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PROVING DISCRIMINATORY INTENT IN SELECTIVE PROSECUTION CHALLENGES—AN ALTERNATIVE APPROACH TO *UNITED STATES V. ARMSTRONG*[1]

Kristin E. Kruse

IN the early hours of July 23, 1999, the Swisher County Sheriff's Department invaded the African-American community in the small west Texas town of Tulia in what appeared to be an arrest rampage.[2] The officers beat on doors, woke-up neighbors, and pulled men and women from their beds—all to arrest them in front of bright lights and TV news cameras swarming about the neighborhood.[3] In the end, the officers arrested forty-six people—nearly ten percent of the adult African-American population of a town of 5,100 people. Forty of the forty-six arrested were African-American, and the remaining six had bi-racial children or were married to someone in the African-American community.[4]

The Swisher County Sheriff's Department arrested the accused based only on the accusations of one newly hired undercover officer, Tom Coleman, without any other corroborating evidence that the people arrested sold drugs.[5] The officer did not wear a recording device, operate video surveillance, or utilize a second officer to observe the deals; nor did he ever produce any drugs.[6] The new officer explained that the only means he used to record the alleged transactions was by writing the names, dates, and other details in ink on his leg.[7] Although this officer had a history of theft, fraud, and abuse of power in his previous law enforcement positions, one by one the arrestees were convicted in trials at which the judge refused to allow evidence of the officer's previous work record,

1. 517 U.S. 456 (1996).

2. *See generally* Complaint at 5, White v. Coleman, No. 2-03CV-0272J, 2004 WL 573657 (N.D. Tex. 2004).

3. *Id.* at 22.

4. *Id.* at 5.

5. *Id.*

6. Adam Liptak, *$5 Million Settlement Ends Case of Tainted Texas Sting*, N.Y. TIMES, Mar. 11, 2004, at A14.

7. Complaint at 19, White v. Coleman, No. 2-03CV-0272J, 2004 WL 573657 (N.D. Tex. 2004).

and the attorneys never cross-examined the officer.[8]

However, these charges were false and full of inaccuracies. The victims included people such as Billy Don Wafer, who was alleged to have bought drugs at a convenience store; however, Wafer provided time sheets and witnesses establishing that he was at work at the time of the purported drug sale.[9] Another defendant, Yul Bryant, had been described as a "'tall black man with bushy type hair,'" but Bryant is actually 5'6" and bald.[10] Coleman also accused Yolanda Smith of selling him drugs on February 14, 1998, at a time when the officer's time sheets indicated that he was off duty.[11] Coleman described Romona Strickland in the original incident report as "'six months pregnant,'" when she in fact was not pregnant at all.[12] On the date Coleman alleged that Tonya White delivered him drugs within 1,000 feet of a playground, she was actually living in Oklahoma City.[13] White even produced a time-stamped check from a bank in Oklahoma City dated the day of the alleged drug deal.[14]

After becoming aware of the unjust situation in early 2001, a team of attorneys from the NAACP Legal Defense Fund, the ACLU, and Hogan & Hartson L.L.P., a Washington, D.C. law firm, began investigating the convictions and filed a petition for a writ of habeas corpus on behalf of those who had already been convicted at trial.[15] The hearing for the writs of habeas petition revealed that Coleman falsified reports, misrepresented the nature and extent of his investigative work, and misidentified various defendants during his Tulia investigation.[16] It also revealed that Coleman committed perjury during numerous prior hearings and trials and had been "described by prior employers as a 'discipline problem' who 'had possible mental problems.'"[17] Judge Chapman's 130-page Findings of Fact and Conclusions of Law based on the hearings reported that the "prosecution had withheld critical impeachment material" and described Coleman as "the most devious, non-responsive law enforcement witness this Court has witnessed in 25 years on the bench in Texas;" and "it would be a 'travesty of justice' for the Tulia convictions to stand."[18] On June 16, 2003, the Court ordered the immediate release of twelve

8. *Id.* at 6; Open Society Policy Center, *Tulia Tip of the Drug War Iceberg*, 43-44 (Jan. 2005), http://www.soros.org/resources/articles_publications/publications/tulia_20050101/tulia.pdf (last visited Sept. 10, 2005) [hereinafter *Tulia Tip of the Drug War Iceberg*].

9. Complaint at 23, White v. Coleman, No. 2-03CV-0272J, 2004 WL 573657 (N.D. Tex. 2004).

10. *Id.*

11. *Id.*

12. *Id.* (quoting the incident report).

13. *Id.* at 24.

14. *Id.*

15. *Tulia Tip of the Drug War Iceberg*, *supra* note 8, at 42; *see also* Hogan & Hartson L.L.P., *The Tulia Case*, http://www.hhlaw.com/News/25813Tulia.pdf (last visited Sept. 10, 2005) [hereinafter Hogan & Hartson] (explaining background of Tulia case and Hogan & Hartson's work in the case).

16. Hogan & Hartson, *supra* note 15.

17. *Id.*

18. *Id.*

individuals who had been imprisoned since the Tulia raid in July 1999.[19] Governor Rick Perry then granted full pardons on August 22, 2003, to thirty-five individuals who were wrongfully convicted in Tulia.[20] On March 11, 2004, the arrestees reached a $5 million settlement with the City of Amarillo in their civil suit.[21] Finally, on January 14, 2005, a Texas state court jury found that Coleman had committed perjury while testifying in another proceeding about an allegation from his previous law enforcement position.[22]

The arrests in Tulia, Texas, despite the final outcome, illustrate that race is still an issue in law enforcement and prosecutorial decisions. Freddie Brookins, whose nineteen-year-old son was arrested in Tulia only weeks before he planned to start college, testified at the Congressional Briefing on Tulia in Washington, D.C. on May 7, 2003, and stated, "I thought that they made a mistake. I didn't think the law did things like this. I didn't think things like this happened in this day and time."[23] The government, however, has always had leeway in making its prosecutorial decisions, but that does not mean that its discretion is unbounded.[24] The Supreme Court in *United States v. Armstrong* reaffirmed that the Equal Protection Clause prohibits selective prosecution on the basis of race.[25] However, to make a selective prosecution claim, as explained by the Court, the defendant faces a high hurdle.[26] He must prove that the "federal prosecutorial policy 'had a discriminatory effect, and it was motivated by a discriminatory purpose.'"[27] While the Court explained that to establish discriminatory effect one must demonstrate that "similarly situated individuals of a different race were not prosecuted,"[28] the Court did not provide any explanation on how to prove discriminatory intent for a selective prosecution claim.[29] Commentators have argued that *Armstrong* makes it more difficult to prove selective prosecution cases, while others are concerned that the door should not be opened to speculative discrimination claims.[30]

This Comment seeks to reconcile these conflicting views and recommends that courts apply the *McDonnell Douglas* burden-shifting framework used in employment race discrimination cases to clarify the test for

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19. *Id.*
20. *Id.*
21. Liptak, *supra* note 6, at A14.
22. Steve Barnes, *Rogue Narcotics Agent in Texas is Found Guilty in Perjury Case*, N.Y. TIMES, Jan. 15, 2005, at A12.
23. *Tulia Tip of the Drug War Iceberg*, *supra* note 8, at 30 (Part II Congressional Briefing: "Systemic Injustice in the War on Drugs: A Briefing from the Frontlines of Tulia, Texas and Beyond"—May 7, 2003).
24. United States v. Armstrong, 517 U.S. 456, 464 (1996).
25. *Id.* at 465.
26. *See id.*
27. *Id.* (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).
28. *Id.*
29. *Id.*
30. *See infra* note 115 (discussing criticisms of *Armstrong*).

selective prosecution based on race.[31] Part I describes the background of selective prosecution claims and key cases that the Supreme Court considered in its analysis in *Armstrong*. Part II reviews the Court's decision in *Armstrong* and explains the Court's holding. Part III discusses problems with the *Armstrong* opinion, including the high burden of proof standard in selective prosecution cases, the difficulty in obtaining statistics to meet the standard, and the Supreme Court's lack of a clear definition of discriminatory intent. Part IV explains the *McDonnell Douglas* burden-shifting framework used in employment discrimination cases to determine discriminatory racial intent and describes this Comment's proposal on how to apply the *McDonnell Douglas* framework to selective prosecution based on race. Finally, Part V explains the importance of applying the *McDonnell Douglas* framework to selective prosecution claims, especially in light of the increased use of racial profiling today in a variety of contexts.

I. BACKGROUND OF SELECTIVE PROSECUTION CLAIMS

To understand the background of selective prosecution claims, one must begin with the power to prosecute. The executive branch is granted the power under the Constitution to execute the laws.[32] This power affords the Attorney General and United States Attorneys "'broad discretion.'"[33] "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision . . .

31. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Race, of course, has long received special consideration. In *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court first used the term "suspect" to describe a racial classification, which would then trigger "most rigid scrutiny" in equal protection analysis. *Id.* at 216.

32. *See* U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed."). Therefore, the prosecutors serve as the "President's delegates" to help him fulfill his responsibility as provided for in the Constitution. United States v. Armstrong, 517 U.S. 456, 464 (1996). In addition, the United States Code also codifies grants of prosecutorial discretion. *See* 28 U.S.C.A. § 516 (2004) (providing that "the conduct of litigation in which the United States, an agency, or officer thereof is party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); *see also* 28 U.S.C.A. § 547 (2004), which provided:

Except as otherwise provided by law, each United States attorney, within his district, shall—

> (1) prosecute for all offenses against the United States; (2) prosecute or defend for the Government, all civil actions, suits or proceedings in which the United States is concerned; (3) appear in behalf of the defendants in all civil actions, suits or proceedings pending in his district against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to these officers, and by them paid into the Treasury; (4) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings; and (5) make such reports as the Attorney General may direct.

33. United States v. Armstrong, 517 U.S. 456, 464 (1996) (citing Wayte v. United States, 470 U.S. 598, 607 (1985) (quoting United States v. Goodwin, 457 U.S. 368, 380, n.11 (1982)).

generally rests entirely in [the prosecutor's] discretion."[34]

Although the power of prosecutorial discretion is broad, it is not "'unfettered' . . . [it is] subject to constitutional restraints.'"[35] These "constitutional restraints" for federal prosecutors include the equal protection component of the Due Process Clause in the Fifth Amendment, which has the same restraint as the equal protection guarantee under the Fourteenth Amendment for state prosecutors.[36] Therefore, due to these constitutional constraints, the decision to prosecute cannot be based on "an unjustifiable standard such as race, religion, or other arbitrary classification."[37]

A. Selective Prosecution Defined

"A selective prosecution claim asks a court to exercise its judicial power over a 'special province' of the Executive."[38] Selective prosecution is not a defense to the criminal charge itself.[39] Instead, it forms the basis for a motion to dismiss if the decision of a prosecutor was based on an unconstitutional rationale.[40] The claim is based on "ordinary equal protection standards."[41] This requires the defendant to prove "that the prosecutorial policy 'had [both] a discriminatory effect and that it was

34. *Id.* (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

35. *Wayte*, 470 U.S. at 608 (quoting United States v. Batchelder, 442 U.S. 114, 125 (1979)). Moreover, the role of prosecutorial discretion has increased with the use of sentencing guidelines, state and federal. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717, 756-58 (1996).

36. *Wayte*, 470 U.S. 598 at 610 (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975)).

37. Oyler v. Boles, 368 U.S. 448, 456 (1962).

38. *See Armstrong*, 517 U.S. at 464 (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985)).

39. *Id.* at 463; *see also In re* United States, 397 F.3d 274, 286 (5th Cir. 2005) (explaining that "[r]acially selective prosecution is a challenge to the prosecution, not a defense to the crime charged."). In *In re United States*, Tyrone Williams was prosecuted for driving a truck as part of an illegal alien smuggling conspiracy, in which nineteen of the seventy-four illegal aliens who were inside the truck trailer died of heat exhaustion in Victoria, Texas. *Id.* at 277. Out of the fourteen co-defendants, Williams was the only African-American defendant besides one other and the only defendant for whom the government sought the death penalty. *Id.* at 278. The district court applied the *Armstrong* standard requiring proof of discriminatory effect and intent and found that the defendant had made a prima facie case because the requirements were "clear to the naked eye." *Id.* The lower court granted the defendant's motion for discovery of information relating to the government's capital-charging practices. *Id.* at 279. However, on an interlocutory appeal, the Fifth Circuit reversed and held that the trial court abused its discretion when it imposed discovery sanctions on the government requiring it to disclose its reasoning for seeking the death penalty for the defendant. *Id.* at 285-86. The trial court judge had planned to instruct the jury that it could decide whether the government's decision to seek the death penalty was selective prosecution. *See id.* at 281. However, the Fifth Circuit criticized this jury instruction because it would turn selective prosecution into a defense. *See id.* at 286.

40. *See Armstrong*, 517 U.S. at 463. Although this Comment focuses on the use of a selective prosecution claim based on racial discrimination as grounds for a motion to dismiss an indictment, selective prosecution claims have also been used to seek damages under 42 U.S.C. § 1983 for violations of civil rights by state officials. *See, e.g.*, Chavez v. Ill. State Police, 251 F.3d 612 (7th Cir. 2001); *see also infra*, notes 199-210 and accompanying text (discussing *Chavez*).

41. Wayte v. United States, 470 U.S. 598, 608 (1985).

motivated by a discriminatory purpose prosecution.'"[42] A selective prosecution claim "begins with a presumption of good faith and constitutional compliance by the prosecutors."[43] "'Clear evidence to the contrary'" is required to prove that the prosecutor was not making decisions that conformed to the Constitution.[44] However, because the claim requires the judiciary to review the decisions of the executive, the Supreme Court has been hesitant to allow the judiciary to upset a decision of the prosecution.[45]

Nevertheless, the broad power that prosecutors wield has been criticized.[46] Even Justice Jackson, a former prosecutor, recognized the problem when he referred to the prosecutor's decision to prosecute as "'the most dangerous power of the prosecutor,' because it enables the prosecutor to 'pick people he thinks he should get, rather than pick cases that need to be prosecuted.'"[47] Jackson also noted that prosecutors are capable of finding a violation in almost anyone, which means that prosecution "becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor."[48] When this "most dangerous power" is exercised by prosecutors who discriminate either intentionally or even unintentionally, defendants can become victims of selective prosecution.

B. Developments in Selective Prosecution Litigation

Selective prosecution as a claim has evolved since it was first discussed in a Supreme Court case in 1886. In *Armstrong*, the Supreme Court reviewed four key cases that have impacted the development of selective prosecution in its discriminatory intent analysis.[49] In two cases, discrimination against Chinese persons was at issue, and in the other two cases, Caucasian defendants asserted that they were targeted for special prosecution.

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42. *Armstrong*, 517 U.S. at 465 (quoting *Oyler*, 368 U.S. at 456).

43. *See United States*, 397 F.3d at 284 (citing *Armstrong*, 517 U.S. at 465-66).

44. *See Armstrong*, 517 U.S. at 464 (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926)).

45. *See Wayte*, 470 U.S. at 607 (explaining that the judiciary is not in a position to review factors used to decide to prosecute such as: "the strength of the case, the prosecution's general deterrence value, the government's enforcement priorities, and the case's relationship to the government's overall enforcement plan"). The Court also indicated that judicial review would delay criminal proceedings, "threaten [] to chill law enforcement" by revealing prosecutors' decision-making process to outsiders, and reduce prosecutorial effectiveness by revealing the government's enforcement policy. *Id.*

46. *See, e.g.*, MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM, 81 (1975) (Bobbs-Merrill Co., Inc. 1978) (quoting address by Justice Robert Jackson, Second Annual Conference of U.S. Attorneys, April 1940).

47. *Id.*

48. *Id.*

49. *Armstrong*, 517 U.S. at 464-67.

1. *The Supreme Court Confronts Selective Prosecution of Chinese in California*

Yick Wo v. Hopkins[50] is the first opinion in which the Supreme Court recognized that equal protection standards apply to prosecution.[51] In *Yick Wo*, the defendant, Wo, a native of China, had operated a laundry business in San Francisco for twenty-two years.[52] When he tried to renew his license, the board of fire-wardens informed him that he was in violation of a new city ordinance prohibiting laundries in wooden buildings and arrested him when he did not pay the fine.[53] Wo petitioned the California Supreme Court for a writ of habeas corpus, arguing that he had been deprived of his personal liberty.[54] The case then went to the United States Supreme Court on a writ of error to the California Supreme Court.[55] In reviewing the ordinance, the Court noted that in 1880, of the 320 laundries in San Francisco, 310 were housed in wooden buildings.[56] Wo presented evidence that of 280 people who applied for licenses from the fire-warden, all 80 non-Chinese received a license, even though their laundries were in wooden structures, and all 200 Chinese applicants were denied.[57] The Supreme Court observed that the effect of the ordinance would be to drive the small laundries owned by Chinese out of business and to give a monopoly to the large laundry operations owned by Caucasians.[58] More importantly, the Court inferred that the ordinance was intended to discriminate against the Chinese and "not merely to regulate the business for the public safety."[59] The Supreme Court, accordingly, held that the ordinance violated equal protection because the government only prosecuted the violators who were Chinese.[60] As the Court explained, a defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law.[61] Thus, the Court held that Yick Wo's imprisonment was illegal and it reversed and remanded the case with instructions to release Yick Wo from prison.[62]

Twenty years later, the Supreme Court considered the issue of selective prosecution again in *Ah Sin v. Wittman*,[63] another case involving discrimi-

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50. 118 U.S. 356 (1886).
51. *See* LEXSTAT 2-9 CRIMINAL CONSTITUTIONAL LAW § 9.04—Decision to Prosecute (Matthew Bender & Co. 2004).
52. *Yick Wo*, 118 U.S. at 358.
53. *Id.* at 358-59.
54. *Id.* at 356.
55. *Id.* at 365.
56. *Id.* at 358-59.
57. *Id.* at 359.
58. *Id.* at 362-63.
59. *Id.*
60. *Id.* at 374.
61. *Id.* at 373.
62. *Id.* at 374.
63. 198 U.S. 500 (1905).

nation against Chinese, in which the Court established the requirement of proving discriminatory effect.[64] In *Ah Sin*, the defendant filed a habeas petition while imprisoned for violating a San Francisco ordinance prohibiting gambling tables in rooms with barricades in place to prevent police from entering.[65] Ah Sin simply alleged in his habeas petition that the ordinance itself was enforced only against Chinese and not against any other races.[66] In its opinion, however, the Court affirmed the dismissal of the petition and held that discriminatory effect had to be established by a showing that people of other races who were similarly situated were treated differently.[67] Since the defendant did not allege that the ordinance's prohibited practices were not exclusively committed by Chinese and did not show that there were other non-Chinese violators of the ordinance who were not prosecuted, Ah Sin could not show discriminatory effect.[68]

2. *Selective Prosecution Claims in Non-Race Cases Establish the Modern Test*

The Supreme Court reviewed selective prosecution again in 1962 in *Oyler v. Boles*, in which the Court explained that proof must establish that the decision to prosecute was not based on an "unjustifiable standard."[69] *Oyler* did not involve racial discrimination, but it concerned two petitioners who alleged that they were discriminated against as habitual criminals and were given life sentences under the West Virginia habitual criminal statute.[70] Both filed separate writs of habeas corpus to appeal the sentences on the grounds of equal protection violations.[71] They submitted statistics indicating that a "high percentage of those subject to the law" had not received life sentences.[72] The Court rejected the statistics explaining that the "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."[73] Although the statistics implied some selective enforcement of the statute, there was no indication that it was "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[74]

Over twenty years ago, in *Wayte v. United States*, the Court first stated

64. *Armstrong*, 517 U.S. at 465 (citing *Ah Sin*, 198 U.S. at 500).
65. *Id.* at 466; *Ah Sin*, 198 U.S. at 503.
66. *Armstrong*, 517 U.S. at 466.
67. *Id.*
68. *Id.*; *Ah Sin*, 198 U.S. at 507-08; *see also infra* notes 105-07 and accompanying text (explaining the difference between the ordinances in *Yick Wo* and *Ah Sin* as distinguished by the Court in *Armstrong*).
69. 368 U.S. 448, 456 (1962).
70. *Id.* at 449 (involving habitual criminal statute assigning mandatory life sentence upon third conviction of a crime punishable by imprisonment).
71. *Id.* at 454.
72. *Id.* at 456.
73. *Id.*
74. *Id.*

a two-prong test for a selective prosecution claim.[75] The Court explained that the claim is based on equal protection standards and specified that the "standards require [the] petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose."[76] In *Wayte*, another non-racial selective prosecution case, the petitioner refused to comply with a 1980 Presidential Proclamation requiring males born during 1960 to register with the Selective Service System.[77] The petitioner was in the group of men required to register; however, he refused to do so and sent letters to government officials informing them that he did not register and did not intend to register.[78] The Selective Service saved the letter in its files, and as a part of its "passive enforcement" policy of only prosecuting unregistered persons in their file, notified the petitioner that if he did not register, he would be prosecuted.[79] After several letters and a visit by an FBI agent, he was indicted for knowingly and willfully failing to register in violation of the Military Selective Service Act.[80] Wayte moved to dismiss the indictment on the ground of selective prosecution.[81] The Supreme Court held that Wayte was not selectively prosecuted because he did not show that the reason the Selective Service chose to prosecute the nonregistrants that it did was because they sent in letters voicing their refusal to register.[82] It also noted that Wayte did not prove that the policy had a discriminatory effect.[83]

II. THE SELECTIVE PROSECUTION STANDARD UNDER *UNITED STATES V. ARMSTRONG*[84]

United States v. Armstrong addressed the standard that must be met to obtain discovery in a selective prosecution claim based on race.[85] The defendants, Armstrong and Hampton, were arrested by agents of the Federal Bureau of Alcohol, Tobacco, and Firearms and the narcotics division of the local police department after they sold undercover agents crack cocaine seven times and the police searched their hotel room where more crack and a loaded gun were found.[86] The defendants were indicted on charges of conspiring to possess with intent to distribute and

75. 470 U.S. 598, 608 (1985). The *Armstrong* Court quoted *Wayte* as the authority for the standards of a selective prosecution claim when it stated the requirements that it applied in the *Armstrong* analysis. *See* United States v. Armstrong, 517 U.S. 456, 465 (1996).
76. *Wayte*, 470 U.S. at 608.
77. *Id.* at 600-01.
78. *Id.* at 601.
79. *Id.* at 602.
80. *Id.* at 603.
81. *Id.* at 604.
82. *Id.* at 609-10.
83. *Id.*
84. 517 U.S. 456 (1996).
85. *Id.* at 458. *Armstrong* specifically involved Rule 16 of the Federal Rules of Criminal Procedure 16—Discovery and Inspection. Therefore, it was at the evidentiary hearing stage before a judge on a motion for discovery.
86. *Id.*

conspiring to distribute more than fifty grams of cocaine as well as on federal firearm offenses.[87] After the indictment, they filed a motion for discovery or for dismissal of the indictment, alleging that they were chosen for federal prosecution because they were African-American.[88] In support of the motion, the defendants attached an affidavit by a "Paralegal Specialist" at the Office of the Federal Public Defender stating that in each of the twenty-four prosecutions for crack cocaine cases closed in 1991, the defendants were African-American.[89] They also included a list of the defendants' names, races, and alleged crimes.[90]

Over the government's objection, the district court granted the motion and ordered the government:

> (1) to provide a list of all cases from the last three years in which the government charged both cocaine and firearms offenses; (2) to identify the race of the defendants in those cases; (3) to identify what levels of law enforcement were involved in the investigations of those cases; and (4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offenses.[91]

The government moved for reconsideration of the discovery order but the motion was denied.[92] When the government said it would not comply with the discovery order, the court dismissed the case.[93] The Ninth Circuit reversed the district court, indicating that due to the proof requirement for a selective prosecution claim, defendants must provide a basis for believing that "others similarly situated have not been prosecuted."[94] However, the Ninth Circuit reheard the case en banc and affirmed the district court's order of dismissal, holding that a "defendant is not required to demonstrate that the government has failed to prosecute others who are similarly situated."[95]

On appeal, the Supreme Court reversed the Ninth Circuit's en banc decision.[96] First, the Court analyzed Federal Rule of Criminal Procedure 16—Discovery and Inspection, which was not considered by the lower courts.[97] Rule 16(a)(1)(C) provides:

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of

87. *Id.*
88. *Id.* at 459.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 459-61.
93. *Id.* at 461.
94. *Id.* (quoting United States v. Armstrong, 21 F.3d 1431, 1436 (9th Cir. 1994) (quoting United States v. Wayte, 710 F.2d 1385, 1387 (9th Cir. 1983), *aff'd*, 470 U.S. 598 (1985)).
95. *Id.* at 461.
96. *Id.* at 461, 470-71.
97. *Id.* at 461-62.

> the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.[98]

The defendants "argue[d] that the documents 'within the possession . . . of the government' that discuss the government's prosecution strategy for cocaine cases are 'material' to respondents' selective-prosecution claim," and that Rule 16 should apply because a claim that "'results in nonconviction' if successful is a 'defense'" under the application of the Rule.[99] However, the Supreme Court explained that under Rule 16 "'the defendant's defense' means the defendant's response to the government's case in chief."[100] Therefore, the Court held "that Rule 16(a)(1)(C) authorizes defendants to examine government documents material to the preparation of their defense against the government's case in chief, but not to the preparation of selective-prosecution claims."[101]

The Court explained that a prosecutor's decision to prosecute is reviewable by the court; however, the defendant must meet the proper threshold showing for selective prosecution.[102] Drawing on equal protection standards, the court held that the defendant claiming selective prosecution must show that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose."[103] To establish discriminatory effect in a selective prosecution case based on race, the defendant making the claim must prove that "similarly situated individuals of a different race were not prosecuted."[104] The Court explained that this requirement, coming from ordinary equal protection standards, was recognized in *Ah Sin v. Wittman*.[105] The Court did not believe that the "similarly situated" requirement makes a selective prosecution claim too difficult to prove since this requirement was proven in 1886 in *Yick Wo v. Hopkins*.[106] Since *Yick Wo* was a successful case of selective prosecution, the court distinguishes it from *Ah Sin*, by explaining that the city ordinance in *Yick Wo* was "'discriminatory in tendency and ultimate actual operation'" while the criminal law in *Ah Sin* was made discriminatory "by the manner of its administration."[107]

The Court concluded that to establish entitlement to discovery on a claim of selective prosecution based on race, the defendant making the

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98. *Id.* at 461-62 (quoting FED. R. CRIM. P. 16(a)(1)(C)).
99. *Id.* at 462 (quoting oral argument transcript).
100. *Id.*
101. *Id.* at 463; *see also* KATHLEEN M. BRINKMAN & GLEN WEISSENBERGER, FEDERAL CRIMINAL PROCEDURE LITIGATION MANUAL 148 (2003) (explaining the impact of *Armstrong* on Federal Rule of Criminal Procedure 16).
102. *See Armstrong*, 517 U.S. at 463.
103. *Id.* at 465 (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)).
104. *Id.*
105. *Id.* at 465-67 (discussing Ah Sin v. Wittman, 198 U.S. 500 (1905)); *see also* discussion *supra* notes 63-68 and accompanying text (explaining background and holding of *Ah Sin*).
106. *Id.* (discussing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).
107. *Id.* at 466 (quoting *Ah Sin*, 198 U.S. at 508); *see also supra* notes 52-57 and accompanying text (explaining the discriminatory manner of the administration of the law).

selective prosecution claim must produce credible evidence that similarly situated defendants of other races could have been but were not prosecuted.[108] This is established by looking for "'some evidence tending to show the existence of the essential elements of the defense,' discriminatory effect and discriminatory intent."[109] Although requiring prima facie evidence before allowing discovery to obtain evidence appears to be a "Catch 22," the Supreme Court held that the Ninth Circuit incorrectly concluded that one can "establish a colorable basis for discriminatory effect without evidence that the government has failed to prosecute others who are similarly situated to the defendant."[110] The Court believed that the Ninth Circuit wrongly assumed that people of all races commit all types of crimes, instead of considering that there may be certain crimes that are generally committed only by one racial or ethnic group.[111]

The Supreme Court found that the "study" and the list of twenty-four African-American defendants who were also prosecuted for possession and dealing of cocaine did not "'tend[ ] to show the existence of the essential elements of' a selective prosecution claim."[112] This evidence did not establish the "similarly situated" requirement for discriminatory effect by identifying individuals who were not African-American and who could have been prosecuted for the same charged offenses but were not.[113]

Because the Supreme Court decided that the defendants did not provide the requisite "similarly situated" evidence to prove the discriminatory effect prong of the test, the Court never even discussed how to prove discriminatory intent.[114] Nor has any Supreme Court case since Armstrong defined how to prove discriminatory intent in a selective prosecution case. This leaves it difficult, if not impossible, for defendants to offer the requisite proof for a prima facie case of selective prosecution.

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108. *Armstrong*, 517 U.S. at 469. The Court noted the costs to the government to cooperate with an order for discovery are the same as the cost to respond to a prima facie case of selective prosecution; therefore, the "rigorous standard" to prove a selective prosecution claim "require[s] a correspondingly rigorous standard for discovery" to help prove a selective prosecution claim. *Id.* at 468.

109. *Id.* at 468 (quoting United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974)). The requisite showing to establish entitlement to discovery has been described by other courts with phrases such as: "colorable basis," "substantial threshold showing," or "reasonable likelihood." *Id.* at 468 (quoting transcript of oral argument and respondent's brief).

110. *Id.* at 469. Most courts of appeals require that the defendant produce some sort of evidence to show that similarly situated defendants of other races could have been prosecuted but were not, which is in accord with equal protection law. *Id.* (citing United States v. Parham, 16 F.3d 844, 846-47 (8th Cir. 1994); United States v. Fares, 978 F.2d 52, 59-60 (2d Cir. 1992); United States v. Peete, 919 F.2d 1168, 1176 (6th Cir. 1990); C.E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1437-38 (10th Cir. 1988); United States v. Greenwood, 796 F.2d 49, 52-53 (4th Cir. 1986); United States v. Mitchell, 778 F.2d 1271, 1277 (7th Cir. 1985)).

111. *Id.* at 469. This was also noted in *Ah Sin* where the Court held that the petitioner failed to show that non-Chinese were also violating the ordinance. *See Ah Sin*, 198 U.S. at 507-08.

112. *Armstrong*, 517 U.S. at 470.

113. *Id.*

114. *See id.*

III. PROBLEMS WITH *ARMSTRONG*'S LACK OF DEFINITION FOR DISCRIMINATORY INTENT

The *Armstrong* decision has been criticized by numerous commentators for a variety of reasons.[115] First, as the Supreme Court stated in *Armstrong*, the "standard is a demanding one."[116] Even in Armstrong, the Court recognized that past selective prosecution cases had a "background presumption that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims."[117] The Court was correct when it noted that the showing required is a "significant barrier."[118] It is such a "significant barrier," however, that the last selective prosecution claim that was successfully brought was the very first case that reached the Supreme Court—*Yick Wo* in 1886.[119]

Second, it is difficult to find proof for a selective prosecution claim primarily because there is rarely any direct evidence of discrimination, leaving only circumstantial evidence at best. Furthermore, the circumstantial evidence that is available is difficult to verify. The Supreme Court, moreover, has carefully scrutinized the use of statistics as proof in selective prosecution cases.[120] Based on the *Armstrong* opinion, nevertheless, data on persons of races different from the claimant who could have been prosecuted for the same crime, but were not, would be appropriate to consider.[121] However, statistics on the races of the individuals who could have been prosecuted for the same charges are often difficult to obtain.[122]

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115. *See generally* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998) (recognizing the broad power of prosecutors and proposing that prosecutors through their prosecutorial decisions "remedy discriminatory treatment of African-Americans in the criminal justice process"); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605 (1998) (criticizing *Armstrong*'s requirement that a selective prosecution claimant provide "some evidence" that similarly situated members of other races were not prosecuted as an "absolute condition" for discovery); Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially-based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127 (2003) (criticizing the lack of clear definitions for selective prosecution claims and proposing a "double-stage" standard of proof to selective prosecution cases); Marc Michael, Note, *United States v. Armstrong: Selective Prosecution—A Futile Defense And Its Arduous Standard of Discovery*, 47 CATH. U. L. REV. 675 (1998) (explaining the background of *Armstrong* and criticizing the standard of review making it nearly impossible to prove selective prosecution).

116. *Armstrong*, 517 U.S. at 463.

117. *Id.* at 463-64.

118. *Id.*

119. *See* Yick Wo v. Hopkins, 118 U.S. 356, 358 (1886).

120. *See Armstrong*, 517 U.S. at 470.

121. *Id.* (explaining that "[t]he study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charge, but were not so prosecuted.").

122. The difficulty of obtaining relevant statistics was illustrated by the *Houston Chronicle*'s traffic stop statistics for minorities in Texas from September 1, 1991, to August 31, 1994. *See infra* note 221. In the study, the *Houston Chronicle* ultimately obtained the data on race and traffic stops in Texas from a Texas Senate committee since the Texas Department of Public Safety never provided the *Houston Chronicle* with the requested data at a

Third, the Supreme Court did not define "discriminatory intent" in *Armstrong* for the purposes of a selective discrimination claim, nor has it defined "discriminatory intent" in any other selective prosecution case since *Armstrong*.[123] The Court explained why the petitioners did not establish the initial prong of the test, "discriminatory effect," but the Court avoided any discussion of "discriminatory intent" with the excuse that it was not necessary since "discriminatory effect" was not proven.[124] This lack of definition leaves lower courts only to speculate at what the Supreme Court would require as proof of "discriminatory intent" for a successful selective prosecution claim.

IV. APPLICATION OF EMPLOYMENT DISCRIMINATION LAW'S *MCDONNELL DOUGLAS* FRAMEWORK TO PROVE DISCRIMINATORY INTENT

Because *Armstrong* provides little guidance on proof of discriminatory intent in a selective prosecution case, this Comment recommends that the courts apply the well-known burden-shifting framework of proof first articulated by the Supreme Court in *McDonnell Douglas Corporation v. Green*[125] to prove discriminatory intent in employment discrimination cases.

A. *McDonnell Douglas* Framework Defined

The Supreme Court explained a specific burden-shifting framework in *McDonnell Douglas* to be used in employment discrimination cases when the plaintiff brings a suit for individual disparate treatment by the employer under Title VII, the ADEA, or section 1981, when there is no direct evidence of discrimination.[126] In the case, Percy Green, an Afri-

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reasonable cost (reasonable cost being less than $60 million, the price the Texas Department of Public Safety reportedly quoted).

123. *See Armstrong*, 517 U.S. at 465-70 (discussing only discriminatory effect and not discriminatory intent).

124. *See id.*

125. 411 U.S. 792, 802-03 (1973). "Borrowing" from similar causes of action, of course, is not an unknown concept in the law. In fact, "borrowing" is recognized for limitations periods. For example, in *Lampf v. Gilbertson*, the Court recognized "borrowing" a statute of limitations for a Rule 10b-5 securities fraud case. *See generally* 501 U.S. 350 (1991). In *Lampf*, the Court noted that a securities fraud action brought under SEC Rule 10b-5 was an implied cause of action, and accordingly, there was no specific statute of limitations for this claim. *Id.* at 358. In this case, the lower courts had borrowed statute of limitations from comparable state fraud statutes. *Id.* at 353. The Supreme Court explained that the idea of borrowing limitations periods was appropriate. *Id.* at 355, 358-59. Nevertheless, it decided in *Lampf* to borrow a limitations period from a comparable federal statute, rather than using state laws. *Id.* at 362. Although limitations periods are recognized as a procedural device, a similar borrowing, related to the methodology of proof for discriminatory intent prong of the selective prosecution test, is also rooted in well-recognized procedure.

126. 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 2.01, at 61 (3d ed. 2002). If there is direct evidence of the employer's intent to discriminate, a court will apply the standard explained in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), requiring the plaintiff to prove by a preponderance of evidence that the protected characteristic was a "motivating factor" and then requiring the defendant to prove that she would have made the same decision without the discriminating factor. *Id.* at

can-American man who had worked as a mechanic and laboratory technician for McDonnell Douglas Corporation, lost his job when the company downsized.[127] Green was active in the civil rights movement, and after he was dismissed, he and other members of the Congress on Racial Equality staged a "stall-in" by stalling their cars on the main roads leading to the company's plant when the morning shift change was scheduled to occur, causing a major traffic jam and great difficulty for workers to get to the factory on time for the day.[128] When McDonnell Douglas advertised a few weeks later that it would be hiring for Green's old position, he reapplied for his old job and was turned down.[129] Green then sued McDonnell Douglas alleging he was not rehired because he was African-American and was involved in the civil rights movement.[130]

The framework that the Supreme Court explained in *McDonnell Douglas* provides a three-part analysis in which the burden of proof shifts between the plaintiff and defendant.[131] This shifting of the evidentiary burdens between the plaintiff and the defendant allows intentional discrimination to be proven without direct evidence.[132] The purpose of the formula has been described as "to sharpen the inquiry to a 'level of specificity' which best allows the fact-finder to resolve the 'ultimate question' of intentional discrimination."[133]

In the first step, the plaintiff has the burden of establishing a prima facie case of racial discrimination.[134] To prove a prima facie case, the plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[135]

The Court explained in a footnote that the facts in different cases will vary; therefore, the prima facie proof articulated in *McDonnell Douglas* may not be applicable in other cases with differing facts.[136] The Supreme

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265-66. Direct evidence is "'any statement or written document showing a discriminatory motive on its face.'" Fierros v. Tex. Dept. of Health, 274 F.3d 187, 195 (5th Cir. 2001) (quoting Portis v. First Nat'l Bank of New Albany, Miss., 34 F.3d 325, 328 (5th Cir. 1994)). For the purposes of this Comment, the proposed framework is referred to as a *McDonnell Douglas*-type analysis because the *McDonnell Douglas* framework serves as the original foundation for Title VII claim analysis.

127. *McDonnell Douglas*, 411 U.S. at 794.

128. *Id.* at 794-95.

129. *Id.* at 796.

130. *Id.*

131. *See* SULLIVAN, *supra* note 126, § 2.01, at 62-63.

132. ABIGAIL COOLEY MODJESKA, EMPLOYMENT DISCRIMINATION LAW § 1:9, at 1-102 (3d ed. 2003).

133. *Id.* at 1-103 (quoting Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 660 (6th Cir. 1999)).

134. *McDonnell Douglas*, 411 U.S. at 802.

135. *Id.*

136. *Id.* at 802 n.13.

Court later explained in *Texas Department of Community Affairs v. Burdine* that the burden of establishing a prima facie case is "not onerous."[137] However, it serves the purpose of "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection."[138] Therefore, the prima facie case "creates a presumption that the employer unlawfully discriminated against the employee."[139] Thus, the Supreme Court later acknowledged in *St. Mary's Honor Center v. Hicks*, that if the trier of fact believes the plaintiff's evidence, and "[i]f the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff" because no issue of fact remains in the case.[140] The evidence, if "taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action."[141]

Once the plaintiff establishes the prima facie case, the burden shifts to the defendant to provide a "legitimate, nondiscriminatory reason for the employee's rejection."[142] In *McDonnell Douglas*, the employer indicated that it did not rehire Green due to his unlawful conduct against the employer by staging the stall-in, and the Court found that this reason was enough to defeat the prima facie case.[143]

The third step in the framework shifts the burden back to the plaintiff to have an opportunity to prove that the reason that the defendant offered was actually pretextual-not the true reason why the plaintiff was dismissed.[144] In *McDonnell Douglas*, the Court explained that Green could have provided evidence that white employees, who committed acts against the company that were of "comparable seriousness to the 'stall-in,'" were still retained or rehired.[145] Other examples of types of evidence that the Court indicated would have been sufficient to rebut the employer's reason for not rehiring Green would be information regarding the employer's treatment of Green during his employment, McDonnell Douglas's reaction to Green's other legitimate activities with the civil rights movement, McDonnell Douglas's general practice and policies with minority employees, and statistics on McDonnell Douglas's employment policy and practice to determine whether the refusal to rehire conformed to a general policy of discriminating against African-Americans.[146] If the plaintiff provides evidence that convinces the fact finder that the reason the nondiscriminatory defendant gave in step two is not true, then the *fact finder may infer* that the real reason for the defendant's action was to

137. 450 U.S. 248, 253 (1981).
138. *Id.* at 254.
139. *Id.*
140. 509 U.S. 502, 528 (1993) (Souter, J., dissenting).
141. *Id.* at 509 (emphasis in original omitted).
142. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1975).
143. *Id.* at 803. The Court further explained that "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it;" therefore, the reason for not re-hiring Green was enough to rebut the prima facie case. *Id.*
144. *Id.* at 804.
145. *Id.*
146. *Id.* 804-05.

discriminate against the plaintiff.[147]

B. How To Apply *McDonnell Douglas* To Selective Prosecution's Discriminatory Intent Requirement

The *McDonnell Douglas* framework, as acknowledged by the Supreme Court, was "never intended to be [a] rigid, mechanized, or ritualistic," framework.[148] Instead, it is a flexible framework that serves as a "procedural device," establishing an "order of proof and production."[149]

In applying the *McDonnell Douglas* framework to selective prosecution claims, the two requirements for selective prosecution as stated by the Supreme Court in *Armstrong*, discriminatory effect and discriminatory intent,[150] can be applied within the context of the burden-shifting framework of *McDonnell Douglas*. In the first step, the criminal defendant would have to prove discriminatory effect, which was defined in *Armstrong*.[151] One must demonstrate that similarly situated individuals who were charged with the same crime but of a different race were treated differently than the defendant.[152] This fact could be shown by statistics indicating the race of similarly situated persons, who were charged with the same alleged crime but were not prosecuted. However, as explained in *Armstrong*, the statistics must include data of *other* races. Otherwise, a court would not consider this evidence as proving different treatment of similarly situated persons, which defines discriminatory effect.[153]

After discriminatory effect is proven in the first step, a court could infer that the prosecutor acted with discriminatory motive or intent—thus establishing a prima facie case of selective prosecution.[154] Of course,

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147. Sullivan, *supra* note 126, § 2.01, at 63.

148. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

149. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 518 (1993) (emphasis in original omitted). *See also supra* note 125, explaining how "borrowing" has been recognized by the Supreme Court for certain procedural practices.

150. United States v. Armstrong, 517 U.S. 456, 465 (1996).

151. *Cf. McDonnell Douglas*, 411 U.S. at 802 (explaining that the plaintiff has the burden of establishing a prima facie case of racial discrimination); *see also supra* notes 134-41 and accompanying text discussing the first step of the *McDonnell Douglas* framework.

152. *Armstrong*, 517 U.S. at 465.

153. *See id.* at 470 (explaining that the statistics the claimant offered did not include information on individuals who were not African-American and could have been prosecuted for the same charges as the claimant, but they were not prosecuted for the charges).

154. The Supreme Court has recognized that an equal protection challenge to an employment test cannot be based solely on its racially disproportionate impact without any proof of a racially discriminatory purpose. In *Washington v. Davis*, 426 U.S. 229 (1976), which is not a Title VII case, the plaintiff made no claim of intentional discrimination and tried to rely only on a study that showed a disparate impact of the employment test on minority applicants. That, of course, was insufficient. Nevertheless, the Court recognized that evidence of racial disparity is still relevant in proving discriminatory purpose: "This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race." *Id.* at 241 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)). The Court also explained that in jury

"the line between discriminatory purpose and discriminatory impact is not . . . bright."[155] This is why the *McDonnell Douglas* burden-shifting framework provides a practical basis for showing intent. Indeed, the hundred-year-old *Yick Wo* case remains a prime example of using statistics to infer intent.[156]

In the second step, the prosecution would have the burden of rebutting the prima facie case for selective prosecution.[157] The government can provide any reason for its decision to prosecute the defendant, as long as it is not discriminatory in nature by being based on race or any other constitutionally impermissible classification.[158] If the government does not provide a reason, the court would presume that the prima facie case for selective prosecution as proven by the claimant in step one was true, and the claimant would prevail on her claim of selective prosecution.

In the third step, the burden would shift back to the defendant to prove that the reason that the government gave was only pretextual.[159] This can be done by offering evidence that the reason the government provided for prosecuting was not the true reason.

Although the key to the initial step is the proper use of statistics, the use of statistics in proving discrimination has a long history. In employment discrimination cases, the use of statistics became popular in the early 1970's.[160] Since then, the complexity and level of sophistication of the statistics has only continued to increase in trying to reveal discrimination in "work force patterns, hiring patterns, or wage differentials that would not be apparent to the naked eye."[161] The Supreme Court acknowledged in *International Brotherhood of Teamsters v. United States*, "[o]ur cases make it unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue."[162] Furthermore, statistics play an important role because they often are the only way to prove "clandestine and covert discrimination" by the employer.[163]

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selection cases that a "prima facie case of discriminatory purpose may be proved" by a statistical absence of one race, which will shift the burden of proof to the state. *Id.* "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts. . . ." *Id.* at 242.

155. *Id.* at 254 (Stevens, J. concurring).

156. *See supra*, notes 120-22 (discussing the difficulty of obtaining relevant evidence).

157. *Cf.* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (explaining that the employer had to provide a "legitimate nondiscriminatory reason for the employee's rejection"); *see also supra* notes 142-43 and accompanying text.

158. *See McDonnell Douglas*, 411 U.S. at 802-03.

159. *Cf. id.* at 804 (explaining that the burden shifts back to the plaintiff to prove that the reason that the employer offered was actually pretextual); *see also supra* notes 144-47 and accompanying text.

160. 1 LEX K. LARSON, EMPLOYMENT DISCRIMINATION, § 9.01 at 9-2 (2d ed. Sept. 2004) (providing explanation of the history and use of statistics in disparate treatment litigation).

161. *Id.*

162. 431 U.S. 324, 339 (1977) (quoting Mayor of Phila. v. Educ. Equal. League, 415 U.S. 506, 620 (1974)).

163. LARSON, *supra* note 160, § 9.01, at 9-4.

The use of statistics to prove discriminatory intent, moreover, has been recognized beyond Title VII cases.[164] In *McCleskey v. Kemp*, an equal protection case on death penalty discrimination, the Supreme Court considered whether the death penalty was unconstitutional under the Eighth and Fourteenth Amendments based on a statistical study showing that the death penalty was imposed on African-Americans more often than Caucasians in Georgia.[165] The *McCleskey* Court recognized that it "has accepted statistics as proof of intent to discriminate in certain limited contexts" and cited the use of statistics on proof of intent in jury selection[166] and in Title VII cases in the form of multiple-regression analysis.[167] The Court even referred to the first selective prosecution case, *Yick Wo v. Hopkins*, as an example of "cases in which a statistical pattern of discriminatory impact demonstrated a constitutional violation."[168] The use of statistics in *McClesky*, however, failed to support the alleged discrimination in death penalty sentences for two fundamental reasons. First, the Court concluded that the decisions of a jury are inherently different because every jury is comprised of different people.[169] Therefore, comparing statistics on jury decisions about the death penalty lacked consistency. Second, the Court observed that, unlike venire-selection or Title VII cases (where the decisionmaker has an opportunity to explain her decisions), juries do not have the opportunity to explain their decisions or the difference in numbers of African-Americans sentenced to the death penalty.[170] In a selective prosecution dispute, however, the prosecutor could explain the decision-making process.[171]

Furthermore, it is significant that the Court in both *McClesky* and *Armstrong* recognized that *Yick Wo* in 1886 was an example of the use of statistics that were sufficient to meet the burden of proof for a selective prosecution claim, even though the analysis was not nearly as sophisticated as today's Title VII multiple-regression statistical studies.[172] As an example of statistical proof of employment discrimination, the *McClesky* court cited *Bazemore v. Friday*, a Title VII case accepting multiple-regression analysis to prove employment discrimination, despite claims that the

164. *See* McCleskey v. Kemp, 481 U.S. 279 (1987).

165. *Id.* at 279, 282-83.

166. *Id.* at 293 (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

167. *Id.* at 294 (citing Bazemore v. Friday, 478 U.S. 385, 400-01 (1986) (Brennan, J., concurring in part)).

168. *Id.* at 294 n.12.

169. *See id.* at 294. This argument is overinclusive. Arguably, nearly all selective prosecution claims involving multiple prosecutors could be rejected on the grounds that individual prosecutors may be different.

170. *Id.* at 296.

171. Although in footnote 17 the *McClesky* opinion cites *Batson v. Kentucky*'s observation that requiring a prosecutor to explain his own decision-making process is different from requiring him to explain the decisions of past prosecutors, this concern, at best, is limited to those situations where information on past prosecutions is not readily available. *See id.* at 297 n.17 (citing Batson v. Kentucky, 476 U.S. 79 (1986)).

172. *See id.* at 294 n.12; *see also* United States v. Armstrong, 517 U.S. 456, 466 (1996).

employees were not similarly situated.[173] Obviously, a sophisticated multiple regression analysis in a selective prosecution case should carry similar weight, but even in *Yick Wo*, a case with no sophisticated multiple regression analysis, the raw statistics were still accepted by the Supreme Court as proof of discriminatory intent.[174] On its face, the ordinance at issue was racially neutral and was apparently focused only on the safety issue of whether laundries with wood burning fires should be housed in wooden or brick buildings.[175] Nevertheless, the Supreme Court accepted the raw statistics to prove discrimination on the fact that far more Chinese laundry owners were rejected than Caucasians.[176]

Since *Armstrong*, the Supreme Court has acknowledged that statistical studies can support a selective prosecution claim but has explained how certain studies fail to prove discrimination.[177] In *United States v. Bass*,[178] the Court considered a motion for discovery on a selective prosecution claim that cited statistics from the Department of Justice that the United States charges African-Americans with death-eligible offenses more than twice as often as it charges Caucasians and enters into plea bargains more often with Caucasians than African-Americans.[179] In its analysis, the Court discussed only discriminatory effect, holding that the Sixth Circuit incorrectly concluded that the nationwide statistics demonstrated the similarly situated requirement for discriminatory effect.[180] The Court explained, "[e]ven 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*."[181] Based on this language, however, the Supreme Court should accept statistics from the region or city where the charge was made, as opposed to nation wide statistics.[182]

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173. *McClesky*, 481 U.S. at 294.
174. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).
175. *Id.*
176. *Id.*
177. *See, e.g.*, United States v. Bass, 536 U.S. 862 (2002) (per curiam).
178. *Id.* at 863.
179. *Id.* at 863-64.
180. *Id.* at 863.
181. *Id.* at 864 (emphasis added).
182. The Fifth Circuit most recently addressed the use of statistics in selective prosecution in *In re United States*, 397 F.3d 274 (5th Cir. 2005), in which the defendant submitted a "report" of sixty-eight other cases dealing with illegal alien smuggling and argued that they were "similarly situated." *Id.* at 280. For an explanation of the facts of *In re United States*, *see supra* note 39. The Fifth Circuit observed that this "report" was the same type of evidence that was offered in *Bass*. *Id.* at 285. However, it noted that "sharing a charge alone" is not enough to serve as evidence of similarly situated defendants in a selective prosecution claim. *Id.* The court explained that "[a] much stronger showing, and more deliberative analysis, is required before a district judge may permit open-ended discovery into a matter that goes to the core of a prosecutor's function." *Id.* Furthermore, it observed that the Hispanic co-conspirators were not similarly situated to Williams because they were not in the cab of the truck, as was Williams, who could have stopped to allow the illegal aliens some air or even turn on the refrigeration in the truck. *Id.* at 284. Therefore, the only similarly situated co-defendant was the other defendant in the truck's cab who was

Finally, easing the burden on defendants in bringing a selective prosecution claim may arguably allow defendants who are guilty to escape prosecution, but American criminal law has created rules that protect well recognized rights, even if a guilty party may go free.[183] The best example is the Exclusionary Rule, a rule that has long been accepted to protect defendants from evidence being used against them that was illegally acquired in violation of Fourth, Fifth, or Sixth Amendment rights.[184] Furthermore, the Court in *Mapp v. Ohio* responded to those who criticized the Exclusionary Rule explaining:

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine, 'the criminal is to go free because the constable has blundered.' *People v. Defore*, 242 N.Y. 13, 21 (1926). In some cases this will undoubtedly be the result. But as was said in Elkins, 'there is another consideration—the imperative of judicial integrity.' *Elkins v. United States*, 364 U.S. 206, 222 (1960).[185]

The importance of judicial integrity applies to the Exclusionary Rule as it should apply to selective prosecution claims. "'If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.'"[186]

C. Analysis of the Seventh Circuit Opinions in *Ford v. Wilson*[187] and *Chavez v. Illinois State Police*[188] That Criticize *McDonnell Douglas*

No court has yet applied the *McDonnell Douglas* framework in a selective prosecution case. The Seventh Circuit, however, has criticized its application in section 1983 cases, although in dicta.[189] In *Ford v. Wilson*, the Seventh Circuit considered a suit under 42 U.S.C. § 1983 for race discrimination by an African-American man who was arrested after a traffic stop when he refused to sign an individual bond, which all drivers in Illinois who receive a traffic ticket must post.[190] In addition to the section 1983 claim, the plaintiff alleged that he was stopped based on racial discrimination.[191] Judge Posner only briefly stated in one paragraph, with no analy-

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also African-American. *Id.* Moreover, the Fifth Circuit emphasized that even the defendant admitted that he had not yet made out a prima facie case. The *defendant himself* stated in his memorandum that he needed discovery *so that he could* make a prima facie case for selective prosecution. *Id.*

183. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 565 (1961).

184. *See id.* (explaining that "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" (quoting Elkins v. United States, 364 U.S. 206, 217) (1960)).

185. *Id.* at 659.

186. *Id.* at 659 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928)).

187. 90 F.3d 245 (7th Cir. 1996).

188. 251 F.3d 612 (7th Cir. 2001).

189. *Ford*, 90 F.3d at 248-49.

190. *Id.* at 246-47.

191. *Id.* at 248.

sis, that he does not believe employment discrimination's *McDonnell Douglas* framework should be applied to section 1983 claims.[192] Judge Posner indicated that if the framework were to be applied to section 1983 claims, anytime a law enforcement officer arrested persons of a different race and the arrestees claimed that the arrest was groundless, they could go to trial in federal court under section 1983.[193]

The brief paragraph in *Ford v. Wilson* does not explain how Judge Posner defines the *McDonnell Douglas* framework; therefore, it is difficult to determine how he came to his conclusion.[194] However, based on his conclusion that the application of *McDonnell Douglas* to section 1983 claims would open the floodgates to groundless claims in federal court, it indicates that he did not consider the purpose that the *McDonnell Douglas* framework serves in employment discrimination cases and how that purpose could be applied to other discrimination cases. In the employment discrimination context, the *McDonnell Douglas* framework has been described as serving as a "process of elimination in which circumstantial evidence is used to eliminate the usual reasons someone does not get a job, thereby leaving the inference that the real reason was discrimination."[195] Likewise, if the *McDonnell Douglas* framework was applied to cases of alleged discrimination, it would not necessarily cause courts to be flooded with alleged racial discrimination cases. Instead, the application of the framework would help the federal courts in the same way that it aids employment discrimination cases—by allowing the court to eliminate some of the most common reasons for discrimination. Nevertheless, at some point, the need for justice is more important than the concern over additional litigation.

Furthermore, the Ninth Circuit criticized *Ford* in *Bingham v. City of Manhattan Beach*, a case in which police stopped a prominent African-American photographer and arrested him based on an outstanding arrest warrant for someone else with the same last name.[196] The police officer argued that the traffic stop was a de minimus deprivation of liberty and, relying on Judge Posner's paragraph on *McDonnell Douglas*, argued that defendants could bring section 1983 claim every time they were stopped.[197] The Ninth Circuit referred to Judge Posner's paragraph as dicta and declined to follow it, explaining that the police officer's argument (partially based on Judge Posner's dicta) "that the *de minimis* doc-

192. *Id.* at 248-49.

193. *Id.* at 249.

194. *Id.*; *see also* Appellant's Main Brief at 11, Ford v. Wilson, 90 F.3d 245 (7th Cir. 1996) (No. 95-2662). The brief submitted by appellant Ford, *did not* mention the application of *McDonnell Douglas* framework; therefore, Judge Posner was not responding to an argument in Ford's main appellate brief. *See id.*

195. SULLIVAN, *supra* note 126, § 2.01, at 62-63. (explaining *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), where the Court explained that the elimination of the most common reasons not to hire (lack of qualifications or no job openings available) was enough to infer that the decision to not hire was discriminatory).

196. 341 F.3d 939, 942 (9th Cir. 2003).

197. *Id.* at 946-47.

trine applies here improperly conflates Fourth Amendment and section 1983 doctrine."[198]

Similarly, in *Chavez v. Illinois State Police*, the plaintiffs in this Seventh Circuit opinion were minorities who had been subject to traffic stops and lengthy searches.[199] They filed a class action suit for violation of civil rights, alleging that racial profiling was improperly used in the stops.[200] The plaintiffs submitted statistics to prove that similarly situated Caucasian drivers were not subjected to the same style of stops and searches.[201] During its discussion on the use of the statistics, the Seventh Circuit explained in a footnote that the plaintiffs had argued that the equal protection claims should be analyzed under the approach used in *International Brotherhood of Teamsters v. United States*,[202] a well-known employment discrimination case in which the court spoke highly of the use of statistics by noting, "'[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue."[203] However, the *Chavez* court dismissed the argument by stating that the application of the analysis "is only relevant to statutory schemes which utilize the *McDonnell Douglas* burden shifting framework, like Title VII, and thus it can not be used here."[204] The *Chavez* court was hesitant to borrow concepts from employment discrimination's framework, but it overlooked that the Supreme Court already borrowed from Title VII principles and applied them to another area of law in *Batson v. Kentucky*[205] when it explained how to challenge racially-motivated peremptory strikes. In a footnote in the *Batson* decision, explaining the

198. *Id.* at 947.
199. 251 F.3d 612, 620 (7th Cir. 2001).
200. *Id.*
201. *Id.* at 626.
202. *Id.* at 638 n.8 (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977)).
203. *Int'l Bhd. of Teamsters*, 431 U.S. at 339 (quoting Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 620 (1974)).
204. *Chavez*, 251 F.3d at 638 n.8.
205. Batson v. Kentucky, 476 U.S. 79, 95-97 (1985). A *Batson* challenge and the *McDonnell Douglas* framework, moreover, are similar. In a *Batson* challenge, the objector must make a prima facie case that the peremptory challenges were based on race. *Id.* at 96-97; *see also* V. HALE STARR & MARK MCCORMICK, JURY SELECTION § 2.13[B], at 50-64 (3d ed. 2001) (providing explanation of *Batson* challenge and cases that have followed the decision). The burden then shifts to the opponent to provide a race-neutral explanation of why they chose to strike certain potential jury members. *Batson*, 476 U.S. at 97. The Supreme Court further described this second step in footnote 20 by drawing on the second step in *McDonnell Douglas* and quoting the employment discrimination case, *Texas Department of Community Affairs v. Burdine*, to explain that "the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Id.* at 98 n.20 (quoting Tex. Dep't of Comty. Affairs v. Burdine, 450 U.S. 248, 258 (1980)). Finally, in the third step of a *Batson* analysis, the judge decides as a matter of fact whether the strike was racially motivated. *Id.* at 98.

The Supreme Court in *Armstrong* did distinguish *Batson* from selective prosecution based on the reasoning that judges are present during jury selection; therefore, judges are arguably better able to decide whether there was discrimination, rather than evaluating the decision-making process of a prosecutor. *See* United States v. Armstrong, 517 U.S. 456, 467-68 (1996). However, *Batson* still provides an example of the Supreme Court borrowing in a criminal equal protection claim case from employment discrimination law as it explained in footnote 20.

second step of a *Batson* challenge, the Court even quoted the employment discrimination case of *Texas Department of Community Affairs v. Burdine*, where the Supreme Court described the second step of the *McDonnell Douglas* framework.[206]

Furthermore, the *Chavez* court's argument regarding application of the employment discrimination's "statutory" framework is misplaced. It appears in the opinion under, "Use of Statistics to Show Discriminatory Effect."[207] However, *McDonnell Douglas* is typically applied in employment discrimination to show discriminatory intent, not discriminatory effect.[208] There is no mention of *McDonnell Douglas* in the "discriminatory intent" section, where it should be located.[209] Nor did the court provide any explanation or any supporting citation as to why the Seventh Circuit believes that the *McDonnell Douglas* framework is "only relevant to statutory schemes" and would not be equally applicable to other areas of law.[210]

V. THE IMPORTANCE OF THIS ALTERNATIVE APPROACH TO SELECTIVE PROSECUTION TODAY

The problem of selective prosecution based on race is an issue that is not abating. Indeed, closely associated with the issue of selective prosecution is the use of racial profiling, which has gained new relevance in the post September 11 world.[211] A recent example of the concerns raised by selective prosecution after September 11, 2001, is the Second Circuit's opinion on the selective prosecution of Muslims in *United States v. Alameh*.[212] Fadi Alameh was prosecuted for unlawful procurement of

206. *Batson*, 476 U.S. at 98 n.20 (quoting *Burdine*, 450 U.S. at 258). The footnote stated, "[a]s we have explained in another context . . . the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Id.*

207. *Chavez*, 251 F.3d at 637-38.

208. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993) (applying *McDonnell Douglas* framework to determine presence of discriminatory intent of new management in firing long-time supervisor); Hazen Paper Co. v. Biggins, 507 U.S. 604, 612-13 (1993) (applying *McDonnell Douglas* to determine presence of discriminatory intent in the employer's decision to fire the employee before his pension benefits would vest); *Burdine*, 450 U.S. at 252-58 (applying *McDonnell Douglas* to determine presence of discriminatory intent in the employer's decision to deny promotion and terminate a female employee).

209. *See Chavez*, 251 F.3d at 645-49.

210. *Id.* at 638 n.8.

211. *See* Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67, 77-81 (2004) (discussing the high use of racial profiling as a part of immigration policy after 9/11, how public approval of racial profiling became more accepting of racial profiling after 9/11, and treatment of non-citizen Arabs and Muslims in the United States); Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1205-07 (2003) (proposing definition of racial profiling); Vijay Sekhon, *The Civil Rights of "Others": Antiterrorism, the Patriot Act, and Arab and South Asian American Rights in Post-9/11 American Society*, 8 TEX. F. ON C.L. & C.R. 117 (2003) (examining treatment of Arabs and South Asians in the United States since 9/11 including racial profiling, hate crimes committed against them, and impact of the Patriot Act).

212. 341 F.3d 167, 172-75 (2d Cir. 2003).

naturalization, 18 U.S.C. § 1425(b), by paying an American woman to marry him as a "green card" marriage.[213] In his defense, he alleged that he was being prosecuted due to his Muslim background.[214] In support of this selective prosecution claim, he offered affidavits from immigration attorneys stating that the type of prosecution against him was "unprecedented" and that prosecutions of Muslims in the United States had "dramatically increased" since September 11, 2001.[215] In particular, he offered statistics of all persons charged in the Southern and Eastern Districts of New York for marriage fraud under either federal or state laws.[216] The list of over 400 names, which were grouped according to whether the name had a Muslim or Arab sounding surname, revealed that before September 11, 2001, 15 percent of this type of charge were against persons with Muslim or Arab sounding names, as compared to after September 11, 2001, where 85 percent were against persons with a Muslim or Arab sounding surname.[217] While the court referred to the classification of the names based on whether they sounded Muslim or Arabic as somewhat "dubious," the Second Circuit also described the results as "striking."[218] Ultimately, the court decided to not recognize the selective prosecution claim on the ground that the government had already investigated the defendant's case for eighteen months before September 11, 2001.[219] The court reasoned that because so much investigation on Alameh's case had already occurred prior to September 11, 2001, the defendant would have been prosecuted in any event—not as part of the post-September 11 increase in Muslim/Arab prosecutions illustrated by the statistics.[220] Although it did not recognize the defendant's selective prosecution claim, the fact that the court's decision turned on the defendant's case being investigated prior to September 11, 2001 implies that the court may be willing to affirm another post September 11 selective prosecution claim by a defendant with a Muslim or Arabic sounding surname who presents similar statistics.

Racial profiling, moreover, has been evident in numerous traffic stop

213. *Id.* at 171.
214. *Id.* at 172.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 174.
220. *Id.*

cases[221] as well as in shoplifting arrests.[222] Disparities in sentencings across races are also still evident.[223] Thus, the role of race in the question of whether to prosecute cannot be ignored. For this reason, providing a clear, defined framework on how to prove both prongs of the test will help defendants, prosecutors, and judges effectively resolve selective prosecution claims.

CONCLUSION

In *To Kill a Mockingbird*, Atticus Finch explained that "[t]he one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow. . . ."[224] His observation that not all "color[s] of the rainbow" receive a "square deal" from the criminal justice system was an accurate observation at that time and is still evidenced by the events in Tulia, discrepancies in race in traffic stops and sentencing lengths, racial

221. Dianna Hunt, *Ticket to Trouble/Wheels of Injustice?/Certain Areas Are Ticket Traps for Minorities*, HOUS. CHRON., May 14, 1995, at A1. In 1995, the *Houston Chronicle* compiled statistics on traffics stops in Texas between September 1, 1991, and August 31, 1994, based on 3.7 million traffic citations in records that a state Senate committee gave to the *Houston Chronicle* after the Texas Department of Public Safety refused to provide documentation. *Id.* The results indicated that Hispanics were disproportionately ticketed more than any other racial minority group in Texas. *Id.* However, in white suburbs surrounding large Texas cities and also white "enclaves" within the large cities, African-Americans also received a disproportionate number of tickets as compared to white citizens. *Id.* For example, in Bellaire, a predominantly white area in southwest Houston, African-Americans were forty-three times more likely than whites to receive a traffic ticket, even though minorities comprised only ten percent of the Bellaire population; they received 58 percent of the tickets written from 1991 to 1994. *Id.*

222. Andrea Elliott, *Macy's Settles Complaint of Racial Profiling for $600,000*, N.Y. TIMES, Jan. 14, 2005, at B1. Macy's recently entered into a consent decree to stop the use of racial profiling of potential shoplifters in their New York stores. *Id.* This was after the New York Attorney General conducted an investigation of Macy's department stores in New York, revealing that Macy's had a "private policing system" that detained and questioned people whom they suspected of shoplifting. *Id.* It also showed that the majority of people who were detained were either African-American or Hispanic. *Id.* The investigation started in July 2003 after a civil rights lawsuit was filed against Macy's by an African-American woman who had been handcuffed, placed in a cell, and forced to make a false confession of shoplifting despite having shown receipts for items she purchased. *Id.*

223. Gary Fields, *Commission Finds Racial Disparity in Jail Sentences*, WALL ST. J., Nov. 24, 2004, at A4. A fifteen-year review of the sentencing guideline system by the U.S. Sentencing Commission demonstrated that the percentage of minorities in the prison population has greatly increased since the sentencing guidelines were written. *Id.* The report also indicated that minorities are more likely to serve long sentences than Caucasian prisoners for the same conviction, concluding that "'[u]niformity of sentencing' still hasn't been 'fully achieved.'" *Id.* For example, a "typical black drug trafficker" is sentenced about ten percent longer than a "similar white drug trafficker." *Id.* However, this report reflects the impact of the sentencing guidelines that have been in place for 21 years. *See* Linda Greenhouse, *Supreme Court Transforms Use of Sentence Guidelines*, N.Y. TIMES, Jan. 13, 2005, at A1. In *United States v. Booker*, 125 S. Ct. 738, 744 (2005) the Surpeme Court recently held that federal judges are only required to "consult" the sentencing guidelines and "take them into account when sentencing" and on appeal will be reviewed for "reasonableness"—this case may change this difference in numbers or it may cause the difference in sentencing across races to become greater. For a discussion of the impact of the *Booker* decision on sentencing, *see generally*, Barry Coburn & Thomas Gilson, *The Road to Booker and Fanfan*, ABA LITIGATION UPDATE, Feb. 2005, http://www.abanet.org/litigation/committee/criminal/booker.pdf (last visited Sept. 10, 2005).

224. HARPER LEE, TO KILL A MOCKINGBIRD 220 (Warner Books, Inc. 1982) (1960).

profiling, and selective prosecution. Selective prosecution prevents defendants from having the opportunity to get a "square deal." The Supreme Court recognized this when it first established selective prosecution as a claim in *Yick Wo* in 1886.[225] However, due to the lack of a clear definition of "discriminatory intent," which must be shown in a selective prosecution claim, it is difficult for most criminal defendants to prove the requisite discriminatory intent.

McDonnell Douglas provides a workable solution to the need to prove discriminatory intent in a selective prosecution claim based on racial discrimination. Its burden-shifting mechanism, which is familiar to the federal courts, provides a necessary tool to aid the justice system in recognizing evidence of selective prosecution. Implementing a variation of the *McDonnell Douglas* burden-shifting framework to define discriminatory intent in selective prosecution claims will insure that the American system of justice is kept free of racial prejudice, and in essence, will help all defendants get a "square deal."

225. *See supra*, notes 50-62 and accompanying text (discussing *Yick Wo* facts and the Supreme Court's holding recognizing selective prosecution).