penalty used to be taken by a panel of all white male prosecutors. See Rene Lynch, *Deciding on Life or Death for O.C.’s Worst Murderers; Justice: Prosecutors meet in secret to weigh evidence, impact on jury. Critics liken process to ‘Star Chamber.’*, *L.A. TIMES*, Feb. 23, 1994, at A1.

115. Angela Davis’s description of a true case from the Public Defender Service for the District of Columbia has much in common with the experiences I had at the Public Defender Office in Tel-Aviv. See Davis, *supra* note 7, at 38 (“The prosecutor would probably deny that race or class had anything to do with the decisions made in McKnight’s case. His unconscious racial biases, however, may have played a significant role in the process. It is doubtful that the white male prosecutor empathized with the middle-aged Vietnamese immigrant; it is likely that he would identify with the defendant who was a white male college student.”).

To sum up, classifications based upon personal circumstances are not inherently bad. Sometimes they are legitimate and useful; however, one must recognize that they could have racial meanings and consequences. I do not propose to forbid such classifications, but when race is involved I propose stricter scrutiny. This will be achieved through not recognizing personal circumstances as a difference when a black defendant claims that a similarly situated white was not prosecuted. To reiterate, this does not mean that the prosecution will not be able to favor a white person because of his personal circumstances. It only means that if the prosecution does so, the burden will be shifted, and it will have to prove by statistical evidence that, in general, there is no correlation between the decision to prosecute and the race of the potential defendant. Thus, if, for example, the prosecution uses normally a classification that has a racial meaning, it will probably be evidenced by the statistics and will be precluded. But if the classification is racially neutral—not only on its face but also *de facto*—there is no reason to assume that the statistics will show bias. If the data shows that there is unequal treatment, it means that there is a serious flaw in the system. This flaw justifies the prohibition of prosecuting a black defendant while a white person who allegedly committed the same offence is not being prosecuted, even if there are differences in their personal circumstances.

I am aware of the following difficulty that my proposal raises: it might be argued that although the proposal permits the prosecution to take into account personal circumstances, it will create a disincentive to do so because of the burden the prosecution will have in presenting statistical data under the second stage of the proposal. Thus, implementation of the proposal might entail situations in which distinctions that we consider as not merely legitimate but also positive and desirable will in actuality be precluded. Let us take terminal illness as an example. Almost everybody would agree that it is sometimes justified not to prosecute a person who is about to die from her illness, while prosecuting a healthy similarly situated individual. The challenge to my proposal is the claim that it might be that the prosecutor will decide to prosecute a terminally ill white person in order to avoid the burden of presenting statistical data.

I assert that it is not reasonable to assume that in many cases the prosecution will refrain from such benevolent, racially neutral distinctions. As I explained above, the burden to provide the statistics is not as heavy as it might initially appear. Once prosecution offices, as is probably required under the new proposal, adopt a method of keeping records, this burden will be even lighter. The costs of prosecuting the ill person, for example, might be even higher than the cost of providing the necessary data. Moreover, if the prosecution only considers racially neutral factors, such as the health conditions of the defendant, there is no reason to assume that the statistics will demonstrate unequal treatment. Therefore, the prosecution will not be deterred by the need to provide statistics.<sup>116</sup>

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116. I submit that, on the margins, there might be some instances in which the prosecution will nevertheless decide not to make a distinction that could have been made under the current legal regime. If the prosecution decides to prosecute, the personal circumstances will still influence the sentencing stage. Under the Federal Sentencing Guidelines, for example, the courts have to consider among other things the criminal

#### D. Classifications Related to the Criminal Conduct

Thus far, I have argued that under the proposed SSI standard *nothing* should be recognized as a difference. I will now address the only classification that will be acceptable for distinction between individuals in the first stage of the SSI standard. This is a classification regarding the actual criminal conduct in question. The distinctions can be made on the basis of the type of criminal activity performed by the individuals, the extent of their criminal activity, and the quantum of it. I will argue that, although these distinctions are ostensibly obvious ones to be made by the prosecution, we still have to limit them and to take precautionary measures preventing them from being (ab)used in a discriminatory way.

The most natural distinction is according to the type of criminal activity. Nobody would challenge the fact that, for instance, American prosecutors have the power to charge someone who committed a serious felony and not to prosecute a person who committed a misdemeanor. This is true not only if the criminal activities of the individuals constitute different offenses, but also when it constitutes the same offence. Thus, for example, it is undeniable that if there is a general law that prohibits the possession of drugs without making a distinction between different drugs, it will be legitimate for the prosecution in some cases to prosecute those who possessed a certain drug and not to prosecute those who possessed another drug, as long as there is a rational explanation for such a practice. The courts have indeed upheld in many cases such distinctions based on the type of criminal activity.<sup>117</sup> The extent or the quantum of illegal activity is also acceptable in many cases as a distinction between individuals, which justifies unequal treatment. Thus, for example, no one will doubt the decision of a prosecutor to dismiss the charges for a theft of a \$5 bill,

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history and other specific characteristics of the defendant. *See* 28 U.S.C.A. § 994. There may be several advantages to considering personal circumstances in the sentencing stage over leaving it to prosecutorial discretion. Most important, the discretion under the sentencing stage is much more limited and controlled than the prosecutorial discretion. This is especially true under the rigid rules of the Federal Sentencing Guidelines and similar guidelines that are currently intact in the vast majority of the states. The clear rules that the guidelines prescribe and the fact that judges have to give reasons for any deviation from these rules reduce the danger of unequal treatment. Conversely, prosecutorial discretion as we know it today is usually not restricted by guidelines and not documented. A prosecutor that does not have to explain her decision is more prone to be influenced by unconscious racism. Another advantage of the sentencing stage is that it allows for context specific decisions, because of the variety of types of punishments that the judge can use. For example, a judge might be able to take into consideration drug addiction and order an alternative for incarceration such as probation with a condition of drug treatment.

117. *See* U.S. v. Cantu, 557 F. 2d 1173 (5th Cir. 1977); Wheaton v. Hagan, 435 F. Supp. 1134 (M.D.N.C. 1977) (upholding the distinction made by law enforcement officials in arresting possessors of marijuana while not arresting possessors of alcoholic beverages); *Pet. of Breen*, 237 F. Supp. 575 (S.D. Tex. 1964), *aff'd on other grounds*, 341 F.2d 96 (5th Cir. 1965), *cert. denied*, 386 U.S. 926 (upholding selectivity in prosecution under the Texas habitual offender statute, the court noted that none of the other offenders was serving time for crimes which had any relation to that of the petitioner); *People v. Garner*, 139 Cal. Rptr. 838 (2d Dist. 1977) (recognizing that a distinction drawn between bookmakers and bettors is a distinction on the basis of the difference in the kind of criminal conduct that is neither suspect nor invidious).

but to prosecute someone who stole a million dollars.<sup>118</sup> The same is true regarding a decision to drop the charges against a person who committed one misdemeanor as opposed to a person who committed the same misdemeanor ten times. Again, the courts indeed upheld these kinds of prosecutorial decisions.<sup>119</sup>

Of course, not every distinction based on the type, extent, or quantum of criminality is rational, and therefore some distinctions will be constitutionally invalid.<sup>120</sup> Nevertheless, the courts usually defer to prosecutorial discretion. The prosecution is bound by its role as an agent of the State to enforce the law. In a reality of limited resources, it is understandable that the prosecution exercises some selectivity based upon the criminal conduct. But this selectivity cannot be discriminatory. I will now point out some dangers of discrimination that lie in the careless exercise of selectivity based upon factors related to the criminal conduct.

First, we have to be aware of the possibility that what the prosecution or the courts see as differences in the type or the extent of the illegal activity is actually informed by stereotypes regarding different offenders. An explanatory example of this risk can be taken from the case of *People v. Rodrigues*.<sup>121</sup> The defendants, two homosexuals, were seen sitting in a parked car at a freeway reststop "engaged in kissing, hugging, and sitting, alternately, on each other's laps. On one occasion one man was observed touching the other's thigh." The two men were arrested and subsequently convicted for engaging in "lewd and dissolute conduct." In re-

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118. The distinction among "type," "extent," and "quantum" of illegal activity is sometimes not very clear, and can be easily deconstructed. For instance, it seems that if in the above example we use a pack of cigarettes instead of the \$5 bill, the distinction between the cigarettes thief and the million-dollar thief will be categorized as a difference in the "type" and not in the "extent" or in the "quantum." However, I find no reason to deviate here from the terminology that is common in the legal literature. See, e.g., Robert Kevin Allen, *Selective Prosecution: A Viable Defence in Canada?*, 34 CRIM. L. Q. 414 (1992); John S. Herbrand, Annotation, *What Constitutes Such Discriminatory Prosecution or Enforcement of Laws as to Provide Valid Defense in Federal Criminal Proceedings*, 45 A.L.R. FED. 732 (1979); John S. Herbrand, Annotation, *What Constitutes Such Discriminatory Prosecution or Enforcement of Laws as to Provide Valid Defense in State Criminal Proceedings*, 95 A.L.R.3d 280 (1979).

119. See *People v. Carter*, 450 N.Y.S.2d 203 (2d Dept. 1982). In that case, two black men were the only participants in a barroom brawl between blacks and whites and were set to be prosecuted for assault in a county that, as a rule, did not prosecute any participant in such incidents. The court ultimately held that the defendants did not meet the burden of showing illegal discrimination between persons similarly situated. Among other reasons, the court noted that the defendants, unlike other participants, committed more culpable conduct by their use of dangerous instruments. See also *State v. Savoie*, 320 A.2d 164 (1974), rev'd on other grounds, 341 A.2d 598 (N.J. 1975), (upholding the decision to initiate prosecution only against two officials who received more than \$100, while others were involved in the same kind of corruption but with lesser amounts of money); *State v. Steurer*, 306 N.E.2d 425 (Ohio 1973), cert. denied, 416 U.S. 940 (1974) (holding that the exercise of prosecutorial selectivity was not constitutionally impermissible since no unjustifiable standard was used in a case where 65 persons engaged in the sale of securities without a license, but only 14 defendants who had sold 10 or more securities were charged).

120. See, e.g., *227 Book Ctr., Inc. v. Codd*, 381 F. Supp. 1111 (S.D.N.Y. 1974) (holding that enforcement of obscenity laws against adult bookstores but not against cinemas constitutes a violation of the Equal Protection Clause).

121. 63 Cal. App. 3d Supp. 1, 133 Cal. Rptr. 765 (1976).

jecting the claim of selective prosecution, which was based on one of the arresting officers' statement that he probably would not have arrested a mixed couple for the same conduct, the court said that "such conduct on the part of the arresting officers would not be based on an 'unjustifiable standard,' for appellants' conduct was 'lewd and dissolute,' as defined above, where the mixed couple's would not appear to be."<sup>122</sup> The court, in this case, actually conflated its own homophobic stereotypes, which were manifested in its evaluation of the defendants' conduct.

*Rodrigues* is a rare case in which such conflation is apparent from just reading the case. The reason is the disgraceful fact that homophobic views—unlike racist or misogynic views—are a type of arbitrary offensive classification that are not only pervasive in our society, but can also be expressed relatively freely without shame or censure. But one can easily imagine how the same mixture of stereotypes and the definition of a "conduct" could occur in a racial context. In such a case, it would most probably be unconscious or concealed. For example, it might be that carrying a weapon by a black person would be seen differently than the same conduct performed by a white person. In a system in which race and national origin were approved by the courts as legitimate considerations for suspicion,<sup>123</sup> it is not hard to imagine how it can also be taken into account by prosecutors when determining that one conduct is more "serious" or dangerous than another. The possibility to charge people for a certain behavior with a certain offence, or with an aggravated offence based on the same behavior "with an intention to commit a crime," increases that danger. In these instances, one might conclude that the defendant intended to commit a crime from circumstances other than the objective conduct. The danger is that race will unconsciously or consciously be one of these "circumstances."<sup>124</sup>

Differences in the type, extent, or quantum of legal activity, like differences in personal circumstances, can be found in any comparison of any pair of cases. Just as no person is identical to another, also no activity is identical to another. This means that the prosecution could attempt to justify almost any selectivity on the basis of different conduct. The danger is that, in some cases, the same differences might be regarded as differences that

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122. *Id.* at 5, 767.

123. See *U.S. v. Weaver*, 966 F.2d 391 (8th Cir. 1992) (approving the fact defendant was a "roughly dressed young black male" as one of the factors that could create reasonable suspicion); see also *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976) ("We further believe that it is constitutional to refer motorists selectively to the secondary inspection area at the San Clemente checkpoint on the basis of criteria that would not sustain a roving-patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry we perceive no constitutional violation.").

124. A striking example is *McQuirter v. State*, 36 Ala. App. 707, 63 So. 2d 388 (1953). In this case the defendant, a black man, was charged and convicted with "an attempt to commit an assault with intent to rape." The only evidence, except for the complainant's testimony that the defendant followed her, was the testimony of a police officer regarding statements that the defendant made to him. The defendant denied both the following and the alleged statements. The court said that "In determining the question of intention the jury may consider social conditions and customs founded upon racial differences, such as that the prosecutrix was a white woman and the defendant was a Negro man."

“make a difference” and in other instances they might be regarded as differences that do not make a difference.

As demonstrated above, in most cases when *the defendants* raised the claim of selective prosecution, the courts approved the selectivity based on differences related to the criminal activity. But it is interesting to see the court’s reaction on one occasion in which *the prosecution* was the party who claimed similarity between the defendant and other individuals. This unusual situation arose in *State v. Holloway*.<sup>125</sup> The defendant there argued that he was singled out for prosecution for tax offences because of his racial and political status as a black representative in the General Assembly of the State of Delaware. The State cited the prosecution of five other individuals on the same charges. Defendant attempted to distinguish these prosecutions from his own on the basis that the indictments therein contained Title 11 criminal charges as well as allegations of Title 30 tax violations. The trial court rejected the distinction and pointed out that defendant’s investigation also started as a Title 11 criminal investigation that did not culminate in an indictment. The court of appeals added that:

Furthermore, this Court is not in the business of determining the prosecutorial merit of any criminal conduct under investigation by the Attorney General; such is the exclusive province of that Office alone. The election not to proceed against defendant on other possible concomitant offenses does not impact the constitutionality of the State’s prosecution of defendant on the instant charges. To hold otherwise would impose an additional constraint on the exercise of the State’s discretion neither anticipated nor authorized by *Yick Wo v. Hopkins, supra*, and its progeny.<sup>126</sup>

My claim is that this passage reflects an attitude of exaggerated deference to the prosecution from which the courts should refrain. On its face, it seems that there was a significant difference between the defendant and the other individuals. In other cases, when the *defendants* claimed similarity to other individuals, as we have seen before, the courts did bother to check if there was a justifiable distinction, and in most cases, they found that there was. But this time, the court was “not in the business” of getting into the depth of the defendant’s claim.

What are the conclusions that should be derived from the above analysis? It is clear that in the American system, prosecutors can legitimately consider aspects that are related to the criminal activity when deciding whether to prosecute or not. But does it mean that differences in the type, extent, or quantum of criminality will be regarded as differences when a black defendant points to a white who was not prosecuted under the SSI standard? When asking the same question in regard to personal circumstances, I reached the conclusion that, although such circumstances are sometimes legitimate for the prosecution to take into account, they should not be accepted as a difference under the first stage of the SSI standard. In regard to differences related to the criminal behavior, it is impossible to maintain the same position. Otherwise, everybody is similarly situated to

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125. *Supra* note 67.

126. *Id.* at 979.



everybody else, and in every case a black defendant would be able to show a white person who was not prosecuted—no matter what this white person did—and, thus, compel the prosecution to provide statistics regarding those who were and those who were not prosecuted for any type of offence or criminal behavior. This is, of course, both irrational and impractical.

The way to cope with the dangers I have described above is limited. The court will have to determine which “differences really make a difference.” In a Common Law case-by-case method, the courts will decide on questions like: Is offence *A* similar to offence *B*? Is offence *X* plus offence *Y* similar to offence *X* alone? Is offence *X* performed in a way *C* that is similar to offence *X* performed in way *D*? These kinds of questions do not have one “correct” answer, but the important thing here is consistency, not correctness. The courts will have to use a lot of common sense and decide which differences justify unequal treatment. Take, for example, the following question: is possession of one kilogram of a certain drug similar to possession of one gram of the same drug, for the purposes of the decision whether to prosecute? If we think that the answer to this question is easy, one can further ask if one kilo is similar to half a kilo, and so on. Any point that will be chosen for drawing the line of distinction will be somewhat arbitrary. But still a line must be drawn. This will be the only way to reduce the dangers described above. After a substantial body of law has developed, the courts will be able to enforce the equal application of the standards that will be developed.

#### *E. Interim Conclusion*

Under the proposed SSI standard, a black defendant will have to prove, at the first stage, that a white individual was involved in a similar criminal activity as hers, and was treated differently. The prosecution, which probably has more access to relevant information, will be able to point out differences that are related to the criminal activity of the individuals and that justify the unequal treatment. The court will then decide whether the differences justify the unequal treatment. The decision of the courts will conform to precedents that will be developed, and will ensure that the prosecution is complying with a set of standards of distinction. Differences that are related to arbitrary classifications such as differences based on religion, national origin, gender, or sexual orientation will not be recognized as differences for this purpose, nor will class differences or differences in personal circumstances.

If the first stage is concluded in a successful showing by the black defendant that a white SSI was not prosecuted, and the prosecution is unable to show that this white person is not similarly situated, the burden will shift to the prosecution to show by statistical evidence that there is no correlation between the decision to prosecute and the race of the defendant, as described in Part IV. If the prosecution is not able to make such a showing, the defendant will win her selective prosecution claim and the charges against her will be dismissed.

## VI. IS THE SSI STANDARD IMPOSSIBLE TO PROVE?

In reference to the standard set forth in *Armstrong* for discovery, Justice Rehnquist wrote for the court:

The similarly situated requirement does not make a selective-prosecution claim impossible to prove. Twenty years before *Ah Sin*, we invalidated an ordinance, also adopted by San Francisco, that prohibited the operation of laundries in wooden buildings. *Yick Wo*, 118 U.S., at 374, 6 S.Ct., at 1073. The plaintiff in error successfully demonstrated that the ordinance was applied against Chinese nationals but not against other laundry-shop operators. The authorities had denied the applications of 200 Chinese subjects for permits to operate shops in wooden buildings, but granted the applications of 80 individuals who were not Chinese subjects to operate laundries in wooden buildings under similar conditions.<sup>127</sup>

And Justice Breyer, concurring, said:

Were the “selective prosecution” defense valid in this case . . . , it should have been fairly easy for the defendants to find, not only instances in which the Federal Government prosecuted African-Americans, but also some instances in which the Federal Government did not prosecute similarly situated Caucasians.<sup>128</sup>

On the other hand, many critics of *Armstrong* argued that the similarly situated standard would be impossible to prove. Angela Davis, for example, wrote:

*Armstrong* leaves the ordinary criminal defendant with little hope that he might ever prevail on a race-based selective prosecution claim and even less guidance on how he might do so. Even if the Court had more precisely explained the quality and quantity of evidence necessary to cross the discovery threshold, it is doubtful that most criminal defendants would be able to meet that standard.<sup>129</sup>

The truth is probably to be found somewhere between these two positions. It might not be “fairly easy” for a defendant to meet the burden, but it is definitely not an impossible task. Davis’s two main arguments in support of her view are not convincing, or at least are not applicable as critiques to my proposal. Her first argument is that “the nature of racism and discrimination has changed significantly since 1886 [the year *Yick Wo* was decided], racism and discrimination are not always overtly displayed or even intentional.”<sup>130</sup> This statement is true, but it is more adequate as a

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127. *Supra* note 5, at 466. Although I subscribe to Justice Rehnquist’s view that the standard is not impossible to prove, I think that his reliance on the only case in which the Supreme Court approved a selective prosecution defense is somewhat ironic. The reason that *Yick Wo* succeeded in his claim was that it was not demanded that he prove discriminatory intent, a requirement that the Court demands today, and that was repeated in so many words by Rehnquist himself in *Armstrong*.

128. *Id.* at 476.

129. Davis, *supra* note 7, at 47.

130. *Id.* at 44.

critique of the discriminatory intent prong than of the similarly situated individuals requirement. Since under my proposal intentions are irrelevant, the fact that discrimination is not overtly displayed will not have much of an effect on the ability to prove the claim. The second main argument that Davis puts forth is that “most criminal defendants are indigent and thus incapable of hiring lawyers and experts to conduct the type of investigation and report apparently necessary to obtain discovery.”<sup>131</sup> The problem of the indigence of most criminal defendants and the lack of adequate representation is indeed one of the most serious problems in the criminal justice system.<sup>132</sup> But its applications are certainly not unique in the context of the need to prove similarly situated individuals. It is much more serious a problem when it comes to defendant’s attempt to prove a defense of insanity, to challenge the DNA evidence of the prosecution, or to perform any other task that involves costly methods. Proving similarly situated individuals will not regularly demand hiring experts, although it might be necessary in some cases to conduct investigations. In some cases, indigent defendants who use the services of a Public Defender Office, or another institution that is in charge of the representation of indigent people, might actually profit from the advantages in data collection of such institutions and from their ability to engage in empirical research.<sup>133</sup>

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131. *Id.* at 47.

132. The literature about this problem is vast. See Charles J. Ogletree, Jr. & Yoav Sapir, *Keeping Gideon’s Promise through Public Defender Offices: The American and Israeli Experiences*, 28 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2003); Note, *Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062 (2000); Jeff Rosentzweig, *The Crisis in Indigent Defense: An Arkansas Commentary*, 44 ARK. L. REV. (1991); Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9 (1986); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986); William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995). Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73 (1993); Stephen B. Bright, *Keeping Gideon from Being Blown Away—Prospective Challenges to Inadequate Representation May Be Our Best Hope*, 4 CRIM. JUST. 10 (1990) Bruce A Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993); Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413 (1988); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323 (1993); Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863 (1996).

133. For the advantages of repeat players see the classic article, Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 98–100 (1974). On the potential of such institutions to collect data regarding racial disparity and the advantages of data collection in the death penalty context, see Carol Steiker & Jordan Steiker, *Should Abolitionists Support “Reform” of the Death Penalty?* 63 OHIO STATE L.J. 417, 427–28. The public defender office in Israel frequently uses its institutional ability to conduct empirical studies and provide statistical data. In a case in which I was involved, we conducted a study on discrimination against Palestinians who were charged with illegal entry to Israel. See also the description of *Tuitt infra* text accompanying note 135.

Two relatively recent cases, in which the defendants succeeded in trial courts to prove the existence of similarly situated individuals who were treated differently, and an order for discovery was granted, can give us some idea of ways in which this requirement could be fulfilled. From reading the decision in *United States v. Olvis*,<sup>134</sup> it seems that the defendants simply knew of Caucasians who were involved in the same or related schemes, and were not prosecuted. In *United States v. Tuitt*,<sup>135</sup> the defendants received information about similarly situated individuals from records of the Springfield office of the Committee for Public Counsel Services, which represents indigent defendants, and from the Hampden County Bar Advocates Office.

So, even under the current legal regime, it is not an insuperable task to prove that similarly situated individuals from a different race were treated differently. It will become easier under the modified SSI standard that I am proposing. First, under the SSI standard there is only the need to find a single SSI while the current standard speaks of "individuals." Second, under my proposal, "similarity" is defined much more broadly. Third, I propose to change the rigid rules of evidence that apparently were applied by the Court in *Armstrong* when it dismissed affidavits presented by defendants as "hearsay."<sup>136</sup> I do not intend to prescribe here the exact rules of evidence that should apply, but I maintain that they can be more flexible than the regular rules of evidence applicable at trial. The hearing is not in front of a jury, but in front of a judge, who can use her discretion to assess the probative value of the evidence presented to her, instead of making a binary decision regarding its admissibility. Furthermore, the nature of the proceeding is that most of the information is accessible to the prosecution and not to the defense. This in itself is a valid reason to allow the defense to present evidence even if it is not admissible at the trial stage. If that evidence contains inaccurate information, the prosecution will easily be able to expose that fact by using its own reliable information.

## VII. CONCLUSION

Since *Yick Wo v. Hopkins*<sup>137</sup> was decided 117 years ago, no defendant has won a claim of selective prosecution in the Supreme Court. There were only a handful of successful claims of racially based selective prosecution in any other court, state or federal, although hundreds of defendants raise the issue every year.<sup>138</sup> These facts speak for themselves. Either we can assume

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134. *Supra* note 62. This case was reversed in *Olvis*, *supra* note 71, on the grounds that the allegedly similarly situated individuals were actually not similarly situated. Without going into detail, it seems that under my suggestion for a revised SSI standard, the outcome would have been the same as the one that the District Court reached.

135. *Supra* note 81.

136. *Supra* note 7, at 47. Davis is noting that, although the court felt at ease in dismissing sworn affidavits by members of the bar presented by the defense as hearsay, the court had no problem accepting sworn affidavits by police officers. *Id.* at 46.

137. 118 U.S. 356 (1886).

138. For a rare case in which the defendant finally prevailed in his racially based selective prosecution claim, see *People v. Ochoa* 212 Cal. Rptr. 4 (1985) (dismissing charges after the prosecution refused to comply with discovery order on the issue).

that in the past 117 years there has not been any other case of racial discrimination in prosecution, or the standard that the courts apply is wrong.

As formerly indicated, the SSI standard I am proposing is not intended to be a silver bullet that will solve the problem of racial discrimination in the criminal justice system. Moreover, if adopted, it will surely have costs. The greatest cost involved is the statistical evidence that will have to be provided, and the records that will have to be kept. Indeed, the costly need to provide a comprehensive and not just a partial statistical picture in order for these statistics to represent an accurate reality was probably an incentive for the Court to stay away from such a standard, and to stick to the discriminatory intent requirement.

However, the potential advantages of the new standard, as described in this Article, are greater than its costs. The proposed standard is aimed at identifying the phenomenon of unequal treatment and amending situations in which this phenomenon occurs. As I argued, racially based selective prosecution is different in many respects from other equal protection issues in different contexts. Its special features and the unique concerns it raises make racially based selective prosecution a good place to start releasing the equal protection jurisprudence from the captivity of the discriminatory intent requirement. This Article has suggested an alternative and has argued that it is a plausible one, while anticipating and responding to foreseeable difficulties in its application.

Crime rates in the United States have decreased dramatically in the last decade,<sup>139</sup> but racial disparity in the criminal justice system continues to increase.<sup>140</sup> In 1960, African Americans comprised a third of the state and federal prison population. In the early 1990s they already comprised about half of that population and the percentage is still on the rise.<sup>141</sup> According to a recent report by the Department of Justice, an estimated twelve percent of African American men ages twenty to thirty-four are in jail or in prison.<sup>142</sup> *Amadou Diallo, Abner Luima, O.J. Simpson and Rodney King* are more than recent scandals. They are names that represent and underscore the degree to which this country is divided between blacks and whites with regard to the criminal justice system. According to poll data, 72% of the black population believes that the criminal justice system treats blacks more harshly than whites,<sup>143</sup> and 66% of black citizens regard the criminal justice system as racist.<sup>144</sup> It is time to consider where we have gone wrong, and to propose reforms. This is the aim of this Article.

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139. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (Sept. 9, 2002), available at <http://www.ojp.usdoj.gov/bjs/glance/viort.htm>.

140. The empirical evidence is vast and devastating. For a good summary of some of the data, see Cole, *supra* note 35, at 4–5.

141. See generally MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995).

142. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (Apr. 2003), available at <http://www.ojp.usdoj.gov/bjs/abstract/pjim02.htm>.

143. See Stuntz, *supra* note 33 (citing The Gallup Organization, Special Reports: Black/White Relations in the U.S., at [http://www.gallup.com/Special\\_Reports/black-white.htm](http://www.gallup.com/Special_Reports/black-white.htm) (June 10, 1997)).

144. See Maria Puente, Poll: Blacks' Confidence in Police Plummet, USA TODAY, Mar. 21, 1995, at 3A cited in Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 699 (1995).