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DISCOVERING RACIAL DISCRIMINATION BY THE POLICE

Alison Siegler & William Admussen

ABSTRACT—For decades, it was virtually impossible for a criminal defendant to challenge racial discrimination by the police or prosecutors. This was because in United States v. Armstrong, 517 U.S. 456 (1996), the Supreme Court set an insurmountable standard for obtaining discovery in support of a selective prosecution claim. Equating the roles of prosecutors and law enforcement officers, lower courts applied this same standard to claims alleging racial discrimination by the police. This high standard led courts to deny discovery and stifle potentially meritorious claims. Recently, criminal defendants have initiated a wave of challenges to “fake stash house” operations, in which federal law enforcement agencies like the ATF and the DEA approach people—overwhelmingly people of color—and induce them to rob a nonexistent drug stash house. Defense attorneys have argued that these practices constitute racially selective law enforcement and that Armstrong’s strict standard should not apply to the police. Three federal courts of appeals responded by recognizing that the differences between prosecutors and law enforcement officers merit lowering the discovery standard for defendants alleging racial discrimination by the police. This Article is the first to describe and defend this important development in equal protection jurisprudence. We argue that other courts should similarly craft a lower discovery standard.

Recognizing that federal courts hear only a fraction of race discrimination claims, this Article embraces the spirit of federalism and proposes an innovative state-level solution: a state court rule lowering the insuperable discovery standard to which most states still cling. This Article draws on a recent Washington state court rule aimed at preventing racial discrimination in jury selection to propose that state courts adopt a similar rule setting a new discovery standard for racially selective law enforcement claims. Such a rule would ensure that state-level equal protection claims are not blocked at the discovery stage, thus enabling courts to adjudicate those claims on the merits.

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INTRODUCTION

Soon after Leslie Mayfield moved to the Chicago suburbs to escape the violence of the city and got a job at LG Electronics, a coworker mounted a campaign to rope him into robbing a drug stash house containing over a million dollars’ worth of drugs. Little did Leslie know that the man nagging him to commit a crime was an informant for the Bureau of Alcohol, Tobacco,
Firearms and Explosives (ATF). For a time, Leslie was able to resist the informant’s overtures. But after Leslie took a loan from the informant to fix his broken-down car, Leslie felt he had little choice but to commit the robbery to repay the debt.\(^2\)

The informant then brought in an undercover ATF agent who told Leslie that he was a disgruntled drug courier seeking to rob his employers of their drugs. He laid out a get-rich-quick robbery scheme, claiming that the stash house would be patrolled by armed guards to encourage Leslie to bring others along and arm himself. When Leslie showed up with his brother, cousin, and a friend, they learned it was all fake—there were no drugs, no armed guards; even the house was a pure figment.\(^3\) All four men were charged, convicted, and received sentences ranging from twenty-two to twenty-seven years in federal prison.\(^4\)

Leslie was arrested as part of what is commonly known as a “fake stash house operation.” Every fake stash house operation follows the same basic playbook: an informant working for the ATF or the Drug Enforcement Agency (DEA) approaches someone like Leslie—a person of color in dire financial straits—offers him an enticing jackpot, and then introduces the target to an undercover agent who describes a heavily guarded house to induce him to bring along friends and guns.\(^5\) Federal prosecutors and agents intentionally set a fictional drug amount that will trigger a high mandatory penalty, while the inducement to bring guns triggers an additional and

\(^2\) Mayfield, 771 F.3d at 422–23.


\(^4\) See Sentencing Order, Mayfield, No. 09-CR-0687, ECF No. 283 (originally sentencing Mayfield to 322 months in prison); Sentencing Order, Mayfield, No. 09-CR-0687, ECF No. 224 (sentencing defendant Ward to 270 months); Sentencing Order, Mayfield, No. 09-CR-0687, ECF No. 225 (sentencing defendant Kindle to 300 months); Sentencing Order, Mayfield, No. 09-CR-0687, ECF No. 265 (sentencing defendant White to 300 months). The government ultimately dismissed the mandatory minimums in Mayfield’s case, and he was resentenced and released after serving 114 months in prison. See Sentencing Order, Mayfield, No. 15-CR-0497 (N.D. Ill. June 15, 2018), ECF No. 160; see also Jason Meisner, Under Pressure by Judges, Prosecutors to Offer Plea Deals in Controversial Drug Stash House Cases, CHI. TRIB. (Feb. 21, 2018, 4:55 PM), https://www.chicagotribune.com/news/breaking/ct-met-atf-stash-house-prosecutions-20180221-story.html [https://perma.cc/D28S-9PN6] (describing the racial disparity among stash house sting operation targets as “so large that there was ‘a zero percent likelihood’ it happened by chance”).

\(^5\) United States v. Kindle, 698 F.3d 401, 404 (7th Cir. 2012) (observing that the ATF “has a standard playbook” for its stash house operations and “the facts between cases are frequently nearly identical”); Eda Katharine Tinto, Undercover Policing, Overstated Culpability, 34 CARDOZO L. REV. 1401, 1446–47 (2013) (“Because the stash house is entirely imaginary, the police invent other critical details that help entice the suspects . . . .”).
consecutive mandatory penalty. As a result, defendants typically face a mandatory minimum sentence of fifteen to twenty-five years in prison. As a result, defendants typically face a mandatory minimum sentence of fifteen to twenty-five years in prison. When the targets gather to execute the law enforcement-led “robbery,” federal agents arrest them, charging them with conspiracy to commit robbery, conspiracy to distribute narcotics, and gun possession. These operations have more than quadrupled since 2004.

Nationwide, federal law enforcement agencies have overwhelmingly targeted people of color to commit these fabricated crimes. In Chicago, from 2011 to 2013, only one individual out of the fifty-seven charged by the ATF in a stash house operation was white. In the past decade of stash house cases in New York, none of the 179 defendants charged were white. In Los Angeles, one agent testified that fifty-five out of sixty stash house defendants indicted were people of color. A 2014 review by USA Today of stash house cases nationwide found that “[a]t least 91% of the people agents have locked up using those [stash house] stings were racial or ethnic minorities.”

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6 See United States v. Washington, 869 F.3d 193, 224 (3d Cir. 2017) (McKee, J., concurring in part and dissenting in part) (“Although no cocaine actually existed, the Government decided to entice targeted individuals with a predetermined quantity of cocaine—10 kilograms—which was double the amount needed to statutorily trigger the mandatory minimum provisions.”); United States v. Hare, 820 F.3d 93, 103–04 (4th Cir. 2016) (“[A]stash house sting entails considerable government involvement—including direct solicitation of the target and total control over the parameters of the robbery, particularly the quantity of cocaine held in the fictitious stash house—and appears highly susceptible to abuse.”); United States v. Briggs, 623 F.3d 724, 729 (9th Cir. 2010) (”[T]he government has virtually unfettered ability to inflate the amount of drugs supposedly in the house and thereby obtain a greater sentence for the defendant.”); United States v. Caban, 173 F.3d 89, 93 (2d Cir. 1999) (“It is unsettling that in this type of reverse sting, the government has a greater than usual ability to influence a defendant’s ultimate Guidelines level and sentence. . . . [T]he difference in offense levels between 49.9 kilograms and 50 kilograms under U.S.S.G. § 2D1.1 potentially could entail as much as 78 months of incremental imprisonment.”).

7 Tinto, supra note 5, at 1447.


12 Heath, supra note 8 (identifying 635 stash house defendants nationwide from 2004 to 2014 and finding 579 were people of color).
response to these disparities, defense attorneys across the country are mounting equal protection challenges, alleging race discrimination by federal law enforcement officers.\textsuperscript{13}

For decades, it was virtually impossible to hold the police accountable for race discrimination. Historically, the legal standards to do so were so difficult to meet that Professor Michelle Alexander predicted that “[t]he racial profiling cases that swept the nation in the 1990s may well be the last wave of litigation challenging racial bias in the criminal justice system that we see for a very long time.”\textsuperscript{14}

Under the Equal Protection Clause,\textsuperscript{15} criminal defendants can object to discriminatory enforcement of the law using two mechanisms: selective prosecution claims and selective law enforcement claims. “‘Prosecution’ refers to the actions of prosecutors . . . and ‘enforcement’ to the actions of law enforcement and those affiliated with law-enforcement personnel.”\textsuperscript{16} A criminal defendant who is charged with a crime can move for dismissal of the indictment, arguing that either the prosecutor, law enforcement officers, or both violated his equal protection rights by impermissibly singling him out on the basis of race.\textsuperscript{17}

The Supreme Court created an insuperable discovery standard for selective prosecution claims in \textit{United States v. Armstrong}.\textsuperscript{18} In practice, \textit{Armstrong}’s discovery standard creates an abstract right without a remedy.\textsuperscript{19}

\begin{thebibliography}{9}
\bibitem{Alexander} \textit{MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS} 138–39 (2d ed. 2012); see also id. at 109 (“[T]he Supreme Court has made it virtually impossible to challenge racial bias in the criminal justice system under the Fourteenth Amendment, and it has barred litigation of such claims under federal civil rights laws as well.”).
\bibitem{Equal Protection Clause} U.S. CONST. amend. XIV, § 1. These protections apply to the federal government as well. \textit{See} \textit{Wayte v. United States}, 470 U.S. 598, 608 n.9 (1985) (noting that the Fifth Amendment imposes the same restraints on the government’s exercise of enforcement discretion as the Fourteenth Amendment). Thus, on the federal level, these challenges are brought through the Due Process Clause’s equal protection component.
\bibitem{Prosecution} \textit{United States v. Washington}, 869 F.3d 193, 214 (3d Cir. 2017); see also \textit{United States v. Garcia-Pena}, No. 17-CR-363-GBD, 2018 WL 6985220, at *3 (S.D.N.Y. Dec. 19, 2018) (“A selective prosecution claim is . . . an . . . assertion that the prosecutor has brought a charge for reasons forbidden by the Constitution. By contrast, a selective enforcement claim is directed solely at police or agent misconduct.” (internal quotation marks omitted) (citation omitted)).
\bibitem{Dismissal} \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 374 (1886) (dismissing indictment based on selective prosecution); \textit{United States v. Humphrey}, 193 F. Supp. 3d 1040, 1059 (N.D. Cal. 2016) (holding that “dismissal of an indictment is a proper remedy for a selective enforcement claim if proven”).
\bibitem{Luna} 517 U.S. 456, 470 (1996).
\bibitem{Luna} \textit{Erik Luna, Transparent Policing}, 85 IOWA L. REV. 1107, 1139 (2000).
\end{thebibliography}
Broadly speaking, to get discovery, a defendant must present “some evidence” tending to show both discriminatory effect and discriminatory intent. First, the discriminatory-effect prong requires a defendant to make a “credible showing of different treatment of similarly situated persons” of another race by the prosecution. However, gathering evidence that individuals of a different race were committing the same offense but were not charged is a near impossible task. Second, a defendant must initially present “some evidence” of discriminatory intent on the part of prosecutors—evidence that will be unobtainable without discovery and that prosecutors have every incentive to keep secret. Thus, the defendant is confronted with Armstrong’s cruel catch-22: he must provide evidence of discrimination to obtain discovery about discrimination.

For many years, courts amplified Armstrong’s catch-22 by improperly affording law enforcement officers the same blind deference that Armstrong afforded prosecutors. Although Armstrong was a selective prosecution case, courts have extended Armstrong’s insurmountable standard to selective law enforcement claims alleging that law enforcement officers discriminated on the basis of race.

As difficult as it is to meet Armstrong’s similarly situated standard in the selective prosecution context, it is still harder to meet in the selective law enforcement context for two reasons. First, it is impossible for a person of color to point to similarly situated white individuals who were not arrested because there is no record of such people. Second, without discovery, a defendant cannot know what led the police to target him, so he cannot know who is “similarly situated” to him.

In the stash house context, three federal courts of appeals recently held that Armstrong should not apply to selective law enforcement claims and accordingly lowered the discovery standard. The Seventh Circuit first distinguished selective prosecution claims from selective law enforcement claims in United States v. Davis. The Third and Ninth Circuits then built on

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20 Armstrong, 517 U.S. at 470.
21 Id.; see also Ah Sin v. Wittman, 198 U.S. 500, 507–08 (1905) (holding that defendants alleging selective prosecution must provide evidence of a similarly situated individual of a different race who was not prosecuted but could have been).
23 Armstrong, 517 U.S. at 468.
24 See infra Section II.A.
25 See 793 F.3d 712, 721 (7th Cir. 2015) (en banc). Professor Siegler and her Federal Criminal Justice Clinic litigated the defense appeal in Davis.
that distinction by eliminating both the granular similarly situated requirement and the discriminatory-intent requirement. These three decisions created a circuit split, as some circuits still apply the Armstrong standard to selective law enforcement claims.

This Article is the first to analyze this new wave of challenges to racially selective law enforcement and the developments in equal protection jurisprudence it has generated. We argue that the path charted by Davis correctly recognizes that Armstrong is inapplicable in the selective law enforcement context and urge other courts to follow suit. A lower standard will enable criminal defendants to obtain discovery and litigate selective law enforcement challenges on the merits, a rarity in the decades since Armstrong.

Although the recent courts of appeals cases allow legitimate claims of race discrimination by the police to survive the discovery stage in many federal courthouses, federal courts hear only a small percentage of criminal cases nationwide, exposing them to only a fraction of such claims. Too many reforms proposed by scholars neglect our system of dual constitutionalism where both federal and state constitutions protect individual rights. This Article argues that state courts should likewise adopt a lower discovery standard for racially selective law enforcement claims.

Building on the recent federal cases, this Article proposes a new discovery rule that state supreme courts could enact to authorize discovery regarding racial discrimination by law enforcement and thus ensure that meritorious equal protection claims against the police are not blocked at the discovery stage. Our proposed rule draws on a Washington state court rule aimed at preventing race discrimination in jury selection.

The Article proceeds as follows. Part I traces the history of the merits standard for equal protection claims challenging race discrimination in criminal cases. It then critiques Armstrong’s insurmountable discovery standard for selective prosecution claims.

Part II explains how, although Armstrong was a selective prosecution case, courts have applied its discovery standard to equal protection claims against law enforcement officers. Part II then details how the Third, Seventh, and Ninth Circuits have recognized that the two types of claims should be treated differently and have departed from Armstrong’s framework, creating


27 See United States v. Alcaraz-Arellano, 441 F.3d 1252, 1264 (10th Cir. 2006); United States v. Hare, 820 F.3d 93, 100 (4th Cir. 2016); see also Bennett v. City of Eastpointe, 410 F.3d 810, 818 (6th Cir. 2005) (applying Armstrong in the civil context); Johnson v. Crooks, 326 F.3d 995, 1000 (8th Cir. 2003) (same).
a lower discovery standard for racially selective law enforcement claims. It argues that those courts were correct to depart from *Armstrong* for three reasons. First, as a doctrinal matter, the police do not enjoy the same deference as prosecutors. Second, as a practical matter, *Armstrong*’s requirements are unworkable in the law enforcement context. Third, a lower discovery standard is the only way judges can adjudicate claims of race discrimination by the police on the merits. Part II concludes that other courts should follow suit and abandon *Armstrong*’s discovery standard in the policing context.

Part III recognizes that federal solutions to race discrimination by law enforcement can have only a limited impact, and that state courts regularly apply *Armstrong*’s high discovery standard to both selective prosecution and selective law enforcement claims. It then explores a growing body of state court rules, laws, and constitutional provisions that are more protective of criminal defendants’ rights than the current constitutional standards.

Part IV identifies a novel avenue for reform: state court rules. Embracing the spirit of federalism, we draw on a recent Washington state court rule aimed at preventing racial discrimination in jury selection to propose that other state courts adopt a similar rule setting a new discovery standard for racially selective law enforcement claims.

I. RACIALLY SELECTIVE PROSECUTION CLAIMS

Former United States Attorney General and Supreme Court Justice Robert H. Jackson remarked that “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.” 28 Justice Jackson explained that the prosecutor’s power to choose his defendants also gives him the power to pick “some person whom he dislikes or desires to embarrass, or select[] some group of unpopular persons and then look[] for an offense.” 29 This ability to selectively target individuals or groups of individuals is where “the greatest danger of abuse of prosecuting power lies.” 30

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29 Id. at 19.
30 Id.; see also Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (“[T]he breadth of discretion that our country’s legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse.”).
Even so, “although prosecutorial discretion is broad, it is not ‘unfettered.’” The Equal Protection Clause is one such limit, prohibiting enforcement that is “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” This limit flows from the Supreme Court’s recognition that the government’s “obligation to govern impartially is as compelling as its obligation to govern at all.”

This Part chronicles the development of the constitutional constraints on prosecutors by describing the foundations of selective prosecution claims, that is, equal protection claims brought against prosecutors. Section I.A tracks the development of the merits standard for selective prosecution claims under the Equal Protection Clause. Section I.B critiques the standard that defendants must meet to gain discovery from a prosecutor’s office on such a claim, which was laid out in United States v. Armstrong. It explains how the Armstrong standard has proven insurmountable in practice—no defendant has met the merits standard for selective prosecution since the nineteenth century, and few have even obtained discovery.

A. Pre-Armstrong Cases

The landmark civil rights case Yick Wo v. Hopkins was the first—and to date only—successful selective prosecution action sustained by the Supreme Court. In that case, a Chinese national, Lee Yick, challenged the enforcement of a San Francisco municipal ordinance regulating the licensing of laundries. The ordinance gave the city’s board of supervisors the power to grant or deny laundry licenses. Yick, despite “hav[ing] complied with every requisite, deemed by the law or by the public officers charged with its administration,” was denied a license and subsequently prosecuted for operating without a license. In his defense, Yick argued that he was singled out for prosecution because of his race, a violation of the Equal Protection Clause. He pointed to the undisputed fact that the board had granted eighty white individuals permission to operate laundries, while two hundred other people of Chinese descent had been denied such permission.

34 118 U.S. 356, 374 (1886).
35 Id. at 357–58.
36 Id. at 366.
37 Id. at 374.
38 Id.
The Court recognized that, on its face, the law was neutral. But the Court went on to evaluate the administrators’ intent in enforcing the law, concluding that the racial disparity in enforcement was “so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners.”

Missing from Yick Wo, however, was a clear articulation of a merits standard for selective prosecution claims. While denying two hundred licenses to Chinese individuals and granting those same licenses to white individuals might seem like an easy case, the Court did not devise a standard to guide future cases.

Nineteen years later, in Ah Sin v. Wittman, the Court laid out the first doctrinal requirement of a selective prosecution claim: a defendant must provide evidence of a similarly situated individual of a different race who was not prosecuted but could have been. In Ah Sin, the defendant alleged that a San Francisco County ordinance prohibiting gambling inside one’s home was enforced solely against Chinese residents. The Court rejected his selective prosecution claim, however, because he did not allege “that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese.” The Court wanted Ah Sin to point to instances of secretive gambling by non-Chinese individuals who were not prosecuted. However, the ordinance prohibited individuals from exhibiting gambling tables in rooms barricaded from police. It would have been nearly impossible for Ah Sin to collect evidence to meet the similarly situated requirement without trespassing. As the facts of Ah Sin demonstrate, the similarly situated requirement is daunting. And this prong is just the start of the difficult merits standard defendants face when asserting selective prosecution claims.

For almost seventy years, there was little change in the Court’s selective prosecution jurisprudence. Then, in 1976, the Court decided the landmark case Washington v. Davis. In that case, the Court clarified that to state an equal protection violation a “discriminatory racial purpose” must be shown. Ten years later, in Wayte v. United States, the Court pronounced a two-prong merits standard for selective prosecution claims. David Wayte was indicted...

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39 Id. at 373–74.
40 Id. at 373.
41 198 U.S. 500, 507–08 (1905).
42 Id. at 504.
43 Id. at 507–08.
44 See id. at 503.
45 426 U.S. 229, 240–41 (1976). Discriminatory purpose is also known as discriminatory intent.
for refusing to register for the Selective Service.\footnote{Id. at 603.} Wayte moved to dismiss the indictment on the ground of selective prosecution, arguing that he and other vocal opponents of the registration program were prosecuted while many less vocal nonregistrants were not.\footnote{Id. at 604.}

The \textit{Wayte} Court began its analysis by noting that “courts [are] properly hesitant to examine the decision whether to prosecute” based on a variety of factors.\footnote{Id. at 607–08.} The Court explained its rationale for insulating prosecutorial decisions from review:

[T]he decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.\footnote{Id. at 607.}

To protect prosecutorial discretion from scrutiny, the Court laid out a rigorous standard: an individual challenging prosecutorial decisions on equal protection grounds must “show both that the passive enforcement policy had a \textit{discriminatory effect} and that it was motivated by a \textit{discriminatory purpose},” also known as discriminatory intent.\footnote{Id. at 608 (emphasis added).} Applying these principles, the Court held that Wayte failed on both grounds. Regarding discriminatory effect, the prosecutions “did not subject vocal nonregistrants to any special burden.”\footnote{Id. at 610.} Regarding discriminatory purpose, Wayte had not established that “the Government prosecuted him \textit{because of} his protest activities.”\footnote{Id.}

\textit{Wayte} thus settled the merits standard for selective prosecution claims: defendants must show discriminatory effect and discriminatory intent. In

\footnote{Id. at 603.} \footnote{Id. at 604.} \footnote{Id. at 607–08.} \footnote{Id. at 607.} \footnote{Id. at 608 (emphasis added).} \footnote{Id. at 610.} \footnote{Id.}
addition, as a part of the discriminatory-effect prong, defendants must point to similarly situated individuals who were not prosecuted, even if the conduct at issue is entirely private and unobservable. Obtaining evidence of similarly situated persons, much less evidence of discriminatory intent, is near impossible without discovery of a prosecutor’s records. As a result, the standard defendants must meet to gain discovery for selective prosecution claims makes all the difference. The Court set that standard in United States v. Armstrong.

B. United States v. Armstrong: An Insurmountable Barrier

United States v. Armstrong was decided in 1996, right in the middle of the federal government’s War on Drugs. The case began in 1992, when a task force of ATF and local police officers raided a hotel room occupied by Christopher Armstrong and four others and discovered crack cocaine. The five were subsequently charged federally with conspiracy to distribute more than fifty grams of cocaine.

The federal public defenders assigned to represent Armstrong noticed a disturbing trend—all twenty-four of the defendants their office had represented in crack cases during 1991 were Black. As a result, Armstrong asserted a selective prosecution claim, arguing that he and his codefendants were selected for federal prosecution, rather than state prosecution, because of their race. In support of a motion requesting discovery on this claim, the attorneys filed an affidavit attesting to this trend of federal crack prosecutions against people of color.

54 Ah Sin v. Wittman, 198 U.S. 500, 507–08 (1905). Because individually identifiable arrest records are not public, it is extremely difficult to determine the names and races of people who were arrested for the same offense but not ultimately prosecuted.
55 See infra notes 89–92, 96.
57 JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 17 (2017) (“It is now widely recognized that the drug war has caused tremendous damage—especially in the low-income African American communities that have been its primary target.”); id. at 164 (“[T]he [federal drug] law’s harsher treatment of crack defendants became one of the most grotesque examples of racial discrimination in the criminal justice system.”).
59 Id. at 458.
60 Id. at 459.
61 In state court, Armstrong would have faced a sentence of three to nine years, but because federal charges were brought, he faced a sentence of fifty-five years to life. See Brief for Respondents at 2–3, Armstrong, 517 U.S. 456 (No. 95-157), 1996 WL 17111, at *2–3; The Supreme Court, 1995 Term—Leading Cases, 110 HARV. L. REV. 135, 166 (1996) [hereinafter Leading Cases].
62 Armstrong, 517 U.S. at 459.
The district court granted the defendants’ motion for discovery, ordering the government to provide information on the cocaine cases it had handled, its charging criteria, and the race of all the individuals prosecuted. The government refused to comply with the discovery order and the district court dismissed the case. The Ninth Circuit, sitting en banc, affirmed.

But the Supreme Court reversed the district court’s discovery order. First, the Court rejected Armstrong’s argument that Federal Rule of Criminal Procedure 16 entitled him to discovery regarding his selective prosecution claim. 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.”

Second, the Court held that Armstrong had not met the standard to obtain discovery for a selective prosecution claim. Like the Wayte Court, the Armstrong Court began by listing various reasons why courts have limited authority to review prosecutorial decisions. Citing separation of powers concerns, the Court explained that “[a] selective-prosecution claim asks a court to exercise judicial power over a ‘special province’ of the Executive.” This “special province” is rooted in the President’s delegation to the Attorney General of the “constitutional responsibility to ‘take Care that the Laws be faithfully executed.’” As a result, prosecutors’ decisions enjoy a “presumption of regularity.” Additionally, the Court explained that its reluctance to review prosecutorial decision-making “stems from a concern not to unnecessarily impair the performance of a core executive constitutional function.” Such review “threatens to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry.” Finally, review “may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.”

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63 Id. (citing Brief for Respondents, supra note 61, at 161–62).
64 Id. at 461.
66 Armstrong, 517 U.S. at 458.
67 Id. at 463.
69 Armstrong, 517 U.S. at 464 (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985)).
70 Id. (quoting U.S. CONST. art. II, § 3).
71 Id. (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926)).
72 Id. at 465.
73 Id. (quoting Wayte, 470 U.S. at 607).
74 Id. (quoting Wayte, 470 U.S. at 607).
Despite these concerns, the Court reiterated the long line of precedent holding that “a prosecutor’s discretion is ‘subject to constitutional constraints,’”\(^\text{75}\) which include “the equal protection component of the Due Process Clause of the Fifth Amendment.”\(^\text{76}\) Equal protection principles dictate “that the decision whether to prosecute may not be based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification.’”\(^\text{77}\)

In light of these conflicting considerations, the Court laid down the standard for obtaining discovery in support of a selective prosecution claim: a defendant must present “some evidence tending to show the existence of the [two] essential elements of” a selective prosecution claim on the merits—discriminatory effect and discriminatory intent.\(^\text{78}\) Further, to prove the discriminatory-effect prong, a defendant must make a “credible showing of different treatment of similarly situated persons.”\(^\text{79}\)

The discriminatory-effect prong’s “similarly situated” requirement demands a comparison with individuals of a different race who could have been prosecuted but were not. Drawing on Ah Sin, the Court required defendants to “identify individuals who were not black and could have been prosecuted for the offenses for which [defendants] were charged, but were not so prosecuted.”\(^\text{80}\) In practical terms, this means that a defendant alleging selective prosecution in a federal crack case must determine the identities and the racial composition of two groups of people: (1) what we call the \textit{selected group}—all defendants prosecuted for crack by a certain federal prosecutor’s office, and (2) the similarly situated \textit{benchmark group}—others of a different race who committed analogous crack offenses but were not federally prosecuted. The Court explained that such a “rigorous standard” was required because of the above justifications: separation of powers concerns and the desire not to impair prosecutorial functions or effectiveness.\(^\text{81}\)

\(^{75}\) \textit{Id.} at 464 (quoting United States v. Batchelder, 442 U.S. 114, 125 (1979)).
\(^{76}\) \textit{Id.} (citing Bolling v. Sharpe, 347 U.S. 497, 500 (1954)).
\(^{77}\) \textit{Id.} (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).
\(^{78}\) \textit{Id.} at 470 (quoting United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974)). The Court clarified that the “some evidence” standard was not a new rule, observing that various circuits had expressed the same standard using a variety of verbal formulations, including “colorable basis,” “substantial threshold showing,” “substantial and concrete basis,” and “reasonable likelihood.” \textit{Id.} at 468.
\(^{79}\) \textit{Id.} at 470.
\(^{80}\) \textit{Id.}
\(^{81}\) \textit{Id.} at 468 (“The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.”).
The Court held that Armstrong had not met the discriminatory-effect prong because he had “failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted.”\(^8\) While Armstrong had properly identified the selected group (the twenty-four people federal prosecutors in Los Angeles had charged with federal crack cocaine offenses in 1991),\(^9\) he had failed to identify a similarly situated benchmark group. The Court explained that identifying similarly situated individuals “should not have been an insuperable task” and posited that there might be, for example, “similarly situated persons of other races [who] were prosecuted by the State of California and were known to federal law enforcement officers, but were not prosecuted in federal court.”\(^8\) Further, rejecting the Ninth Circuit’s assumption that “people of all races commit all types of crimes,”\(^8\) the Court pointed to a United States Sentencing Commission Report concluding that “[m]ore than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black” and determined there was no discriminatory effect.\(^8\) Of course, as the dissent observed, the racial disparity in sentencing says nothing about the crime rate across races, since that disparity might itself be evidence of racially selective prosecution tactics.\(^8\) Nonetheless, the Court

\(^8\) Id. at 470.

\(^9\) See id. at 459.

\(^8\) Id. Without access to discovery, it is unclear how a defendant would locate individuals “known to federal law enforcement officers” who were not federally prosecuted. Even setting aside that requirement, data regarding the races of individuals prosecuted for crack offenses in the state system, rather than the federal system, are extremely difficult to obtain. See Drew S. Days III, Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution, 48 Me. L. Rev. 179, 188 (1996) (“Although the U.S. Sentencing Commission publishes detailed information about federal defendants sentenced for crack, there is no comparable information available for defendants prosecuted or sentenced for crack at the state level. Relevant state statistics are particularly hard to come by because the majority of states do not distinguish between crack and powder cocaine for penalty or record-keeping purposes.”).

\(^8\) Armstrong, 517 U.S. at 469 (quoting United States v. Armstrong, 48 F.3d 1508, 1516–17 (9th Cir. 1995)).

\(^8\) Id. (citing U.S. Sent’g Comm’n, Annual Report 107 tbl.45 (1994)).

\(^7\) Justice John Paul Stevens remarked, “[I]t is undisputed that the brunt of the elevated federal penalties falls heavily on blacks. While 65% of the persons who have used crack are white, in 1993 they represented only 4% of the federal offenders convicted of trafficking in crack. Eighty-eight percent of such defendants were black.” Id. at 479–80 (Stevens, J., dissenting). Justice Stevens concluded that the “figures [discussed by the majority] are entirely consistent with the allegation of selective prosecution.” Id. at 482. Professor Pamela Karlan later pointed out that Armstrong’s statistics “are exactly what one would expect if race were in fact the explanation for the pattern of prosecutorial decisions.” Pamela S. Karlan, Race, Rights, and Remedies in Criminal Adjudication, 96 Mich. L. Rev. 2001, 2025 n.119 (1998); see also Katherine Beckett, Kris Nyrop & Lori Pfingst, Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests, 44 Criminology 105, 121 (2006) (“[A]lthough a majority of drug transactions involving the five serious drugs under consideration here involve a white drug dealer, 64 percent of those arrested for drug delivery in Seattle from January 1999 to April 2001
concluded that the district court had erred in granting discovery. For Armstrong, the similarly situated requirement proved insurmountable, and he was unable to meet the discriminatory-effect prong.

Armstrong’s second prong, discriminatory intent, makes the selective prosecution discovery standard still harder to meet. Unless a defendant has access to a smoking gun—for example, an admission by the government that they targeted the defendant based on his race or racist text messages—it is hard to provide evidence of intent before receiving discovery. Many discovery motions are denied for failure to provide “some evidence” of discriminatory intent. As a result, “[t]he bar for selective [law enforcement and prosecution claims has been set at a nearly unreachable height for the vast majority of criminal defendants, an example of an abstract right with no practical remedy.”

Since the Court established Armstrong’s demanding discovery standard, there has not been a single successful selective prosecution or selective law enforcement claim on the merits. What is more, the last

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89 See, e.g., United States v. Al Jibori, 90 F.3d 22, 24–26 (2d Cir. 1996). In Al Jibori, the prosecutors explained that they targeted the defendant in part because of his ethnicity and nationality. Id. at 24, 26. The Second Circuit made clear that if the government had kept quiet, discovery would not have been granted. Id. at 25–26; see also McAdams, supra note 22, at 622 & n.76 (describing cases where the defendant gets “lucky” by gaining access to data about unprosecuted offenders).

90 See, e.g., United States v. Mumphrey, 193 F. Supp. 3d 1040, 1064 (N.D. Cal. 2016) (relying on “race-based comments” by some San Francisco police officers for a discriminatory-intent finding and granting discovery in support of a selective law enforcement claim).


92 Luna, supra note 19, at 1139; see also McAdams, supra note 22, at 640 (“The Armstrong holding and the implications of its reasoning create a barrier to discovery that, for the great majority of criminal cases, is insuperable.”). Moreover, the concept of “discriminatory intent” is notoriously elusive. See Aziz Z. Huq, What Is Discriminatory Intent?, 103 CORNELL L. REV. 1211, 1240–63 (2018).

93 See United States v. Washington, 869 F.3d 193, 215 (3d Cir. 2017) (“The government itself concedes that ‘neither the Supreme Court nor this Court has ever found sufficient evidence to permit discovery of a prosecutor’s decision-making policies and practices.’” (quoting Brief for Appellee United States of America at 31, Washington, 869 F.3d 193 (No. 16-2795), 2016 WL 7034184, at *31)); Kristin E. Kruse, Comment, Proving Discriminatory Intent in Selective Prosecution Challenges—An Alternative
successful selective prosecution claim at either the state or federal level was the very first one that reached the Court back in 1886—Yick Wo. In only a handful of cases have defendants even been able to meet Armstrong and gain discovery. In practice, courts often deny discovery motions based on a failure to provide sufficient evidence of either similarly situated individuals or discriminatory intent. The extraordinary difficulty of obtaining selective prosecution discovery in a criminal case stands in stark contrast to the ready discovery provided to civil plaintiffs.

Armstrong is a deeply flawed decision, as many scholars have observed. By valuing prosecutorial discretion above equal protection principles, it strikes exactly the wrong balance between deference to the executive and individual rights. The Armstrong Court’s concerns about chilling prosecutorial discretion mask a recurring “theme in the Court’s treatment of race: ‘a fear of too much justice.’” Shutting down all selective prosecution claims is not the answer. After all, courts review executive

\[\text{Approach to United States v. Armstrong, 58 SMU L. Rev. 1523, 1535 (2005) (“[Armstrong] 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.”); James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1539–40 (1981).}\\]

\[\text{94 See Vorenberg, supra note 93, at 1539–40; Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886).}\\]

\[\text{95 See, e.g., United States v. Jones, 159 F.3d 969, 975, 977–78 (6th Cir. 1998) (holding defendant had provided “‘some evidence’ tending to show the existence of discriminatory effect” and discriminatory intent based on law enforcement agents’ “outrageous and unprofessional” behavior that included agents sending the defendant a postcard that pictured “a black woman with a basket of bananas on her head”); United States v. Al Jibori, 90 F.3d 22, 26 (2d Cir. 1996) (granting defendant’s discovery motion based on government’s admission that it targeted defendant in part because of race). For more recent examples, see United States v. Coley, No. 17-CR-89-JGC, 2018 WL 6304588, at *2 (N.D. Ohio Dec. 3, 2018), and Mumphrey, 193 F. Supp. 3d at 1048, which found that “[d]efendants ha[d] satisfied Armstrong in respect to their claim of selective enforcement” and granted discovery in a federal drug sting operation.}\\]

\[\text{96 See, e.g., United States v. Thorpe, 471 F.3d 652, 658 (6th Cir. 2006); United States v. Hedaithy, 392 F.3d 580, 608 (3d Cir. 2004); United States v. Hayes, 236 F.3d 891, 896 (7th Cir. 2001); United States v. Magana, 127 F.3d 1, 8 (1st Cir. 1997).}\\]

\[\text{97 See supra note 91.}\\]

\[\text{98 See Miriam H. Baer, Timing Brady, 115 Colum. L. Rev. 1, 25 (2015) (“If the civil plaintiff, who seeks primarily the payment of money, must share his evidence . . . then surely the prosecutor, who seeks the defendant’s loss of liberty or life, ought to suffer the same obligations.”); Bruce A. Green, Federal Criminal Discovery Reform: A Legislative Approach, 64 Mercer L. Rev. 639, 642 (2013) (“[T]he limited scope of discovery in federal criminal cases cannot easily be reconciled with the liberality of discovery in modern civil litigation.”).}\\]


\[\text{100 Leading Cases, supra note 61, at 175 (quoting McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting)).}\\]
decisions all the time in other contexts. But here, blind deference to the majority tramples the rights of the minority—or minorities, as the case may be. And Armstrong’s flaws are multiplied when the deference it affords prosecutors is inexplicably imported into an entirely different context—policing.

II. RACIALLY SELECTIVE LAW ENFORCEMENT CLAIMS

The exacting Armstrong standard not only strikes the wrong balance in the selective prosecution context, but for years has improperly blocked equal protection claims against the police. Law enforcement officers may play an even bigger role in the criminal legal system than prosecutors. On average, between 2011 and 2015, 24% of the U.S. population over the age of sixteen had some contact with law enforcement. Law enforcement officers’ vast discretion creates great potential for racial bias. Police “have discretion regarding whom to target (which individuals), as well as where to target (which neighborhoods or communities).” And discrimination by law enforcement officers—both conscious and unconscious—is well documented. Such discrimination can have lethal consequences.

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101 See, e.g., 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”); 5 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §§ 28:1–15 (2d ed. 1984) (collecting cases where courts review executive discretion).


103 See ALEXANDER, supra note 14, at 123.

104 Id.


The challenges criminal defendants face in obtaining the discovery necessary to hold the police accountable for racially discriminatory practices mirror and exceed the challenges in the selective prosecution context. This Part analyzes recent cases that declined to apply Armstrong to equal protection claims against law enforcement officers. Section II.A explains how, in the years after Armstrong, federal courts regularly applied Armstrong’s onerous discovery standard to equal protection claims against the police, resulting in the denial of nearly every discovery claim. Section II.B details how, more recently, three federal appellate courts declined to apply Armstrong’s discovery standard to racially selective law enforcement claims and lowered the standard for defendants seeking discovery about race discrimination by the police. In addition, it untangles the murky and conflicting legal standards that have replaced Armstrong. Section II.C synthesizes these recent cases, concluding that a lower discovery standard for selective law enforcement claims correctly appreciates the differences between prosecutors and law enforcement officers and enables courts to assess claims against the police on the merits.

A. Armstrong Applied to Selective Law Enforcement Claims

For many years, courts applied Armstrong’s legal framework to racially selective law enforcement claims. At the merits stage of a selective law enforcement challenge, courts applied the selective prosecution merits standard articulated in Wayte and reiterated in Armstrong, holding that “[a] defendant challenging a criminal prosecution at . . . the law enforcement . . . inflection point[] must provide ‘clear evidence’ of discriminatory effect and discriminatory intent.”107 Every circuit to address the issue continues to use the same merits standard for both selective prosecution and selective law enforcement claims.108

At the discovery stage of a selective law enforcement challenge, courts also applied Armstrong’s standard, requiring defendants to present “some

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108 See Flowers v. Fiore, 359 F.3d 24, 35 (1st Cir. 2004) (requiring plaintiff to show “that he was treated differently from similarly situated non-African-American motorists and that the action taken against him was motivated, at least in part, by his race”); Brown v. City of Syracuse, 673 F.3d 141, 151–52 (2d Cir. 2012); Washington, 869 F.3d at 214; United States v. Bullock, 94 F.3d 896, 899 (4th Cir. 1996); Bowling v. City of Aberdeen, 681 F.3d 215, 227 (5th Cir. 2012); Bennett v. City of Eastpointe, 410 F.3d 810, 818 (6th Cir. 2005); United States v. Bell, 86 F.3d 820, 822–23 (8th Cir. 1996); United States v. Sellers, 906 F.3d 848, 852 (9th Cir. 2018); United States v. Alcaraz-Arellano, 441 F.3d 1252, 1264 (10th Cir. 2006).
evidence tending to show” both discriminatory effect and intent.109 Since both selective prosecution and selective law enforcement claims are rooted in the Equal Protection Clause, courts reflexively assumed Armstrong’s discovery standard applied across the board. For example, in United States v. Barlow, the Seventh Circuit held that although “Barlow complains not of selective prosecution, but of racial profiling, a selective law enforcement tactic,” the “same analysis governs both types of claims: a defendant seeking discovery on a selective enforcement claim must meet the same ‘ordinary equal protection standards’ that Armstrong outlines for selective prosecution claims.”110

The Fourth Circuit,111 Tenth Circuit,112 and district courts across the country113 likewise adhere to this view, applying Armstrong’s discovery standard to selective law enforcement claims. In United States v. Alcaraz-Arellano, for example, Alcaraz-Arellano sought discovery alleging that a law enforcement officer’s decision to stop him was motivated by race.114 The Tenth Circuit, relying on Armstrong, held that defendants “must produce ‘some evidence’ of both discriminatory effect and discriminatory intent” to gain discovery.115 The court remarked that “[t]he elements [of the discovery standard] are essentially the same for a selective-enforcement claim” and a selective prosecution claim.116

In contrast, before Barlow, the Seventh Circuit had previously suggested in the civil context that there might be good reasons for treating selective prosecution and law enforcement claims differently. In Chavez v.

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110 310 F.3d 1007, 1010 (7th Cir. 2002) (citing Armstrong, 517 U.S. at 465). Barlow is often cited for this proposition. See, e.g., United States v. Paxton, No. 13-CR-0103, 2014 WL 1648746, at *3 (N.D. Ill. Apr. 17, 2014) (“Defendants’ racial profiling claim is essentially a selective enforcement claim, instead of a selective prosecution claim. The two claims are, however, analyzed under the same standard.” (citing Barlow, 310 F.3d at 1010)); Urbanique Prod. v. City of Montgomery, 428 F. Supp. 2d 1193, 1223–24 (M.D. Ala. 2006) (quoting Barlow, 310 F.3d at 1010).
111 United States v. Hare, 820 F.3d 93, 100 (4th Cir. 2016) (denying discovery because defendants “[d]id not put forth ‘some evidence’ making a ‘credible showing’ of the elements of a discrimination claim”).
112 Alcaraz-Arellano, 441 F.3d at 1264.
114 441 F.3d at 1261.
115 Id. at 1264 (quoting Armstrong, 517 U.S. at 470).
116 Id.
Illinois State Police, the Seventh Circuit became the first court to recognize the difference between the two types of claims and to create a lower standard of proof for selective law enforcement claims, at least in the civil context.  

Chavez involved a civil class action § 1983 lawsuit in which Black and Hispanic motorists alleged that the Illinois State Police had engaged in racial profiling at drug-interdiction checkpoints. Chavez emphasized that Armstrong “narrowly focused on the constitutional implications of interfering with the prosecutorial function, a factor at the heart of a criminal defendant’s claim of selective prosecution.” Chavez, however, was stopped by law enforcement officers but never prosecuted. The Seventh Circuit ultimately concluded that “[t]his case is . . . not like Armstrong” because it involves police conduct, not prosecutorial discretion.  

Chavez then somewhat relaxed the standard of proof required to demonstrate discriminatory effect. Under Armstrong, a claimant would have to show that “similarly situated defendants of other races could have been prosecuted, but were not.” Chavez observed: “Armstrong emphasized . . . the fact that it would not be impossible to name a similarly situated individual treated differently in the context of a selective prosecution claim.” But Chavez recognized that this would be a more difficult burden to meet in the selective law enforcement context, because it would be virtually impossible to identify a particular individual whom the police did not stop. Chavez therefore held that the plaintiffs “do not have to provide the court with the name of an individual who was not stopped; instead they may attempt to use statistics to show that the [police] treated them differently than other motorists who were similarly situated.” Despite Chavez’s recognition that it is more difficult to provide “similarly situated” evidence in the law enforcement context than the prosecution context, that difference did not translate into a different discovery standard in the criminal context for over a decade.
Although *Chavez* was a civil selective law enforcement case, the same basic question arises in both the civil and criminal contexts: Did the police violate the Constitution? While this Article focuses on the criminal context, the distinction *Chavez* drew between prosecutors and the police applies equally.

**B. Discovery in Selective Law Enforcement Cases**

Spurred by racial disparities in the ATF’s fake stash house operations, criminal defense attorneys have launched a recent wave of litigation seeking discovery to support claims of racially selective law enforcement. Courts have reacted by criticizing the fake stash house operation, referring to it as a “disreputable tactic,” a “tawdry” and “tired sting operation [that] seems to be directed at unsophisticated, and perhaps desperate, defendants who easily snap at the bait put out for them by [the government agent].” The Ninth Circuit, for example, has accused law enforcement of “trolling for targets” when the confidential informant “provocatively cast his bait in places defined only by economic and social conditions.” Judges have even expressed “disgust with the ATF’s conduct” in these cases.

Three courts of appeals have responded to this recent litigation by recognizing the differences between prosecutors and the police and lowering the *Armstrong* discovery standard in the selective law enforcement context: the Seventh Circuit in *United States v. Davis*, the Third Circuit in *United States v. Washington*, and the Ninth Circuit in *United States v. Sellers*. After distinguishing *Armstrong*, these courts jettisoned its impractical similarly situated requirement for the discriminatory-effect prong and

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127 United States v. Kindle, 698 F.3d 401, 414 (7th Cir. 2012) (Posner, J., concurring in part and dissenting in part); see also id. at 416 (remarking that “[t]he operators of stash houses would pay law enforcement to sting potential stash house robbers” because a “sting both eliminates one potential stash house robber (unless the defendant was entrapped) and deters other criminals from joining stash house robberies, since they may turn out to be stings”).

128 United States v. Lewis, 641 F.3d 773, 777 (7th Cir. 2011).

129 United States v. Black, 733 F.3d 294, 303 (9th Cir. 2013). For further criticism of stash house operations, see Tinto, *supra* note 5, at 1446–51.

130 United States v. Paxton, No. 13-CR-0103, 2018 WL 4504160, at *2 (N.D. Ill. Sept. 20, 2018); see also United States v. Hudson, 3 F. Supp. 3d 772, 786 (C.D. Cal. 2014) (“Zero. That’s the amount of drugs that the Government has taken off the streets as the result of this case and the hundreds of other fake stash-house cases around the country. That’s the problem with creating crime: the Government is not making the country any safer or reducing the actual flow of drugs.”), rev’d and remanded sub nom. United States v. Dunlap, 593 F. App’x 619 (9th Cir. 2014).

131 793 F.3d 712, 719–23 (7th Cir. 2015) (en banc).

132 869 F.3d 193, 214–21 (3d Cir. 2017).

133 906 F.3d 848, 852–56 (9th Cir. 2018).
eliminated the discriminatory-intent requirement. Sellers and Washington went on to craft new, lower discovery standards for selective law enforcement claims, with the Ninth Circuit holding either prong alone sufficient to obtain discovery. This Section chronicles these important developments.

1. Distinguishing Armstrong

The Seventh Circuit was the first to hold that Armstrong’s discovery standard does not apply in the selective law enforcement context. In United States v. Davis, defendants charged as part of an ATF fake stash house operation sought discovery in support of a racially selective law enforcement claim. They established that of the ninety-seven people the ATF had selected for its fake stash house operation in Chicago since 2006, seventy-five were Black, sixteen were Hispanic, and six were white. The district court granted discovery and the government appealed.

In Davis, the government argued on appeal that Armstrong applied and that the defendants had failed to meet its comparative standard. Applying Armstrong would have required the defense to make one of two showings. First, the defendants would have had to identify one or more similarly situated individuals of a different race whom the ATF did not select—an impossible standard, since there is no way to identify the null set of people the ATF did not approach to commit a manufactured crime. Alternatively, the defendants would have had to identify a similarly situated benchmark group whose racial composition differed from that of the selected group in a statistically significant way. But this, too, was an impossible standard for the defendants to meet because the government refused to provide

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134 793 F.3d at 714–15.
136 Davis, 793 F.3d at 715; see also Expert Report of Max M. Schanzenbach at 2, United States v. Brown, 299 F. Supp. 3d 976 (N.D. Ill. 2018) (No. 12-CR-0632-RC), ECF No. 555 (arguing that “[w]hen any one of [Dr. Fagan’s] assumptions is relaxed or tested, the results no longer support an inference of racial discrimination”).
138 In this context, the benchmark group would consist of others of a different race who were not approached by the ATF but were otherwise similarly situated to the people the ATF had selected to commit stash house offenses.
139 Reply Brief & Supplemental Short Appendix of the United States at 14, Davis, 793 F.3d 712 (No. 14-1124), 2014 WL 1664051, at *14 (“Even under the most expansive construction of the similarly situated requirement, the entire adult population provides no meaningful basis on which to conduct a comparison with these defendants.”).
information that would enable the defendants to define a similarly situated benchmark group. Specifically, the government refused to disclose the ATF’s criteria for selecting defendants for its stash house operation—that is, the purportedly race-neutral rules that the agency claimed to use to determine whom to target.\textsuperscript{140} The en banc Seventh Circuit held that the defendants had not met \textit{Armstrong}’s similarly situated requirement because “[t]he district court did not identify any similarly situated [white] person who had not been prosecuted.”\textsuperscript{141}

But that was not the end of the inquiry. The Seventh Circuit distinguished \textit{Armstrong} and concluded that a different discovery standard should govern selective law enforcement claims.\textsuperscript{142} The court recognized that “\textit{Armstrong} was about prosecutorial discretion,” not the discretion of law enforcement officers.\textsuperscript{143} It further observed that there were salient differences between police and prosecutors that counseled in favor of a different standard.\textsuperscript{144} Unlike prosecutors, the court explained, “[a]gents of the ATF and FBI are not protected by a powerful privilege or covered by a presumption of constitutional behavior.”\textsuperscript{145} The court continued:

Unlike prosecutors, [law enforcement] agents regularly testify in criminal cases, and their credibility may be relentlessly attacked by defense counsel. They also may have to testify in pretrial proceedings, such as hearings on motions to suppress evidence, and again their honesty is open to challenge. Statements that agents make in affidavits for search or arrest warrants may be contested, and the court may need their testimony to decide whether if shorn of untruthful statements the affidavits would have established probable cause. Agents may be personally liable for withholding evidence from prosecutors and thus causing violations of the constitutional requirement that defendants have access to material, exculpatory evidence. Before holding hearings (or civil trials) district judges regularly, and properly, allow discovery into nonprivileged aspects of what agents have said or done.\textsuperscript{146}

\textsuperscript{140} The Seventh Circuit observed that the law enforcement agency’s targeting criteria could help a defendant prove a selective law enforcement claim on the merits: “Analysis of the targeting criteria (and whether agents followed those rules in practice) could shed light on whether an initial suspicion of race discrimination in this case is justified.” \textit{Davis}, 793 F.3d at 723.

\textsuperscript{141} \textit{Id.} at 715.

\textsuperscript{142} \textit{Id.} at 720–21.

\textsuperscript{143} \textit{Id.} at 720.

\textsuperscript{144} \textit{Id.} at 720–21.

\textsuperscript{145} \textit{Id.} at 720.

\textsuperscript{146} \textit{Id.} at 720–21 (citations omitted).
The court held that these differences justified applying a different discovery standard for selective law enforcement claims—one that is lower than Armstrong’s selective prosecution discovery standard.\(^{147}\)

Over the next few years, two other federal courts of appeals built on the distinctions the Seventh Circuit had drawn between prosecutors and law enforcement officers and likewise distinguished Armstrong. In similar selective law enforcement challenges to fake stash house operations, the Third and Ninth Circuits subsequently agreed with “the core rationale of Davis: the special solicitude shown to prosecutorial discretion, which animated the Supreme Court’s reasoning in Armstrong . . . does not inevitably flow to the actions of law enforcement, or even to prosecutors acting in an investigative capacity.” \(^{148}\) The Third and Ninth Circuits bolstered Davis’s reasoning. In United States v. Washington, the Third Circuit highlighted a key distinction from prosecutors—law enforcement officers’ limited immunity:

A challenge to a law-enforcement policy also implicates another area where immunity is limited. The ATF reverse sting model is familiar to us and other courts precisely because it is a defined operation, one with policies, manuals, targeting criteria, and standards. Its appearance from coast to coast is not some kind of convergent law-enforcement evolution, but instead is due to the promulgation of official policies by a federal agency. Claims of unconstitutional policies or practices, lodged against entities rather than individuals, often cannot be met with qualified or good-faith immunity defenses at all.\(^{149}\)

In United States v. Sellers, the Ninth Circuit joined the Davis and Washington courts in recognizing that “[s]elective prosecution is not selective [law] enforcement—especially not in the stash house reverse-sting context.”\(^{150}\) Like the other courts, the Sellers court summarized the salient differences between the two actors: “[A]gents occupy a different space and role in our system than prosecutors; they are not charged with the same

\(^{147}\) See id. at 721–23.

\(^{148}\) United States v. Washington, 869 F.3d 193, 219 (3d Cir. 2017); see also United States v. Sellers, 906 F.3d 848, 855 (9th Cir. 2018) (“Today we join the Third and Seventh Circuits and hold that Armstrong’s rigorous discovery standard for selective prosecution cases does not apply strictly to discovery requests in selective enforcement claims like Sellers’s.”). In Sellers, the defendants established “that of 51 defendants indicted in stash house reverse-sting operations between 2007 and 2013, at least 39 were black or Hispanic.” Id. at 851; see also id. (noting that an agent involved in the operation “testified that more than 55 of the approximately 60 individuals who have been indicted in his stash house reverse-sting operations are people of color.”).

\(^{149}\) 869 F.3d at 219–20.

\(^{150}\) 906 F.3d at 852–53.
constitutional functions, and their decisions are more often scrutinized by—and in—courts.”

The Ninth Circuit highlighted an additional reason for applying a lower discovery standard in the law enforcement context. The *Sellers* court observed that the similarly situated element of the discriminatory-effect prong was especially daunting when applied to policing: “Asking a defendant claiming selective [law] enforcement to prove who could have been targeted by an informant, but was not, or who the ATF could have investigated, but did not, is asking him to prove a negative; there is simply no statistical record for a defendant to point to.” The court thus recognized that *Armstrong*’s cruel catch-22 is compounded in the selective law enforcement context. As hard as it is to prove discrimination without discovery, it is still more difficult to identify particular people who—by definition—had no contact with the police.

These differences between prosecutors and police led the Third and Ninth Circuits, as well as at least one district court, to join the Seventh Circuit’s conclusion that “the sort of considerations that led to the outcome in *Armstrong* do not apply to a contention that agents of the FBI or ATF engaged in racial discrimination when selecting targets for sting operations, or when deciding which suspects to refer for prosecution.” That recognition, in turn, set the stage for these appellate courts to depart from *Armstrong*’s discovery standard in the selective law enforcement context and forge an entirely new standard for discovery—a key development in safeguarding equal protection rights.

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151 Id. at 853.
152 Id. (citing *Chavez v. Ill. State Police*, 251 F.3d 612, 640 (7th Cir. 2001)).
153 The Third Circuit gestured to this same compounded catch-22 in summarizing Washington’s argument: “Washington also points to the difficulty of obtaining pre-discovery statistics in selective prosecution cases, arguing that requiring the same in law-enforcement cases—when there are likely to be no records of similarly situated individuals who were not arrested or investigated—would transform the functional impossibility of *Armstrong*/Bass into a complete impossibility.” *Washington*, 869 F.3d at 216; see also *McAdams, supra* note 22, at 617–18 (“When . . . the defendants complain that similarly situated Whites are not arrested or prosecuted at all, there will be no records to find to meet the similarly situated requirement.”). In *United States v. Bass*, 536 U.S. 862, 864 (2002), the Court held that the *Armstrong* standard applies to motions for discovery regarding a claim alleging selective application of the death penalty based on race.
155 *Sellers*, 906 F.3d at 852–54.
157 *United States v. Davis*, 793 F.3d 712, 721 (7th Cir. 2015) (en banc).
158 Shortly after *Davis* was decided, the Fourth Circuit cited it with approval, noting that the “Seventh Circuit offers cogent analysis” regarding the differences between law enforcement officers and prosecutors. *United States v. Hare*, 820 F.3d 93, 101 (4th Cir. 2016) (quoting *Davis*, 793 F.3d at 720–21).
2. **A New Discovery Standard**

Although the Seventh Circuit held that *Armstrong* does not govern discovery requests in the selective enforcement context, it did not articulate a new discovery standard in its place. *Davis* acknowledged that “[t]he racial disproportion in stash-house prosecutions remains troubling, . . . and is a legitimate reason for discovery provided that the district court does not transgress *Armstrong* or an applicable privilege,”\(^{159}\) for example, by ordering discovery of a prosecutor’s files without satisfying the *Armstrong* standard. The court ultimately found the particular discovery order to be overbroad and instructed the district court to pursue a more nuanced approach, but recognized that “some of the [defendants’] discovery asks for information from supervisors or case agents of the FBI and ATF, and this is outside the scope of *Armstrong*, the executive privilege, and the deliberative-process privilege.”\(^{160}\)

Rather than devising a new legal standard, the Seventh Circuit laid out a process for district courts to follow at the discovery stage of a selective law enforcement claim: “If the initial inquiry gives the judge *reason to think* that suspects of another race, and otherwise similarly situated, would not have been offered the opportunity for a stash-house robbery, it might be appropriate to require the FBI and ATF to disclose, in confidence, their criteria for stash-house stings.”\(^{161}\) At a minimum, this framework authorizes judges to require law enforcement agencies to disclose their operational criteria based on less than *Armstrong* requires. It is essential for a defendant seeking to litigate a selective law enforcement claim on the merits to obtain law enforcement’s criteria because those criteria define the benchmark group. For example, if the ATF’s criteria for its fake stash house operations are to target people with prior convictions for violence, drugs, and robbery, then the benchmark group will consist of the entire universe of people with those prior convictions in the same geographic area and time period as the operation. If the benchmark group is substantially more white than the people the ATF selected—the selected group—that is evidence of discriminatory effect. *Davis*’s lower discovery standard makes it possible for a defendant to gather the evidence needed to prove discrimination on the merits.\(^{162}\)

\(^{159}\) 793 F.3d at 722. In particular, the district court had found that “the overwhelming majority of the defendants named [were] individuals of color.” Id. at 719 (quoting United States v. Davis, No. 13-CR-0063 (N.D. Ill. Oct. 30, 2013), ECF No. 124; see also Defendants-Appellees’ Brief, supra note 135, at 2.

\(^{160}\) *Davis*, 793 F.3d at 722.

\(^{161}\) Id. at 723 (emphasis added).
After *Davis*, the Third and Ninth Circuits fashioned a lower discovery standard for selective law enforcement claims, altering both the discriminatory-effect and discriminatory-intent prongs of *Armstrong*. Regarding discriminatory effect, both courts eliminated the similarly situated requirement, holding that a defendant seeking discovery “need not . . . show that . . . similarly situated persons of a different race or equal protection classification were not arrested or investigated by law enforcement.”  

Accordingly, a defendant alleging race discrimination does not need to identify particular individuals who are similarly situated to the defendant but were not arrested—such as *Ah Sin*’s non-Chinese residential gamblers.  

A defendant likewise does not need to identify through statistics a granular similarly situated benchmark group that is more white than the selected group that includes the defendant. Instead, *Washington* held that a defendant seeking discovery must present “a proffer that shows ‘some evidence’ of discriminatory effect,” and that “proffer must contain reliable statistical evidence, or its equivalent.”  

After the elimination of the similarly situated requirement, it is not entirely clear what evidence a defendant must provide to meet the discriminatory-effect prong under *Washington* and *Sellers*. Perhaps a defendant can establish discriminatory effect simply by showing that the selected group—consisting of himself and others targeted in a certain type of law enforcement operation—is composed primarily of people of color, without drawing any comparison to a benchmark group. But it is more

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162 United States v. Washington, 869 F.3d 193, 221 (3d Cir. 2017); United States v. Sellers, 906 F.3d 848, 855 (9th Cir. 2018) ("[A] defendant need not proffer evidence that similarly-situated individuals of a different race were not investigated or arrested to receive discovery on his selective enforcement claim in a stash house reverse-sting operation case.").

163 See supra text accompanying notes 41–43 (discussing *Ah Sin*). In *Chavez*, the Seventh Circuit recognized the difficulty of identifying specific people who were not selected by the police. *See Chavez v. Ill. State Police*, 251 F.3d 612, 639–40 (7th Cir. 2001) ("[P]laintiffs who allege that they were stopped due to racial profiling would not, barring some type of test operation, be able to provide the names of other similarly situated motorists who were not stopped."). *But see* United States v. Hare, 820 F.3d 93, 99–100 (4th Cir. 2016) (defining the proper comparison group in stash house sting operations as individuals who would have been "receptive to a stash house robbery scenario" and who the "ATF had the means of infiltrating"); United States v. Brown, 299 F. Supp. 3d 976, 1010 (N.D. Ill. 2018) (requiring the defendant to point to individuals that were “actually available for selection by the ATF and willing to commit a stash house sting”).

164 869 F.3d at 220–21.

165 Professor Richard McAdams has previously advocated for this kind of standard in the selective prosecution context. *McAdams, supra* note 22, at 624–25 (proposing the rule that “a court may order discovery on a selective prosecution claim if it has a reasonable basis for finding that race and the decision to prosecute are correlated, meaning that prosecutors charge a significantly higher proportion of violators of the defendant’s race than of other races”). Professor Issa Kohler-Hausmann cogently argues that requiring any comparative showing (the “counterfactual causal model”) in this context is incorrect.
likely that Sellers’s statement that a defendant need not proffer evidence about “similarly-situated individuals of a different race”\(^\text{166}\) does not eliminate a comparative standard altogether, but simply means that the defendant need not identify particular people who are similarly situated to him. Presumably the defendant still must present some comparative evidence showing that law enforcement officers targeted people of color to a greater degree than their representation in the general population or some other benchmark group. Washington’s requirement of “reliable statistical evidence,”\(^\text{167}\) for example, suggests that a defendant must provide comparative evidence demonstrating a racial disproportion between the selected group and some benchmark group.

One district court, after jettisoning Armstrong’s similarly situated requirement for the discriminatory-effect prong, went so far as to require that the comparative showing be statistically significant. In United States v. Lopez, another fake stash house case, the court held that “the appropriate standard is that where a defendant who is a member of a protected group can show that that group has been singled out for reverse sting operations to a statistically significant extent in comparison with other groups, this is sufficient to warrant further inquiry and discovery.”\(^\text{168}\) The court in Lopez found that the defendants had met this standard by showing that “not a single one of the 179 individuals targeted in DEA reverse sting operations in SDNY in the past ten years was white, and that all but two were African-American or Hispanic,” a disparity that was “in stark contrast to the racial makeup of New York and Bronx Counties.”\(^\text{169}\) Like the Third and Ninth Circuits, the court in Lopez found that a comparative discriminatory-effect showing was

because it isolates racial signifiers and pretends “the social facts of race [are] not what they are today in the United States.” Issa Kohler-Hausmann, Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination, 113 NW. U. L. REV. 1163, 1221 (2019). The counterfactual causal model does not include a “prior sociological account of the distribution and meaning of [everything held constant] by different racial/ethnic groups.” Id. at 1192. As a result, “there is no limiting principle on what should or should not be stripped away in order to get at some imagined solid state of race or ethnicity.” Id.

\(^{166}\) 906 F.3d at 855 (emphasis added).
\(^{167}\) 869 F.3d at 221.
\(^{169}\) Id. A district court in New Mexico likewise found discriminatory effect based on a broad benchmark group. See Order Granting Discovery at 4, United States v. Casanova, No. 16-CR-2917-JAP (D.N.M. June 12, 2017), ECF No. 57. In Casanova, the defendant presented statistical evidence of a disparity between the racial makeup of defendants arrested in an ATF drug operation (the selected group) and defendants arrested in drug-and-firearm cases in Albuquerque and the District of New Mexico (the benchmark group). Id. at 2. The court purported to be applying Armstrong, but nevertheless concluded that the defendant had demonstrated both discriminatory effect and discriminatory intent and granted discovery. Id. at 1, 4.
sufficient to grant discovery; no evidence of discriminatory intent was necessary.\textsuperscript{170}

Given these ambiguities, a defendant seeking to demonstrate discriminatory effect would do best to gather data about the racial composition of the selected group and of the general population with the goal of establishing that law enforcement agents arrested people of color to a greater degree than is warranted by their representation in the general population. For example, on remand, Washington met this new lower standard using census data.\textsuperscript{171} The district court ordered the government to provide “[a] list by case name and number of each defendant in every stash house robbery sting conducted” by the ATF, including the racial makeup of the defendants in those cases, the circumstances of the stash house targeting, and information about individuals who were targeted but not arrested.\textsuperscript{172}

Regarding the discriminatory-intent prong, both Washington and Sellers held that a defendant “need not, at the initial stage, provide ‘some evidence’ of discriminatory intent.”\textsuperscript{173} This was a monumental development in equal protection jurisprudence. For the prior two decades, the discriminatory-intent requirement—especially in combination with the similarly situated aspect of the discriminatory-effect requirement—had been an insurmountable barrier for defendants seeking discovery from police and prosecutors alike.\textsuperscript{174}

The Third and Ninth Circuits differed slightly in the new role each ascribed to discriminatory intent. In Washington, the Third Circuit added a strange caveat: “[T]he proffer must be strong enough to support a reasonable inference of discriminatory intent and non-enforcement” against similarly situated people of other races.\textsuperscript{175} This caveat muddies the waters as it seems

\textsuperscript{170}See 415 F. Supp. 3d at 425–27.
\textsuperscript{171}See Motion for Discovery Pertaining to Claim of Selective Enforcement at 5–6, United States v. Washington, No. 2:13-CR-0171-JHS (E.D. Pa. Mar. 17, 2018), ECF No. 319 (using census data to compare the racial composition of the relevant geographic area to that of the defendants charged in fake stash house operations).
\textsuperscript{173}United States v. Washington, 869 F.3d 193, 221 (3d Cir. 2017); see also United States v. Sellers, 906 F.3d 848, 856 (9th Cir. 2018) (“[O]btaining discovery on a selective enforcement claim does not ‘require some evidence tending to show the existence of [both] essential elements of the defense, discriminatory effect and discriminatory intent.’” (quoting United States v. Armstrong, 517 U.S. 456, 468 (1996))).
\textsuperscript{174}See supra Section I.B; supra Part II.
\textsuperscript{175}Washington, 869 F.3d at 221 (emphasis added).
to suggest that the defendant’s evidentiary proffer must support an inference of the two requirements the court seemingly eliminated.\textsuperscript{176} Conversely, in \textit{Sellers}, the Ninth Circuit held that a defendant raising a selective law enforcement claim need only meet one prong of \textit{Armstrong}, thus rendering the discriminatory-intent prong entirely optional.\textsuperscript{177} Rather than using the discriminatory-intent requirement as a bar to discovery, \textit{Sellers} repurposed it as a second avenue for obtaining discovery—if the defendant cannot provide some evidence of discriminatory effect, the defendant can instead present some evidence of discriminatory intent, such as evidence of overt racial bias in the form of racist communications among law enforcement officers.\textsuperscript{178}

In addition to altering the two prongs of \textit{Armstrong}, the Ninth Circuit lowered the evidentiary threshold for obtaining discovery still further by redefining “some evidence” to mean that defendants simply “must have \textit{something} more than mere speculation to be entitled to discovery.”\textsuperscript{179} The court explained that “what that \textit{something} looks like will vary from case to case,” thus giving district courts a great deal of discretion to determine how much evidence is enough to grant discovery.\textsuperscript{180} This low evidentiary threshold stands in contrast to the Third Circuit’s requirement that a defendant present “reliable statistical evidence” to establish discriminatory effect.\textsuperscript{181}

In a separate concurring opinion in \textit{Sellers}, Judge Jacqueline Nguyen reflected on how law enforcement’s focus on certain geographic areas might provide additional proof of discriminatory effect and discriminatory intent. She concluded that “[e]vidence that law enforcement agents or their confidential informants scoured disproportionately minority neighborhoods in search of stash house reverse sting targets is evidence of discriminatory effect.”\textsuperscript{182} Regarding discriminatory intent, Judge Nguyen questioned

\textsuperscript{176} Cf. \textit{id.} (holding that a defendant “need not, at the initial stage, provide ‘some evidence’ of discriminatory intent”).

\textsuperscript{177} 906 F.3d at 856 (“[E]ven if the dissent were correct that Sellers presented no evidence of discriminatory effect, evidence of discriminatory intent may be enough to warrant discovery.” (citation omitted)).

\textsuperscript{178} \textit{Id.} at 856 n.11 (“Indeed, even in the selective prosecution context, the Supreme Court left open the possibility that direct admissions by prosecutors of discriminatory purpose . . . would entitle the defendant to discovery without showing some evidence of discriminatory effect.”); see \textit{also}, e.g., United States v. Mumphrey, 193 F. Supp. 3d 1040, 1064 (N.D. Cal. 2016) (relying on “race-based comments” by some San Francisco police officers to grant discovery in support of a selective law enforcement claim).

\textsuperscript{179} \textit{Id.}

\textsuperscript{180} \textit{Id.}

\textsuperscript{181} \textit{Washington,} 869 F.3d at 221.

\textsuperscript{182} \textit{Sellers,} 906 F.3d at 861 (Nguyen, J., concurring).
“whether conducting stash house operations almost exclusively in neighborhoods known to be black and Hispanic, and excluding neighborhoods known to be white, is in fact a ‘facially neutral’ policy,” positing that agents “limiting their operations to minority neighborhoods . . . [is] also potentially indicative of discriminatory purpose.”

Finally, while Davis, Washington, and Sellers increase the likelihood of defendants obtaining discovery, no court has lowered Armstrong’s high merits standard in the policing context. Given the near impossibility of identifying similarly situated individuals even with discovery, courts should seriously consider lowering the merits standard as well.

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Davis, Washington, and Sellers recognized that a strict application of Armstrong is inappropriate for selective law enforcement claims. Davis, however, did not articulate a clear standard applicable in future cases. Washington formulated a new standard in Armstrong’s place: a defendant need only present “some evidence” of discriminatory effect and need not present evidence of similarly situated individuals or evidence of discriminatory intent. Sellers allowed a defendant to meet just one of the two

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183 Id. at 860–61. One district court in New Mexico found that a defendant provided “some evidence” of discriminatory intent by highlighting the “ATF’s focus on neighborhoods with a predominantly minority population, use of primarily African-American confidential informants (CIs), and targeting of African-American neighborhood contacts.” Order Granting Discovery, supra note 169, at 3; cf. Kohler-Hausmann, supra note 165, at 1188–91 (arguing that discrimination in a hypersegregated city may be masked in statistical comparisons because a neighborhood’s “racial history [has] produced a social geography [where] few if any majority-black neighborhoods . . . share all relevant characteristics with majority-white neighborhoods”).

184 See, e.g., Sellers, 906 F.3d at 856 (“Thus, obtaining discovery on a selective enforcement claim does not ‘require some evidence tending to show the existence of [both] essential elements of the defense, discriminatory effect and discriminatory intent,’ notwithstanding that the defendant will eventually need to show both elements to prevail on the claim.” (alteration in original) (citation omitted) (quoting United States v. Armstrong, 517 U.S. 456, 468 (1996))).

185 At the merits stage in the Chicago stash house litigation, for example, one judge denied defendants’ motion to dismiss for racially selective law enforcement because they had not provided evidence that the individuals in their similarly situated benchmark group were “actually available for selection by the ATF and willing to commit a stash house [robbery].” United States v. Brown, 299 F. Supp. 3d 976, 1010 (N.D. Ill. 2018) (emphasis added). Yet the benchmark group was by definition composed of people whom the ATF did not approach to commit a stash house robbery. It is therefore hard to imagine how a defendant could go about showing the subjective willingness of anyone in that benchmark group. This example illustrates the difficulty, if not the impossibility, of meeting the similarly situated standard, even with discovery in hand.
Armstrong prongs and eliminated the impractical similarly situated requirement, holding that a defendant need only provide “something more than mere speculation” to demonstrate discriminatory effect. Under Sellers and Washington, however, it remains unclear whether or to what degree defendants are required to present a comparative analysis to demonstrate discriminatory effect.

As this progression demonstrates, Davis ushered in a significant change in the discovery standard for defendants challenging racially selective law enforcement practices. Although that new standard was honed in the context of fake stash house operations, it applies broadly to any case in which a criminal defendant is seeking discovery to support a claim of race discrimination by the police. 186

C. Resolving the Split in Authority

In the wake of these three recent circuit court cases, other courts should adopt a lower discovery standard for selective law enforcement claims. Without a lower standard, potentially meritorious claims cannot move forward and discrimination will go unchecked.

Davis, Washington, and Sellers were correct in adopting a lower discovery standard for three reasons. First, the doctrines that underlie Armstrong’s selective prosecution holding do not apply in the law enforcement context. Second, requiring a similarly situated showing to establish discriminatory effect is especially unworkable in the law enforcement context. Third, a lower discovery standard is necessary to enable criminal defendants to litigate selective law enforcement challenges on the merits.

The first justification for a lower discovery standard in the selective law enforcement context relates to the salient differences between prosecutors and law enforcement officers. Armstrong, at its core, rests on “the special solicitude shown to prosecutorial discretion”—not law enforcement discretion. 187 In particular, a “presumption of regularity” supports prosecutorial decisions and, “in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” 188

186 See, e.g., United States v. Mumphrey, 193 F. Supp. 3d 1040, 1048 (N.D. Cal. 2016) (agreeing with the reasoning in Davis and granting discovery in support of a selective law enforcement claim in an ordinary federal drug sting operation); Order Granting Discovery, supra note 169, at 4 (granting discovery in a non-stash house ATF drug sting operation).


But the “presumption of regularity” does not apply to law enforcement officers. Armstrong took the phrase “presumption of regularity” from United States v. Chemical Foundation, in which the Court discussed the presumption as applied to a “public officer” appointed by the President pursuant to an executive order and a statute—someone with far more authority than a law enforcement officer. When elaborating on this “presumption of regularly,” the Armstrong Court also quoted Bordenkircher v. Hayes, a case about a prosecutor’s discretion to initiate plea bargaining.

The Armstrong Court further explained that prosecutors are accorded a presumption of regularity because “the Attorney General and United States Attorneys retain ‘broad discretion’ to enforce the Nation’s criminal laws” under Article II, Section Three. As a result, a “selective-prosecution claim asks a court to exercise judicial power over a ‘special province’ of the Executive.” But there is no “special province” of law enforcement. In fact, “[u]nlike prosecutors, [law enforcement] agents regularly testify in criminal cases, and their credibility may be relentlessly attacked by defense counsel.” The right to cross-examine a witness, guaranteed by the Sixth Amendment, is broad. Moreover, “[s]tatements that agents make in affidavits for search or arrest warrants may be contested, and the court may need their testimony to decide whether if shorn of untruthful statements the affidavits would have established probable cause.”

In the civil context, law enforcement officers are not afforded the same presumption of constitutionality as prosecutors. While prosecutors ordinarily are shielded by absolute immunity for their prosecutorial acts, police

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189 272 U.S. 1, 13–15 (1926).
191 Id. (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)).
192 Id. (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985)).
193 United States v. Davis, 793 F.3d 712, 720 (7th Cir. 2015) (en banc); see also id. (“They also may have to testify in pretrial proceedings, such as hearings on motions to suppress evidence, and again their honesty is open to challenge.”).
194 See United States v. Lankford, 955 F.2d 1545, 1548 (11th Cir. 1992) (noting it is well established that “[t]he right of confrontation guaranteed by the Sixth Amendment includes the right of cross-examination”); Davis v. Alaska, 415 U.S. 308, 316 (1974) (“[T]he cross-examiner is not only permitted to delve into the witness’ story to test the witness’ perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.”).
195 Davis, 793 F.3d at 720 (citing Franks v. Delaware, 438 U.S. 154 (1978)).
196 See Buckley v. Fitzsimmons, 509 U.S. 259, 268–71 (1993); id. at 273 (“A[ct]s undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.”); Forrester v. White, 484 U.S. 219, 225–26 (1988) (stating that absolute immunity extends to “Executive Branch officials who . . . perform prosecutorial functions that are ‘intimately associated with the judicial phase of the criminal process’” (citation omitted)). Even prosecutors, however, are not immune from liability
officers and federal agents enjoy no such categorical protection. Rather, law enforcement officers receive only “qualified immunity” for personal liability in the performance of their duties.\textsuperscript{197} Law enforcement officers may be held personally liable for “withholding evidence from prosecutors and thus causing violations of the constitutional requirement that defendants have access to material, exculpatory evidence.”\textsuperscript{198} When a police officer does arrest a person without probable cause, the officer may be liable in a civil rights suit for damages.\textsuperscript{199} As the Third Circuit explained forty years before \textit{Washington}, “[t]he special considerations which lead us to grant absolute immunity to a prosecutor’s decision to initiate and present a criminal action are simply not present when a federal law enforcement officer is charged with constitutional violations.”\textsuperscript{200}

To the extent that any special considerations support deference to law enforcement, those considerations carry the least weight when a law enforcement policy is challenged. This is especially relevant in the stash house context, as such operations appear across the United States not because of “some kind of convergent law-enforcement evolution, but instead . . . due to the promulgation of official policies by a federal agency.”\textsuperscript{201} There is no qualified immunity for suits brought against entities, such as counties or state police agencies, when the alleged violation is an entity-wide policy.\textsuperscript{202}

Nor do \textit{Armstrong}’s other justifications for deference apply to law enforcement. \textit{Armstrong} found that deference to prosecutors’ decisions “rests in part on an assessment of the relative competence of prosecutors and

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\textsuperscript{197} See \textit{Harlow v. Fitzgerald}, 457 U.S. 800 (1982). Professor William Baude recently called into question whether such qualified immunity has a constitutional basis. \textit{See generally William Baude, Is Qualified Immunity Unlawful?}, 106 CALIF. L. REV. 45 (2018) (arguing that the doctrine of qualified immunity is unlawful and inconsistent with principles of statutory interpretation).

\textsuperscript{198} \textit{Davis}, 793 F.3d at 720; see also \textit{Moldowan v. City of Warren}, 578 F.3d 351, 381 (6th Cir. 2009) (recognizing that “virtually every other circuit has concluded either that the police share in the state’s obligations under \textit{Brady}, or that the Constitution imposes on the police obligations analogous to those recognized in \textit{Brady}”).


\textsuperscript{200} \textit{Forsyth v. Kleindienst}, 599 F.2d 1203, 1216 (3d Cir. 1979).

\textsuperscript{201} \textit{United States v. Washington}, 869 F.3d 193, 220 (3d Cir. 2017) (“The ATF reverse sting model is familiar to us and other courts precisely because it is a defined operation, one with policies, manuals, targeting criteria, and standards.”).

\textsuperscript{202} \textit{Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit}, 507 U.S. 163, 166 (1993) ("[U]nlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983.")
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courts,” which is “not readily susceptible to the kind of analysis the courts are competent to undertake.” But courts see thousands of civil suits against police officers each year. While courts have historically been hesitant to review decisions of prosecutors, no such hesitance exists for police officers. To the contrary, when a person is arrested without a warrant, courts are actually required to review the police officer’s discretionary decision. Thus, courts commonly inquire into the arrest process and any procedures the officer may or may not have followed.

Justice Neil Gorsuch recently recognized these distinctions in his concurrence in Nieves v. Bartlett, explaining that “enough questions remain about Armstrong’s potential application [to the law enforcement context] that I hesitate to speak definitively about it today.” In support, Justice Gorsuch cited the three courts of appeals cases discussed above and summarized their conclusion that “the presumptions of regularity and immunity that usually attach to official prosecutorial decisions do not apply equally in the less formal setting of police arrests.”

Finally, Armstrong found that deference to prosecutors’ charging decisions “also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function,” which may “chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry.” But law enforcement officers do not have the same type of “core executive function” to which the Court refers. Prosecutors decide when the law should be enforced, and the judiciary is loath to evaluate

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204 Section 1983 suits are routinely brought against police officers in their individual capacity. For example, data collected in New York City from 2015 to 2018 suggest that at least 152 lawsuits have been filed against police officers for violations of the Equal Protection Clause alone. See Legal Aid Soc’y, Lawsuits Against New York City Police Officers, CAPSTAT, https://www.capstat.nyc/lawsuits/?charge_group_value=&charge_outcomes_value=&causes_of_action_value=Violation+of+Equal+Protection+Clause&tags_value=&force_details_value=&stop_location_value=&county_value=&incident_date=&plaintiff_race_value=&plaintiff_gender_value=&settlement_amount=&outcome=&sort=-settlement_amount [https://perma.cc/R3RW-RGSD].

205 See United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965).


208 Id. at 1733–34 (first citing United States v. Sellers, 906 F.3d 848, 856 (9th Cir. 2018); then citing United States v. Washington, 869 F.3d 193, 219 (3d Cir. 2017); and then citing United States v. Davis, 793 F.3d 712, 720–21 (7th Cir. 2015)).

those decisions due to separation of powers concerns.\textsuperscript{210} No separation of powers concern exists in the law enforcement context.\textsuperscript{211} Moreover, any chilling effect a lower discovery standard might have on law enforcement will be tempered by an important practical limit: for defendants to bring a successful selective law enforcement claim, they would need to be arrested for a particular crime—such as crack distribution—or as part of a specific law enforcement operation—such as a sting operation or drug-interdiction checkpoint. They would also need to demonstrate that law enforcement had arrested a selected group whose racial composition is different from that of the general population (or some other benchmark group). And determining the contours of that selected group presents its own challenges.\textsuperscript{212}

At the end of the day, the time is right to “chill law enforcement” by subjecting the police officer’s “motives and decisionmaking to outside inquiry.”\textsuperscript{213} It is both morally and legally troubling that the police can run operations that almost exclusively target people of color. Discovery is the only mechanism a defendant has to start the process of holding law enforcement accountable. Departing from \textit{Armstrong} is thus an important step toward equal justice for all.

The second reason courts should adopt a lower discovery standard for selective law enforcement claims is that \textit{Armstrong}’s similarly situated requirement is unreasonable in the law enforcement context. It is impossible to identify a particular white individual whom the police did not target or investigate because it is impossible to prove a negative. Identifying similarly situated individuals is “especially difficult in policing cases: police keep no ‘records of instances in which they could have stopped a motorist . . . but did not.’”\textsuperscript{214} Even if the defendant uses statistics, \textit{Armstrong}’s similarly situated

\textsuperscript{210} See, e.g., Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973) (“The primary ground upon which this traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine.”); \textit{Cox}, 342 F.2d at 171 (“[A]s an officer of the executive department [a U.S. Attorney] exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.” (citation omitted)). \textit{But see} KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 210 (1979) (“If separation of powers prevents review of discretion of executive officers, then more than a hundred Supreme Court decisions spread over a century and three-quarters will have to be found contrary to the Constitution!”).

\textsuperscript{211} See supra notes 201–204 and accompanying text.

\textsuperscript{212} See infra note 301.

\textsuperscript{213} \textit{Armstrong}, 517 U.S. at 465 (quoting \textit{Wayte}, 470 U.S. at 607).

requirement would require a defendant at the discovery stage to identify white individuals who met the law enforcement agency’s selection criteria, but whom police did not target. Yet, without the law enforcement agency’s criteria—often the very object of the defendant’s motion for discovery—this is impossible. It is unsurprising that “[m]ost—though not all—judges have denied defendants’ [selective law enforcement discovery] motions on the grounds that they could not prove that ‘similarly situated’ whites were not targeted.”

Courts recognize Armstrong’s ill fit in the selective law enforcement context. As one New Jersey appellate court explained, “In most instances, a claim of selective [law] enforcement cannot be proven without discovery of police records, which show enforcement patterns during a period of time in a given geographical location. These records are usually within the exclusive control of the police agency.” The Fourth Circuit observed that “[i]n the stash house sting context, a defendant . . . face[s] considerable difficulty obtaining credible evidence of similarly situated individuals who were not investigated by ATF.” Justice Gorsuch recently recognized the Third, Seventh, and Ninth Circuits’ reasoning that “comparative data about similarly situated individuals may be less readily available for arrests than for prosecutorial decisions, and that other kinds of evidence—such as an officer’s questions and comments to the defendant—may be equally if not more probative in the arrest context.”

The third reason the discovery standard for selective law enforcement claims should be lowered is to allow courts to adjudicate police discrimination claims on the merits. For example, the new standard set in Davis enabled Professor Siegler and her Federal Criminal Justice Clinic to obtain discovery about the ATF’s selection criteria for its Chicago stash house operations and the racial composition of the selected group—the ninety-four defendants targeted in stash house operations in Chicago from 2006 to 2013—as well as extensive criminal history data to determine the

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215 Kohler-Hausmann, supra note 165, at 1190.
218 Nieves v. Bartlett, 139 S. Ct. 1715, 1733–34 (2019) (Gorsuch, J., concurring) (citing United States v. Sellers, 906 F.3d 848, 856 (9th Cir. 2018); then citing United States v. Washington, 869 F.3d 193, 219 (3d Cir. 2017); and then citing United States v. Davis, 793 F.3d 712, 720–21 (7th Cir. 2015)).
universe of individuals who met the ATF’s selection criteria.\textsuperscript{220} Armed with this information, the Clinic retained Professor Jeffrey Fagan to produce an expert report. Professor Fagan used the ATF’s selection criteria and the criminal history data obtained in litigation against the Illinois State Police to identify a benchmark group, identifying 292,442 individuals who met the ATF’s selection criteria but were not pursued for fake stash house operations.\textsuperscript{221} Fagan then used several statistical analyses to compare the racial composition of the benchmark group (72.2\% nonwhite; 55.4\% Black) with the racial composition of the selected group (91.5\% nonwhite; 78.7\% Black).\textsuperscript{222} Fagan concluded: “The results of several empirical analyses converge to show a pattern of discrimination by defendant race and ethnicity in the targeting of Black and Hispanic persons for fictitious Stash House stings.”\textsuperscript{223}

Based on Fagan’s report, the Clinic litigated the issue on the merits, filing motions to dismiss for racially selective law enforcement on behalf of forty-three indigent federal criminal defendants charged in twelve fake stash house cases in Chicago, including Leslie Mayfield.\textsuperscript{224} The nine federal judges presiding over the cases held an unprecedented joint evidentiary hearing on the defendants’ motions to dismiss.\textsuperscript{225} In the wake of that hearing, the United States Attorney’s Office for the Northern District of Illinois made highly unusual plea offers, offering to dismiss all of the mandatory-minimum gun and drug charges.\textsuperscript{226} Many of the forty-three defendants who were originally facing fifteen to thirty-five years in prison received time-served sentences and were released.\textsuperscript{227} None of this would have happened if the Seventh Circuit had strictly applied \textit{Armstrong}’s discovery standard in \textit{Davis}.

\textsuperscript{220} See Brown, 299 F. Supp. 3d at 992 (“The government estimates that as a result of the Court’s orders, more than 5,000 pages of [discovery] materials have been disclosed.”). In addition, Professor Siegler obtained state-level criminal history data that included race in a separate proceeding, \textit{Id.} (“To assist Professor Fagan in obtaining the data necessary to conduct his analysis, the Court presided over protracted third-party subpoena proceedings involving the Illinois State Police[,] resulting in] an extensive amount of crime data being turned over . . . .” (citations omitted)).

\textsuperscript{221} See Report of Jeffrey Fagan, Ph.D., \textit{supra} note 9, at 5–6, 20.

\textsuperscript{222} \textit{Id.} at 17 tbl.3.1, 18 tbl.3.2, 22.

\textsuperscript{223} \textit{Id.} at 36.

\textsuperscript{224} See United States v. Paxton, No. 13-CR-0103, 2018 WL 4504160, at *1 (N.D. Ill. Sept. 20, 2018) (describing the motions to dismiss filed in the twelve criminal cases “after extensive discovery, expert analysis and a unique hearing before the nine judges from this district who had false stash house cases on their calendars”); Motion to Dismiss for Racially Selective Law Enforcement, \textit{supra} note 219, at 25 (arguing that “[t]he Fagan Report’s statistical analyses create a strong inference that the ATF intentionally targeted racial minorities”).

\textsuperscript{225} Paxton, 2018 WL 4504160, at *1; see also Meisner, \textit{supra} note 4.

\textsuperscript{226} Meisner, \textit{supra} note 4.

\textsuperscript{227} See \textit{id.}; Sweeney & Meisner, \textit{supra} note 3.
The bottom line is that Armstrong is a bad fit for the selective law enforcement context—both doctrinally, as the underlying rationales do not apply, and functionally, because in practice the similarly situated requirement is impossible to meet. Moreover, the discovery standard matters. Relaxing that standard enables judges to evaluate meritorious claims, which in turn can lead prosecutors to reassess whether to move forward with prosecution. Courts should therefore revisit their discovery standards for selective law enforcement claims and depart from Armstrong.

III. STATE-LEVEL REFORM

Federal courts are only part of the story. Most law enforcement interactions involve local police, and about 87% of all prisoners are held in state systems. While Davis, Washington, and Sellers took important strides toward full enforcement of equal protection rights on the federal level, state courts still apply Armstrong’s insurmountable discovery standard to selective law enforcement claims. As a result, Armstrong often thwarts state defendants seeking selective law enforcement discovery, either under the federal Equal Protection Clause or a state constitutional equivalent.

A state-level solution is needed to ensure that meritorious equal protection claims are not blocked by Armstrong’s impossible discovery standard. Too often, efforts to address discrimination by police focus exclusively on federal-level reforms. Reformers and scholars tend to forget that the United States has a system of dual constitutionalism, where both the federal Constitution and state constitutions protect individual rights. As Justice William Brennan observed in a famous article, “State constitutions . . . are a font of individual liberties, their protections often

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228 In addition to the Chicago stash house litigation, after a federal district court in San Francisco granted discovery in support of a selective law enforcement claim, United States v. Mumphrey, 193 F. Supp. 3d 1040 (N.D. Cal. 2016), the government dismissed the cases against thirty-seven defendants arrested as part of an ATF drug sting operation, Notice of Dismissal, Mumphrey, No. 14-CR-0643-EMC (N.D. Cal. Jan 25, 2017), ECF No. 293 (order approving government’s notice of dismissal with prejudice).


231 G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 1 (1998) (“Americans live under a system of dual constitutionalism, but one would hardly know it.”).
extending beyond those required by the Supreme Court’s interpretation of federal law.”

Section III.A traces state courts’ adoption of Armstrong’s discovery standard for both selective prosecution and law enforcement claims. Section III.B identifies recent state-level reforms in other contexts that are more protective of criminal defendants’ rights than the federal Constitution. In particular, it looks to state court rules, state statutes, and reinterpretations of state constitutional provisions. It further explains how each of these mechanisms is a potential vehicle for reforming the discovery standard for selective law enforcement claims brought in state courts, setting the stage for Part IV to ultimately propose a new state court rule.

A. Armstrong on the State Level

State courts have generally applied Armstrong’s discovery standard to both selective prosecution and selective law enforcement claims brought under the Fourteenth Amendment. Courts in California, New Jersey, Colorado, Washington, and Pennsylvania all do so. As one Pennsylvania court explained, “in cases of alleged selective enforcement,” a party “needs to produce evidence ‘tending to show the existence of the essential elements of the defense, discriminatory effect and discriminatory intent.’” Pennsylvania, like other states, roots this standard in

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233 People v. Sanchez-Eseverre, No. C065460, 2011 WL 5138080, at *1, *5 (Cal. Ct. App. Oct. 31, 2011) (applying Armstrong’s “some evidence” standard to a claim that Hispanic drivers were singled out for enforcement of traffic laws). In fact, California’s discovery rules “prohibit[] any discovery in a criminal case which is not expressly mandated by statute or required by the U.S. Constitution.” People v. Superior Ct. (Baez), 94 Cal. Rptr. 2d 706, 714 (Ct. App. 2000); see also Cal. Penal Code §§ 1054(e), 1054.5(a).


235 People v. Valencia-Alvarez, 101 P.3d 1112, 1116 (Colo. App. 2004) (“To obtain discovery on this issue, the defendant need not establish a prima facie case of selective enforcement. The defendant must, however, provide some evidence tending to show the existence of both discriminatory effect and discriminatory intent.” (citing United States v. Armstrong, 517 U.S. 456, 468 (1996))).

236 State v. Johnson, No. 52123-3-I, 2005 WL 353314, at *5 (Wash. Ct. App. 2005) (recognizing that “[t]he Armstrong decision was in the context of selective prosecution, not selective enforcement” but ultimately concluding that for discovery purposes “the requirement for a determination of who is similarly situated used for selective prosecution claims should be applied here”).


No state court has yet recognized the distinction the three federal courts of appeals have drawn between selective prosecution and selective law enforcement.

Only Arizona has independently considered the discovery standard for selective law enforcement claims under its own constitution and adopted Armstrong. In Jones v. Sterling, the Arizona Supreme Court extended Armstrong’s discovery standard to selective law enforcement claims when interpreting a provision of Arizona’s constitution mirroring Article II’s executive power provisions. The defendants asserted that police conducting traffic stops had engaged in racially selective law enforcement, requested discovery, and moved for appointment of an expert witness under Arizona’s discovery rules. The expert appointment issue turned on whether the defendants had met their burden for obtaining discovery.

Although the court was not bound to follow Armstrong, it nevertheless drew parallels between the Arizona constitution and the United States Constitution and extended Armstrong’s discovery standard to selective law enforcement claims. The court concluded that the policy reasons animating Armstrong were also present in the selective law enforcement context, explaining that the “Arizona Constitution, like its federal counterpart, charges the executive branch with the duty to ensure that the ‘laws be faithfully executed.’” As a result, the court imposed Armstrong’s “demanding standard” on the defendants.

B. State Law Reforms

Our federalist system allows for states to protect individual rights to a greater degree than the federal government. Supreme Court decisions interpreting the Equal Protection Clause of the U.S. Constitution define a constitutional minimum of protection; that is, they set the federal floor. But these decisions do not prevent states from setting higher standards for combatting discrimination. In recent years, states have enacted legislation, passed criminal rules of procedure, or interpreted their own constitutions to provide more protections to criminal defendants than the federal

239 The case the court quoted in laying out the standard for selective law enforcement cases cites Armstrong. See Koken, 911 A.2d at 1031. Additionally, the opinion clearly lays out the distinction between selective enforcement and selective prosecution claims. See KC Equities, 95 A.3d at 934.


241 Id. at 1272–73. Jones was African American, while Rodriguez-Burgos and Rodriguez were Latino. Id. at 1272. Arizona Rule of Criminal Procedure 15.9(a) enables indigent defendants to apply for funding for experts.

242 Id. at 1279.

243 Id. at 1278 (comparing U.S. CONST. art. II, § 3 with ARIZ. CONST. art. 5, § 4).

244 Id. at 1278–79.
Constitution. For example, states have enacted new rules to combat racial discrimination in jury selection and enlarge prosecutors’ obligation to disclose exculpatory evidence. This Section discusses those reforms and suggests how the same mechanisms could be used to create new state-level discovery standards for racially selective law enforcement claims.

1. State Court Rules

Most state courts’ rulemaking authority allows them to promulgate rules governing their practices and procedures. The source of courts’ authority varies from state to state and often comes from state statutes, state constitutions, or a court’s inherent authority.245 State court rules cover a broad range of areas, from court interpreters to access to records to security to jury selection. Recently, some states have achieved criminal justice reforms using state court rules. For example, Washington adopted a state court rule that extends protections against discrimination in jury selection, and several state courts have promulgated rules that expand a prosecutor’s required discovery disclosures. These new rules provide a valuable model for setting a new discovery standard for selective law enforcement claims.

A recent rule adopted by the Washington Supreme Court to combat race discrimination in jury selection demonstrates how reform can be enacted through state court rules. In Batson v. Kentucky, the Supreme Court set a high “purposeful discrimination” standard for race-based jury selection claims.246 Batson’s purposeful discrimination requirement is analogous to Armstrong’s discriminatory-intent requirement, as both expect the defendant to provide difficult-to-procure evidence of intentional discrimination. Batson has been widely criticized for providing scant protection to defendants seeking to challenge racial discrimination in jury selection. 247 Like Armstrong, Batson is insurmountable for many defendants.248


246 476 U.S. 79, 95 (1986).


248 See Jeffrey Bellin & Junichi P. Semitsu, Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney, 96 CORNELL L. REV. 1075, 1092 (2011) (examining 269 federal civil and criminal Batson decisions over a nine-year period and finding that relief in the form of a new trial was granted in fewer than 7% of the cases and that in “85.1% [of the] cases, the court rejected the Batson claim altogether”); EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4 (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/NG4A-Z9HT] (presenting two years of research in eight southern states that “uncovered shocking evidence of racial discrimination in jury selection”).
The Washington Supreme Court recognized *Batson*’s unworkability, concluding that “[t]wenty-six years later it is evident that *Batson* . . . is failing us.”249 The court cited a growing body of evidence showing that “*Batson* has done very little to make juries more diverse or prevent prosecutors from exercising race-based challenges.”250 In response, the Washington Supreme Court assembled a working group to formulate a new state court rule to rectify *Batson*’s shortcomings. The working group included defense attorneys, prosecutors, judges, and practitioners who agreed that “[t]he proposed rule should not simply codify *Batson* and its progeny.”251

Eventually, the Washington Supreme Court adopted General Rule 37, which provides additional protections against discrimination in jury selection.252 The rule replaces *Batson*’s “purposeful discrimination” standard with an “objective observer” test, stating that the judge should grant the objection if “an objective observer could view race or ethnicity as a factor” in the peremptory strike, even if the court does not find that “purposeful discrimination” is afoot.253 The rule further defines an “objective observer” as someone who “is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors.”254 Additionally, the rule lists presumptively invalid reasons for a peremptory challenge. This list includes the many purportedly race-neutral reasons that typically shield prosecutors’ strikes of prospective jurors, like prior contact with law enforcement, distrust of law

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250 *Id.* In *Saintcalle*, the court relied heavily on Justice Stephen Breyer’s concurring opinion in *Miller-El v. Dretke*, 545 U.S. 231. Justice Breyer explained that “studies and anecdotal reports suggest[] that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem.” *Id.* at 268 (Breyer, J., concurring) (collecting sources).

251 WASH. CT. JURY SELECTION WORKGROUP, PROPOSED NEW GR 37—JURY SELECTION WORKGROUP FINAL REPORT 3 (2018) [hereinafter WORKGROUP FINAL REPORT], https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf [https://perma.cc/LM44-LWLK]. Recall that state courts are not bound by the low level of protection that *Batson* affords criminal defendants. Rather, because *Batson* is rooted in the Equal Protection Clause, it defines a constitutional minimum of protection; that is, it sets the federal floor. Nothing prevents states from combatting discrimination in jury selection more aggressively, whether through court rules or legislation.


253 WASH. CT. GEN. R. 37(f).

254 *Id.* 37(f).
enforcement, living in a high-crime neighborhood, not being a native English speaker, and so on.\textsuperscript{255} Rule 37 also codifies the concept of comparative juror analysis.\textsuperscript{256} The Supreme Court and lower courts have held that it is evidence of purposeful discrimination if a prosecutor’s reason for a given peremptory strike applies equally to an otherwise similarly situated juror of another race or gender who was not struck from the jury.\textsuperscript{257} Yet, unlike several state and federal courts,\textsuperscript{258} the Supreme Court has never explicitly held that comparative juror analysis is sufficient to prove a \textit{Batson} violation. Rule 37 moves the law forward by codifying the varieties of comparative juror analysis that can lead to the conclusion that discrimination is afoot.

Other state supreme courts have also begun to explore whether to adopt a similar rule to address \textit{Batson}’s many shortcomings. Recently, the Supreme Court of California convened a work group to consider whether its current standard for peremptory strikes is sufficient to eliminate discrimination.\textsuperscript{259} Connecticut and North Carolina have similarly formed work groups to study racial bias in jury selection.\textsuperscript{260}

In the discovery context, state courts have expanded criminal defendants’ right to obtain exculpatory evidence beyond the federal constitutional standard set in \textit{Brady v. Maryland}.\textsuperscript{261} \textit{Brady} doctrine imposes an onerous requirement that defendants establish “materiality”: prosecutors are only required to disclose exculpatory evidence if the defendant

\begin{footnotesize}
\textsuperscript{255} Id. 37(h).
\textsuperscript{256} Id. 37(g).
\textsuperscript{257} See Foster v. Chatman, 136 S. Ct. 1737, 1741 (2016) (finding impermissible discrimination when a prosecutor struck a Black juror because she was “too young” and “divorced” yet allowed white jurors to remain who were younger and also divorced); Miller-El v. Dretke, 545 U.S. 231, 261–63 (2005) (finding a prosecutor’s practice of seating white people but striking Black people who held identical opinions about the minimum sentence for murder was discriminator).
\textsuperscript{258} See, e.g., Gutierrez, 395 P.3d at 203; People v. Beauvais, 393 P.3d 509, 512 (Colo. 2017); People v. Sánchez, 375 P.3d 812, 874–75 (Cal. 2016) (Liu, J., concurring) (collecting state cases from Illinois, New York, and Alabama, as well as cases from six federal courts of appeals).
\textsuperscript{260} Beth Schwartzapfel, \textit{A Growing Number of State Courts Are Confronting Unconscious Racism in Jury Selection}, MARSHALL PROJECT (May 11, 2020, 6:00 AM), https://www.themarshallproject.org/2020/05/11/a-growing-number-of-state-courts-are-confronting-unconscious-racism-in-jury-selection [https://perma.cc/S4T2-CZ7D].
\textsuperscript{261} 373 U.S. 83, 87 (1963).
\end{footnotesize}
establishes that the evidence has a “reasonable probability” of affecting the outcome of the trial or sentencing. Justice Thurgood Marshall critiqued the materiality prong as “enabl[ing] prosecutors to avoid disclosing obviously exculpatory evidence” by deeming that evidence nonmaterial. The materiality prong means that only the most egregious failures to disclose evidence lead to reversal on appeal. Like the standards in Batson and Armstrong, Brady’s materiality requirement is too demanding to provide any meaningful protection for defendants and bars otherwise meritorious claims.

Recently, the Supreme Court of Pennsylvania’s Criminal Procedural Rules Committee published notice of a proposed amendment that seeks to remove the demanding “materiality” requirement. The amendment explains:

[The exculpatory evidence rule] was amended in 2019 to remove the provision of “materiality” from the requirement of mandatory disclosure by the prosecution of information favorable to the defense. While originally intended to convey the idea that the information was relevant to the case at issue, the

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262 United States v. Bagley, 473 U.S. 667, 682 (1985) (holding that, regardless of request, favorable evidence is material and must be disclosed “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different”); accord Kyles v. Whitley, 514 U.S. 419, 433–44 (1995).

263 Bagley, 473 U.S. at 700 (Marshall, J., dissenting) (explaining that a materiality standard means “there is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial[,] . . . permit[ting] prosecutors to withhold with impunity large amounts of undeniably favorable evidence”).

264 See Christopher Deal, Note, Brady Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury, 82 N.Y.U. L. REV. 1780, 1793 n.77 (2007) (“With Brady, prosecutors have no mandatory procedure to follow or neutral observer to placate. They are not duty-bound to serve the interests of the defendant. Instead, they can withhold nonmaterial evidence for any or no reason; and the guiltier the defendant seems, the more evidence they can withhold.”).

265 See, e.g., Daniel S. Medwed, Brady’s Bunch of Flaws, 67 WASH. & LEE L. REV. 1533, 1543 (2010) (“When Brady issues do come to light, the materiality test is a heavy burden for a defendant to overcome on appeal.”); Angela J. Davis, The American Prosecutor: Independence, Power, and the Threat of Tyranny, 86 IOWA L. REV. 393, 432 (2001) (discussing a Pittsburgh Post-Gazette study that “found that prosecutors intentionally withheld evidence in hundreds of cases during the past decade, but that courts overturned verdicts in only the most extreme cases”); Scott E. Sundby, Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland, 33 GEORGE L. REV. 643, 647 (2002) (describing the Supreme Court’s increasingly narrow reading of “materiality” as a significant hurdle for defendants).

term had become more narrowly defined in practice and used as an obstacle for disclosure.  

The proposed amendment thus aligns itself with ABA Model Rule of Professional Conduct 3.8(d) and various state court ethical rules that likewise eliminate the materiality component and require disclosure of all favorable evidence regardless of its effect on the outcome of the case.  

Similarly, Alaska and Hawaii have state court rules that appear to remove or modify the “materiality” requirement. A number of federal district courts have local rules that explicitly require disclosure of favorable evidence “without regard to materiality.”  

State courts could institute similar rules to codify the new racially selective law enforcement discovery standard established by the federal courts of appeals. State courts could go even further and devise a system that authorizes the appointment of experts to assist defendants in establishing their selective law enforcement claim. Part IV more fully explores this possibility by proposing a new state court rule.

267 Id. at 8.  
268 See, e.g., MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS’N 2020); TENN. SUP. CT. R. 8; In re Larsen, 379 P.3d 1209 (Utah 2016); In re Kline, 113 A.3d 202 (D.C. 2015); VA. STANDING COMM. ON LEGAL ETHICS, LEGAL ETHICS OPINION 1862: “TIMELY DISCLOSURE” OF EXCULPATORY EVIDENCE AND DUTIES TO DISCLOSE INFORMATION IN PLEA NEGOTIATIONS 2 (2012) (opinion of Virginia Legal Ethics Committee); In re Disciplinary Action Against Feland, 820 N.W.2d 672, 678 (N.D. 2012); In re Jordan, 913 So. 2d 775 (La. 2005).  
269 ALASKA R. CRIM. P. 16(b)(3) (requiring prosecutors to disclose “information . . . which tends to negate the guilt of the accused . . . or would tend to reduce the accused’s punishment” without reference to materiality). Interpreting this rule, Alaska courts have articulated a relatively lower requirement for disclosure than Brady. When evidence “was known to the prosecution and subject to discovery under Criminal Rule 16 but not disclosed, the defendant[] . . . need only show that the ‘undisclosed evidence might have affected the judgment of the jury or the outcome of the trial.’” Roseman v. State, No. A-659, 1985 WL 1078004, at *5 (Alaska Ct. App. Dec. 26, 1985) (quoting Maloney v. State, 667 P.2d 1258, 1264–65 (Alaska Ct. App. 1983)).  
270 Hawaii Rule of Penal Procedure 16(b)(1)(vii), which governs the disclosure of exculpatory evidence in felony cases, does not contain a materiality requirement on its face. Cf. HAW. R. PENAL. P. (16)(d) (providing discovery in misdemeanor cases only “[u]pon a showing of materiality”). The explicit inclusion of a materiality requirement in misdemeanor cases suggests that the court intentionally omitted any materiality requirement for the disclosure of favorable evidence in felony cases. See State v. Townsend, 784 P.2d 881, 883–84 (Haw. Ct. App. 1989) (“[I]n a case involving a felony, Rule 16 discovery is automatically available to the parties as a matter of right. However, the parties in a misdemeanor case may resort to discovery only by grace of the court’s discretion, upon a showing of materiality and reasonableness.”).  
2. **State Statutes**

State statutes provide another vehicle for reform. In both the civil and criminal contexts, state legislatures commonly determine the scope and duties of the discovery process, such as the default number or length of depositions, the scope of discovery, or procedures for electronically stored evidence.\(^{272}\) Overall, most states’ discovery statutes tend to be more expansive than the Federal Rules of Criminal Procedure.\(^{273}\) All states except Delaware, Indiana, and Nevada have statewide criminal discovery rules, promulgated either legislatively or judicially.\(^{274}\)

Texas’s Michael Morton Act is one recent example of criminal justice reform accomplished through a legislative change in discovery standards. Texas passed the Michael Morton Act\(^{275}\) in 2013 in response to a series of high-profile instances of prosecutorial misconduct, later rectified by exonerations.\(^{276}\) The Act radically changed criminal discovery in Texas by creating an open-file policy, which obviates the need for defense counsel to continually request discovery and eliminates delays in discovery production.\(^{277}\) The Act also attempted to relax the standard for disclosure of exculpatory evidence by rejecting *Brady*’s prohibitive “materiality” standard, just as the courts of appeals broke with *Armstrong*.\(^{278}\)

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\(^{272}\) *See, e.g.*, S.B. 224, 100th Gen. Assemb., 1st Reg. Sess., at 7, 9, 13, 18 (Mo. 2019) (limiting interrogatories, providing additional procedures for privileged materials, clarifying that electronically stored evidence is discoverable, and imposing time limitation on depositions); ME. R. UNIFIED CRIM. P. 16(a)(1)–(2) (establishing automatic disclosure of evidence by prosecutors in criminal cases).

\(^{273}\) Emily Dyer, Chelsea Stacey & Adrian Viesca, *Statewide Rules of Criminal Procedure: A 50 State Review*, 1 NEV. L.J.F. 1, 23 (2017); *see also* Baer, *supra* note 98, at 3 (“State legislatures are increasingly adopting more generous discovery regimes, many of which impose earlier and more rigorous disclosure requirements on prosecutors.”).

\(^{274}\) *See* Dyer et al., *supra* note 273, at 23 & n.157.


\(^{278}\) *See* S. COMM. ON CRIM. JUST., BILL ANALYSIS, S. 590-1611, 83d Reg. Sess., at 1 (Tex. 2013), https://capitol.texas.gov/tlodocs/83R/analysis/pdf/SB01611S.pdf [https://perma.cc/BVS2-DNB3] (“Every defendant should have access to all the evidence relevant to his guilt or innocence, with adequate time to examine it.”); TOWARDS MORE TRANSPARENT JUSTICE, *supra* note 276, at 22 (“Under the Act,
requires automatic disclosure of all “exculpatory, impeachment, or mitigating” evidence that “tend[s] to reduce the punishment for the offense charged.”

Texas courts, however, have ignored the Act’s clear design and gutted this provision by clinging to older language in the statute that uses the word “material” in a wholly different context.

Many other state legislatures have deviated from Brady and the Federal Rules of Criminal Procedure by requiring that prosecutors automatically turn over a broader category of relevant evidence to defendants. The Minnesota and North Carolina legislatures have enacted the most expansive open-file discovery statutes in the country.

In this vein, state legislatures could pass a new discovery standard for selective law enforcement claims that is not bound by Armstrong. Notably, before addressing the constitutional question, Armstrong held that Rule 16 of the Federal Rules of Criminal Procedure did not apply to discovery in support of a racially selective prosecution claim. A state legislature could similarly sidestep the constitutional question altogether by creating a state rule of criminal procedure codifying a discovery standard for disclosing evidence about race discrimination by the police.

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279 TEX. CODE CRIM. PROC. ANN. art. 39.14(h).

280 Id. art. 39.14(a); see Watkins v. State, 554 S.W.3d 819, 821 (Tex. App. 2018) (“[T]he definition or standard we must use to determine whether the objectionable evidence was material is the same after the passage of the Michael Morton Act as it was before passage, regardless of what the Legislature may have thought or intended to accomplish.” (emphasis added)); Clifton, supra note 277, at 344–47, 345 n.232 (collecting cases and prosecutors’ briefs advancing this position).

281 See Ben Grunwald, The Fragile Promise of Open-File Discovery, 49 CONN. L. REV. 771, 779 (2017) (“About thirty states provide defendants with broader discovery than the federal rule by partially or fully embracing these standards, which are more generous with respect to both witness lists and witnesses’ prior statements.” (citation omitted)). New York, for example, recently overhauled its criminal discovery statute, instituting an open-file system that requires prosecutors to automatically disclose a wide variety of evidence and implementing timelines for disclosure. N.Y. CRIM. PROC. LAW § 245.20 (McKinney 2020).

282 See MINN. R. CRIM. P. 9.01 subd. 1 (requiring disclosure of “all matters within the prosecutor’s possession or control that relate to the case”); N.C. GEN. STAT. ANN. § 15A-903(a)(1) (West 2016) (requiring disclosure of the “complete files of all law enforcement agencies, investigatory agencies, and prosecutors’ offices involved”); see also Grunwald, supra note 281, at 789–90 (examining Minnesota and North Carolina’s expansive discovery rules). Nevertheless, courts in both states have read Brady’s high materiality standard into their rules regarding disclosure of exculpatory evidence. See Pederson v. State, 692 N.W.2d 452, 460 (Minn. 2005); State v. Dorman, 737 S.E.2d 452, 472 (N.C. Ct. App. 2013).


A third way states reform criminal discovery is by interpreting their own constitutions to provide greater protection to defendants. Since state constitutions work independently from the federal Constitution, states should chart different paths than the Supreme Court. But state courts often lockstep, imitating federal courts’ interpretations of federal constitutional provisions when interpreting analogous state constitutional provisions. Lockstepping is unwise and antifederalist. Instead, state courts should interpret their own constitutions to forge a new discovery standard for racially selective law enforcement claims.

The United States Constitution is often called a “federal floor of individual rights.” While the “Supremacy Clause forbids state courts from providing less protection than what the U.S. Constitution guarantees,” the Supreme Court’s interpretation of the federal Constitution does not “limit the authority of [any] State . . . to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.”

As Sixth Circuit Judge Jeffrey Sutton remarked, “[S]tate guarantees may be the most promising source of rights, [and] state courts the most promising venue for vindicating them.” In the context of an equal protection challenge to school funding, Justice Marshall noted in dissent that “nothing in the Court’s decision today should inhibit further review of state educational funding schemes under state constitutional provisions.”

Similarly, in the Fourth Amendment context, the Court has explained that its constitutional holdings do “not affect the state’s power to impose higher standards on searches and seizures than required by the federal Constitution

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285 Douglas, supra note 284, at 106.

286 Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980); see also Oregon v. Hass, 420 U.S. 714, 719 (1975) (“[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.” (emphasis omitted))).


if it chooses to do so.” And in his final majority opinion, Justice Antonin Scalia underscored that “state courts may experiment all they want with their own constitutions, and often do in the wake of this Court’s decisions.”

Despite these precedents, state courts tend to look to federal case law for guidance on interpreting analogous provisions of state constitutions. State courts “lockstep” by “analyz[ing] the analogous rights in the state constitution as conferring the same level of protection as their federal counterparts,” diluting individual rights down to the federal floor. Judge Sutton critiques this practice, arguing that state courts “diminish their constitutions by interpreting them in reflexive imitation of the federal courts’ interpretation of the Federal Constitution”—a “grave threat to independent state constitutions, and a key impediment to the role of state courts in contributing to the dialogue of American constitutional law.” Indeed, lockstepping eviscerates the dual constitutional protection that citizens of federal and state polities should enjoy.

Historically, state courts have broken out of lockstep and departed from the Supreme Court’s one-size-fits-all interpretation. For example, in affirming the right to remain silent, the Supreme Court of California held that prosecutors could not use pre-Miranda statements to impeach a defendant who testifies, and “pause[ed] . . . to reaffirm the independent nature of the California Constitution and [its] responsibility to separately define and protect the rights of California citizens.” In doing so, the Supreme Court of California broke from federal precedent that allows prosecutors to impeach a testifying defendant with pre-Miranda statements.

In the discovery context, at least two state supreme courts have interpreted their state constitutions to set a lower materiality standard than

291 Douglas, supra note 284, at 106.
292 SUTTON, supra note 287, at 174; see also Goodwin Liu, Brennan Lecture, State Constitutions and the Protection of Individual Rights: A Reappraisal, 92 N.Y.U. L. REV. 1307, 1338 (2017) (“A state court may recognize individual rights that go unrecognized by the Supreme Court because of textual or historical considerations unique to that state or its constitution. . . . But there is nothing illegitimate about a state court rejecting the Supreme Court’s interpretation of a parallel constitutional provision on grounds that are not state-specific.”).
293 See Douglas, supra note 284, at 122 (“[L]ockstepping goes against the ideal of judicial federalism, which suggests that state constitutions should play a significant role in protecting individual liberties.”); see also Brennan, supra note 232, at 503 (“One of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens.”).
294 People v. Disbrow, 545 P.2d 272, 280 (Cal. 1976) (en banc).
Brady. In *State v. Shepherd*, the New Hampshire Supreme Court explained: “[O]ur constitutional analysis differs from that under the Federal Constitution regarding when the defendant has the burden to prove materiality.” 296 The court explained that under the New Hampshire constitution, if the defendant proves that the prosecution knowingly withheld “favorable, exculpatory evidence,” “there is a presumption that the evidence is material and the burden shifts to the State to prove, beyond a reasonable doubt,” that the evidence is not material.297 The court justified this departure by explaining that *Brady*’s standard “impose[s] too severe a burden upon the defendant.”298 New York’s highest court similarly broke with *Brady* long before its legislature enacted sweeping discovery reform.299 The court held that, under the due process clause of the state constitution, evidence withheld in the face of a specific discovery request is “material” as long as there is “a ‘reasonable possibility’ that the failure to disclose the exculpatory [evidence] contributed to the verdict.”300

In the selective law enforcement context, states need not apply *Armstrong*’s insurmountable discovery standard to claims brought under analogous state constitutional equal protection provisions.301 Many state constitutions have equal protection clauses which can be interpreted to provide more protection to criminal defendants than the federal Constitution.302 In one decision, Massachusetts’s highest court concluded that “evidence of racial profiling is relevant in determining whether a traffic stop is the product of selective [law] enforcement violative of the equal protection guarantee of the Massachusetts Declaration of Rights.”303

297 Id. at 1035 (quoting State v. Laurie, 653 A.2d 549, 552 (N.H. 1995)).
298 Id.
299 See supra note 281 for a summary of New York’s recent discovery reform.
300 People v. Vilardi, 555 N.E.2d 915, 920–21 (N.Y. 1990) (explaining that the court was rejecting the “reasonable probability” standard because “a backward-looking, outcome-oriented standard of review that gives dispositive weight to the strength of the [prosecutor’s] case clearly provides diminished incentive for the prosecutor . . . thoroughly to review files for exculpatory material, or to err on the side of disclosure where exculpatory value is debatable”).
301 Of course, *Armstrong* did not address selective law enforcement claims, only selective prosecution claims. Therefore, even under the federal Constitution, a state court could set a lower discovery standard for selective law enforcement claims, as the Third and Ninth Circuits did.
302 See, e.g., S.D. CONST. art. VI, § 18 (“No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.”); M.G.L.A. CONST. art. I, pt. 1 (Massachusetts) (“All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”).
court recognized that its holding “[did] not consider whether the same result would be reached under the Fourteenth Amendment to the United States Constitution."³⁰⁴

Similarly, states should not lockstep with Armstrong for selective law enforcement discovery claims. Instead of blindly adopting Armstrong’s standard, state courts should interpret their own state constitution’s equal protection clause to authorize discovery under a standard akin to the Third and Ninth Circuits’ standard. Such an approach is especially prudent given the distinctions the federal courts of appeals have drawn between the selective law enforcement context and the selective prosecution context in Armstrong.

Under this approach, even cases like Jones v. Sterling could come out differently. In Jones, the defendants brought a selective law enforcement claim under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, not the Arizona constitution’s equal protection provision, but sought discovery under Arizona’s discovery rules. The Arizona Supreme Court adopted Armstrong, reasoning that the United States Constitution and the Arizona constitution describe executive power similarly.³⁰⁵ Regardless, the court could have concluded that the prosecutorial considerations underlying Armstrong do not translate into Arizona’s separation of powers structure, perhaps recognizing that law enforcement officers historically do not enjoy the same level of state constitutional protection as prosecutors. If a state claim had been brought, however, the court would have had an entirely clean slate to set its own discovery standard for selective law enforcement claims. After all, states are bound only by the United States Supreme Court’s interpretation of the Fourteenth Amendment and are free to interpret their own equal protection provisions more expansively.³⁰⁶

Finally, because Armstrong did not address selective law enforcement claims, states deciding such claims are not bound by any particular interpretation. Even if a claim is brought under the Fourteenth Amendment, a state court may be animated by different policy considerations that lead it to reject Armstrong’s application to the selective law enforcement context, including the very same considerations that spurred three federal courts of appeals to depart from Armstrong.

³⁰⁴ Id. at 690 n.2.
Critics argue that lockstepping is good because it creates uniformity and predictability in outcomes at the federal and state levels. But “[t]here is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way.” The considerations that nine Supreme Court Justices must weigh when interpreting the United States Constitution are distinct from each state’s constitutional considerations. From an originalist perspective, the drafters’ intentions are likely to be different, especially in newer states. From a purposivist perspective, the social, economic, and other contextual circumstances are similarly bound to differ. As a result, highly generalized guarantees in the federal Constitution, such as the prohibition on “unreasonable” searches, do not necessarily “have just one meaning over a range of differently situated sovereigns.”

Moreover, “[f]ederalism considerations may lead the U.S. Supreme Court to underenforce (or at least not to overenforce) constitutional guarantees in view of the number of people affected and the range of jurisdictions implicated”—considerations to which states, as sovereigns, should pay no attention.

307 State v. Florance, 527 P.2d 1202, 1209 (Or. 1974) (explaining the importance of uniformity in search-and-seizure law); People v. Gonzalez, 465 N.E.2d 823, 825 (N.Y. 1984) (same); see also Earl M. Maltz, The Dark Side of State Court Activism, 63 Tex. L. Rev. 995, 1006–23 (1985) (arguing that expansive state court interpretations of individual rights result in unnecessary duplication and uncertainty about the scope of such rights).

308 SUTTON, supra note 287, at 174.


310 A classic example of this is differing treatment of riparian rights based on the location of the state. In eastern states, where water is more plentiful, anyone whose land borders a body of water may use a reasonable amount. Western states, where water is scarce, follow a prior appropriation rule, which establishes water rights based on the first person to put it to beneficial use. See Joseph W. Dellapenna, The Evolution of Riparianism in the United States, 95 Marq. L. Rev. 53 (2011).

311 SUTTON, supra note 287, at 174; see also id. at 17 (“In some settings, the challenge of imposing a constitutional solution on the whole country at once will increase the likelihood that federal constitutional law will be underenforced, that a ‘federalism discount’ will be applied to the right. State courts face no such problem in construing their own constitutions.” (footnote omitted)); Goodwin Liu, State Courts and Constitutional Structure, 128 Yale L.J. 1304, 1339 (2019) (reviewing SUTTON, supra note 287) (“Some constitutional issues are inherently complex and, as a practical matter, might be best resolved on a state-by-state basis rather than through one-size-fits-all adjudication for the entire nation.”).

312 SUTTON, supra note 287, at 175. Judge Sutton parallels James Madison’s insight in Federalist No. 51 that dividing power “between two distinct governments,” in addition to dividing power within each government, is vital to securing our basic rights and liberties. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961); see also Liu, supra note 311, at 1308 (declaring Judge Sutton “a true believer in Madison’s insight” in Federalist No. 51).
especially true. For example, states that have a history of particularly egregious discrimination or police misconduct may want to have lower discovery standards than others.

In sum, our dual constitutional system empowers states to independently determine the rights guaranteed by their constitutions. Such independent, state-specific interpretation is preferable to states lockstepping with the Supreme Court’s interpretations. In the selective law enforcement context, states are not bound by federal precedent because the Court has not mandated that the Armstrong standard be applied. Accordingly, state courts should interpret their state constitutions to authorize a less demanding discovery standard for selective law enforcement claims.

IV. A NEW DISCOVERY STANDARD ON THE STATE LEVEL

Armstrong’s standard is not workable in the selective law enforcement context. Yet, as long as state courts continue to employ the insuperable Armstrong standard, defendants challenging race discrimination by the police will be denied discovery, and both state and federal equal protection guarantees will go unfulfilled.

Rather than waiting for the discovery standard to evolve through the uncertain and slow common law process, states can proactively change the standard through one of the avenues of reform discussed above—state court rules, state statutes, or state constitutional provisions. Of these, state court rules are the most promising. Just as the Washington Supreme Court created a standard for race discrimination in jury selection that was easier to meet than Batson, state courts should adopt a lower discovery standard in the selective law enforcement context.

This Part proposes a state court rule to facilitate discovery in support of racially selective law enforcement claims. Section IV.A describes the proposed rule (the Rule), which seeks to provide a clear and objective standard that can be applied consistently by state courts. Our Rule preserves the spirit of Armstrong by including a comparative standard but follows Washington and Sellers by eliminating Armstrong’s granular similarly situated requirement. Finally, Section IV.B responds to potential criticisms of the Rule.

A. The Proposed Rule

A new state court rule is preferable to either a state statute or a court decision reinterpreting a state constitutional provision. Such a rule would enable defendants to investigate race discrimination while avoiding legislative gridlock, the vagaries of litigation, and lockstepping.
Legislatures, by design, are slow-moving creatures. Much pressure must be brought to bear and consensus reached for any progress to be made, especially in the criminal justice arena. Texas’s Michael Morton Act, for example, was the result of a series of exonerations that “shook the public’s trust in the Texas criminal justice system,” as well as an extensive advocacy effort by Texas Appleseed and the Texas Defender Service. Thus, state statutes are not an ideal mechanism for the type of reform needed in the selective law enforcement arena.

Litigation that asks a state court to reinterpret its state constitution is also less tangible than it would seem. First, reformers would need to find the right case—one with sufficient evidence of discrimination, and with data that are accessible before discovery to enable the defendant to develop the record. Second, the court would have to swim against the tide of lockstepping. Finally, a state supreme court would be unlikely to hear a selective law enforcement discovery case if it is already settled law that Armstrong applies. Thus, litigation is also a less viable avenue of reform.

A state supreme court rule akin to Washington’s Rule 37 is therefore the best way to enable defendants to obtain discovery regarding race discrimination by the police. Such a rule should draw on the framework outlined in the recent federal court of appeals cases.

The first section of our proposed Rule addresses its purpose. The remainder of the Rule articulates the discovery standard.

1. Text

(a) Purpose. The purpose of this rule is to set the standard for granting discovery in support of a racially selective law enforcement claim brought by a criminal defendant. A racially selective law enforcement claim is a challenge that a particular law enforcement agency or its constituent agents violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or the equal protection provision of the [name of state] constitution.

(b) Required Evidentiary Showing. To obtain discovery, a defendant shall present evidence sufficient to create a reasonable inference of either discriminatory effect or discriminatory intent. A defendant need not present evidence of both discriminatory effect and discriminatory intent.

313 TOWARDS MORE TRANSPARENT JUSTICE, supra note 276, at ii–iii.
(1) Discriminatory Effect Showing Sufficient to Obtain Discovery. A defendant is entitled to discovery if the defendant presents evidence sufficient to create a reasonable inference that there is a disparity between (i) the racial composition of the “selected group” and (ii) the racial composition of the “benchmark group.”

(A) Selected Group. The selected group is the defendant and the universe of individuals selected by law enforcement officers for arrest or citation.

(B) Benchmark Group. The benchmark group is the general population of the relevant geographic area reflected in publicly available census data.

(C) Relevant Geographic Area. The relevant geographic area is the geographic area policed by the law enforcement agency that arrested or cited the defendant.

(D) Racial Composition. In determining the racial composition of the selected group and the benchmark group, respectively, a defendant may aggregate all people of color (nonwhites) or provide a more detailed racial breakdown.

(E) Similarly Situated Showing Not Required to Establish Discriminatory Effect. To obtain discovery under this section, a defendant is not required to present any evidence that there existed similarly situated individuals of a different race who were not selected by law enforcement officers for arrest or citation, or to present any comparison beyond the general population of the relevant geographic area.

(2) Discriminatory Intent Showing Sufficient to Obtain Discovery. A defendant is entitled to discovery if the defendant presents evidence sufficient to create a reasonable inference that the law enforcement agency or its agents acted with discriminatory intent.

2. Rationale

The Rule’s required evidentiary showing charts a middle ground between Washington and Sellers on one hand and Armstrong on the other. Recall that Armstrong requires a threshold showing of “some evidence” of discriminatory effect and discriminatory intent. 314 In addition, for

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discriminatory effect, *Armstrong* requires a defendant to make an impossibly granular similarly situated comparison only ever met at the merits stage in *Yick Wo* and rarely met at the discovery stage.\(^{315}\) *Washington* and *Sellers*, however, set a much lower bar for both prongs, removing the similarly situated element of the discriminatory-effect prong and holding that a defendant need not prove discriminatory intent.\(^{316}\)

Under the Rule’s section (b), a defendant is entitled to discovery if the defendant presents evidence sufficient to create a reasonable inference of either discriminatory effect or discriminatory intent. The Rule departs from *Armstrong* in that proof of both prongs is not required. The Rule tracks and clarifies *Armstrong*’s “some evidence” standard by requiring “evidence sufficient to create a reasonable inference.”\(^{317}\)

The Rule’s discriminatory-effect section, section (b)(1), maintains a requirement that the defendant present evidence of a racial disparity. However, like *Washington* and *Sellers*, section (b)(1)(E) of the Rule eliminates the impossible “similarly situated” requirement, avoiding *Armstrong*’s catch-22. The Rule proposes a clearer discriminatory-effect standard than *Washington* and *Sellers*. Section (b)(1) expressly requires the defendant to present a straightforward comparison “sufficient to create a reasonable inference that there is a disparity” between two groups, the “selected group” and the “benchmark group.” In addition, section (b)(1)(D) enables the defendant to aggregate people of color (nonwhites), rather than requiring a more fine-grained analysis. For example, if the selected group is 40% Black and 50% Hispanic, that group is composed of 90% people of color for purposes of the Rule’s comparative standard.

Sections (b)(1)(A)–(B) lay out the definitions for the “selected group” and the “benchmark group.” The “selected group” comprises “the defendant and the universe of individuals selected by law enforcement officers for arrest or citation.”\(^{318}\) The “benchmark group” is defined as “the general population of the relevant geographic area reflected in publicly available

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\(^{315}\) Id. (first citing Ah Sin v. Wittman, 198 U.S. 500, 507–08 (1905); and then citing Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886)); see also supra notes 94, 96 and accompanying text.

\(^{316}\) See supra notes 148–158 and accompanying text.

\(^{317}\) 517 U.S. at 468–69.

\(^{318}\) Notably, without discovery, it is difficult to ascertain the contours of the selected group, let alone the race of each person in the selected group. Recall that information about the selected group was some of the very evidence the *Armstrong* defendants sought in discovery. See supra text accompanying note 63. The defense may be able to search the court’s electronic docketing system to learn the names of other people law enforcement have selected for the same operation, sting, or offense, but that system typically does not provide race information. The best way to determine the selected group is therefore to contact the public defender’s office and the private bar and gather names, case numbers, and race from every single lawyer who represents a client targeted in the particular operation.
census data.” Section (b)(1)(C) defines the “relevant geographic area” as the “geographic area policed by the law enforcement agency that arrested or cited the defendant.” If a law enforcement agency were intentionally targeting predominately Black or Hispanic neighborhoods, drawing the benchmark group from the particular geographic area where the agency ran the operation would mask discrimination. Accordingly, the Rule defines the benchmark group more broadly, as all of the people available to be selected for arrest by that agency.

The closely analogous employment discrimination context supports this conception of the two groups. In the Title VII context, the statistical question is “how many African-Americans should have been hired based on the relevant labor market?”319 In a failure-to-hire case, the selected group is the universe of nonwhite applicants who were not hired and the benchmark group is the relevant labor pool.320 In the selective law enforcement context, the question is how many people of color should have been selected (aka “hired”) by the law enforcement agency based on the available pool of people (the benchmark group).

Using the general population reflected in census data as the benchmark group is justified by the practical realities of a criminal case in which the defendant has not yet obtained discovery and therefore does not know the law enforcement agency’s selection criteria. Without any information about the law enforcement agency’s selection criteria, it is difficult for a defendant to identify a more specific benchmark group than the general population. Using the general population as the benchmark group is the only way to avoid backing defendants into yet another catch-22. As the defendants in Davis observed: “The government cannot refuse to disclose its targeting criteria and, simultaneously, criticize defendants for using a comparison group that does not incorporate those secret criteria.”321 Even if the defendant knows that the agency’s selection criteria include, for example, people with certain criminal histories, it is extremely difficult to determine the universe of people with prior convictions for a particular offense.322 And even if that universe of people is identifiable, race data are rarely publicly available.323

319 E.E.O.C. v. O & G Spring & Wire Forms Specialty Co., 38 F.3d 872, 875 (7th Cir. 1994).
320 Of course, under Title VII, this question arises at the merits stage. A civil plaintiff is automatically entitled to discovery that enables the plaintiff to define the parameters of the selected group and the benchmark group. See Fed. R. Civ. P. 26(b)(1).
322 See Starr, supra note 214, at 492 (“[I]t is very hard for litigants to prove racial profiling. . . . In federal criminal cases, just getting discovery is notoriously difficult.”).
323 See, e.g., Chavez v. Ill. State Police, 251 F.3d 612, 643 (7th Cir. 2001) (noting that the Illinois State Police’s citations database “does not record the race of the motorist,” a lacuna that proved fatal to
In the Chicago stash house litigation that Professor Siegler led in the district court, for example, it took nine months, hundreds of pages of motions, and a related civil subpoena enforcement action to obtain the kind of racially coded criminal history data needed to construct a benchmark group.  

The Rule’s use of the general population as the benchmark group is also supported by analogizing to employment discrimination law, where “[t]he relevant geographic area should be the geographic area from which applicants would have come, absent any discrimination.” In the employment discrimination context, this means the “immediate locality, either the city in which the employer is located, or the surrounding Standard Metropolitan Statistical Area.” There, the benchmark group is defined as the general population when the job skill involved is one that many people have or can fairly or readily acquire. In the selective law enforcement context, the general population within the law enforcement agency’s purview is likewise the appropriate benchmark group because every member of that population is equally “qualified” to commit a crime. As Judge Nguyen explained in Sellers, “There is no reason to suspect that persons of a particular race are more likely to agree to commit a stash house robbery unless one believes that persons of that race are inherently more prone to

the plaintiffs’ claim: “Without comparative racial information, plaintiffs can not prove that they were stopped, detained, or searched, when similarly situated whites were not”); Report of Dr. Jeffrey Fagan, Ph.D., supra note 9, at 7 (“Both sources of criminal history information provided for this litigation have limited or no information on the Hispanic ethnicity either of the defendants or the [benchmark] population.”). As Professor Sonja Starr remarks:

Often . . . the limits of available data will mean that it is just not possible to determine whether the police are discriminating based on race. These research challenges are also problems for courts, litigants challenging such discrimination, and police departments themselves as they seek to comply with their constitutional obligations.

Starr, supra note 214, at 487.

324 See supra notes 219–220 and accompanying text.


326 2 JOHN F. BUCKLEY IV & MICHAEL R. LINDSAY, DEFENSE OF EQUAL EMPLOYMENT CLAIMS § 20:9 (2020); see also E.E.O.C. v. Chi. Miniature Lamp Works, 947 F.2d 292, 303 (7th Cir. 1991) (“Because of this flaw, and because the comparison was not restricted to black entry-level workers, we believe that the court erred in accepting these comparisons based upon ‘relevant labor markets’ smaller than Chicago.”).


328 This is especially true when the prosecution refuses to disclose the law enforcement agency’s selection criteria, making it difficult to identify a narrower benchmark group than the general population.
committing violent crime for profit—a dangerously racist view that has no place in the law.”

Unlike United States v. Lopez, section (b)(1) of the Rule does not require that the racial disparity between the selected group and the benchmark group be statistically significant. It is true that in the Title VII context, the Supreme Court has held that “a prima facie case of disparate-impact liability” is essentially “a threshold showing of a significant statistical disparity, and nothing more.” This standard, however, applies at the merits stage, after the plaintiff has gained discovery under the broad civil standard.

Statistical significance is an unreasonable gatekeeper at the discovery stage of a criminal case. Traditionally, courts require statistical significance at the 5% level (a p-value of 0.05 or less), the standard for publishing an empirical study in a peer-reviewed scientific journal. In the selective law enforcement context, the p-value represents the probability that the level of racial disparity observed in the defendant’s data would appear by random chance alone—that is, if race played no role in law enforcement’s decisions. Although courts employ this demanding standard in other contexts, statistical significance at any level has no place in a discovery standard that applies before the defendant has received any data. Defendants seeking discovery about discrimination should not have to establish discrimination with the degree of confidence required for statistical significance.

Requiring a defendant who has not obtained any discovery to meet the same standard as an academic seeking to publish a study in a peer-reviewed journal is unreasonable. For example, an academic researcher would not have to prove that the result is statistically significant at the 5% level to publish in a peer-reviewed journal, yet this standard is applied to defendants in a criminal case.

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330 See supra notes 168–170 and accompanying text.
332 Jonah B. Gelbach, Estimation Evidence, 168 U. PA. L. REV. 549, 553 (2020) (“Courts frequently focus on conventional hypothesis testing . . . at the significance level of 5%, because that is the approach many statistics-using scholars take in their scholarly activities.”).
333 David H. Kaye, Is Proof of Statistical Significance Relevant?, 61 WASH. L. REV. 1333, 1337–39 (1986) (“A significance test determines whether an observed result is so unlikely to have occurred by chance alone that it is reasonable to attribute the result to something else.”); David H. Kaye & David A. Freedman, Reference Guide on Statistics, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 211, 250 (3d ed. 2011) (“The p-value is the probability of getting data as extreme as, or more extreme than, the actual data—given that the null hypothesis is true.”).
334 Empirical evidence in the civil context suggests that “using conventional hypothesis testing with the most common significance level, 5%, is tantamount to requiring the plaintiff to present evidence powerful enough to convince the plaintiff’s most favorable juror that there is at least a 79% chance the plaintiff’s litigation position is correct.” Gelbach, supra note 332, at 581; see also Richard A. Posner, An Economic Approach to the Law of Evidence, 51 STAN. L. REV. 1477, 1511 (1999) (“The five percent convention is rooted in considerations that have no direct relevance to litigation, such as the need to ration pages in scientific journals.”).
journal will lead to the same result as Armstrong—it will block potentially meritorious claims.\textsuperscript{335} Such a high standard raises a serious risk that courts will incorrectly assume that no discrimination exists when discrimination is, in fact, afoot. Courts instead should look to whether the defendant has created a reasonable inference that a disparity exists. If a defendant can show that the police are targeting people of color at a rate greater than their representation in the general population, judges should grant discovery.

Additionally, requiring statistical significance is impractical at the discovery stage of a criminal case. To establish a statistically significant disparity, a defendant would have to hire an expensive expert to produce a report. But many criminal defendants are indigent and would have to petition the court to appoint an expert.\textsuperscript{336} If the defendant succeeded in obtaining an expert, the government would also hire an expensive expert to produce a report contending that the defendant had not shown a statistically significant disparity. And all of this would occur before the defendant had obtained any discovery.

Section (b)(1)(E) further tracks Davis, Washington, and Sellers by not requiring the defendant to identify either a granular similarly situated benchmark group or particular similarly situated individuals—that is, specific people—who were not targeted by law enforcement.\textsuperscript{337} This choice recognizes that Armstrong’s similarly situated requirement is neither appropriate nor feasible at the discovery stage of a selective law enforcement claim; it is simply impossible for a defendant to point to a particular person whom law enforcement chose not to arrest. Professor Issa Kohler-Hausmann levies a more structural critique of the similarly situated prong, explaining that even “[i]n the face of overwhelming disparate racial impact, litigants are still expected to show that the effect of race and race alone can be isolated

\textsuperscript{335} Requiring statistical significance thus risks what are known as Type II errors—“finding no relationship when one does exist”—in favor of avoiding Type I errors—“finding a relationship—for example, between race and decision to prosecute [or arrest]—when none actually exists.” McAdams, \textit{supra} note 22, at 613 n.46. Given that discovery occurs at the fact-finding stage of the case, a forgiving standard that risks Type I errors is preferable to a demanding standard that entirely prevents defendants from uncovering race discrimination.

\textsuperscript{336} See, e.g., 18 U.S.C. § 3006A(e)(1) (authorizing the appointment of experts in indigent criminal cases); Jones v. Sterling, 110 P.3d 1271 (Ariz. 2005) (denying defendants’ motion for an expert in a selective law enforcement case); McAdams, \textit{supra} note 22, at 621 (“Defendants who are not wealthy enough to produce their own survey cannot meet the similarly situated standard.”). In Professor Siegler’s stash house litigation, for example, “the Court also granted Defendants’ motion for the appointment of a top expert, Dr. Jeffrey Fagan, to conduct a statistical analysis of the stash house cases in this District to determine whether there were statistically significant racial anomalies.” Order at 2, United States v. Brown, No. 12-CR-0632-RC (N.D. Ill. June 13, 2017), ECF No. 581.

\textsuperscript{337} See \textit{supra} Section II.B.2.
from other factors to support a counterfactual causal account of discrimination.338 Eliminating this requirement allows for a fairer assessment of discriminatory effect.

Section (b)(2) of the Rule does not require a discriminatory-intent showing at the discovery stage, in keeping with Washington and Sellers. The Rule thus has the same effect as Washington’s Rule 37, which removed the discriminatory-intent requirement in the jury-selection context and substituted an “objective observer” test.339 Following Sellers, section (b)(2) nevertheless preserves the opportunity for a defendant to present evidence “sufficient to create a reasonable inference” of discriminatory intent in order to obtain discovery.

Although our Rule is silent on the type of evidence that can meet this requirement, statistical evidence is relevant here, too. Despite the Supreme Court’s holding in McCleskey v. Kemp that nonstatistical evidence is required to demonstrate discriminatory intent, that case, like Armstrong, arose in the selective prosecution context340 and has been interpreted to blunt the force of statistical evidence in the selective law enforcement context.341 We agree with Professor Aziz Huq that statistical evidence can provide evidence of discrimination, including discriminatory intent.342 All of the reasons for limiting Armstrong to the selective prosecution context apply equally to McCleskey. In short, the Court’s prohibition on the use of statistics to demonstrate discriminatory intent should not apply in the selective law enforcement context.343

338 Kohler-Hausmann, supra note 165, at 1190–91. After discovery, at the merits stage, the similarly situated standard is even more problematic because “it is not difficult for law enforcement to come forward with plausible bases to distinguish potential targets as not ‘similarly situated,’ especially post hoc and especially when there are highly unequal distributions between groups of variables that are plausibly rational for law enforcement to consider, such as residence in high crime neighborhoods or criminal history.” Id. at 1191 (discussing the Chicago stash house litigation).

339 See supra notes 252–254 and accompanying text.

340 481 U.S. 279, 289, 298–99 (1987) (holding that the “racially disproportionate impact” in the administration of the death penalty in Georgia was not enough to overturn the defendant’s guilty verdict absent a showing of “racially discriminatory purpose”).


342 Huq, supra note 92, at 1283 (“[T]he judge tasked with investigating discriminatory intent should embrace statistical findings for their modest, but important, role of evidentiary support[,] . . . [particularly since] animus and statistical discrimination are often best flushed out using econometric tools.”).

343 See Brown, 299 F. Supp. 3d at 996 n.14 (discussing this position). The authors will flesh out this argument in a future paper.
By requiring a comparison between the selected group and the benchmark group, the Rule tracks the ultimate merits standard for selective law enforcement and thus is still guided by the “spirit of Armstrong.” At the same time, the Rule also recognizes a key real-world limitation—a more granular comparison is impossible without discovery. As a result, the comparative showing required by the Rule utilizes publicly available census data and can be done without an expert. The Rule leaves any assessment of the quantum of evidence needed to create a reasonable inference of discriminatory effect to the discretion of the trial judge.

B. Response to Critiques

This Rule may generate some resistance. After all, state appellate courts have traditionally applied Armstrong in the selective law enforcement context.

A comparison with Washington’s Rule 37 is instructive. In that context, critics worried that an expanded Batson standard would open the floodgates to meritless challenges. Of course, in the Batson context, some peremptory strikes are driven by implicit—or even explicit—bias. If these challenges have merit, opening the floodgates is a good thing because it curbs discrimination. State and federal judges alike have expressed concern that Batson’s high standard blocks meritorious claims, observing that it is vanishingly rare for Batson challenges to be granted or upheld. Many scholars agree that the Batson standard is so high as to be virtually unmeetable.

The ACLU’s contribution to the Washington Workgroup

345 See supra Section III.A.
346 See Franklin L. Dacca, Individual Statement, in WORKGROUP FINAL REPORT, supra note 251, at 24, 25–26 (contending that the proposed standard would “create an unworkable voir dire process subject to lengthy interruptions, delay, confusion and inappropriate scrutiny of individual jurors”).
347 See State v. Saintcalle, 309 P.3d 326, 335 (Wash. 2013) (plurality opinion) (“In over 40 cases since Batson, Washington appellate courts have never reversed a conviction based on a trial court’s erroneous denial of a Batson challenge.”), abrogated on other grounds by City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017); People v. Gutierrez, 395 P.3d 186, 203 (Cal. 2017) (Liu, J., concurring) (“Today’s decision is the first time in 16 years, and the second time in over 25 years, that this court has found a Batson/Wheeler violation.”); Chamberlin v. Fisher, 885 F.3d 832, 846 (5th Cir. 2018) (en banc) (Costa, J., dissenting) (“[O]nly two of the hundreds of Batson decisions in our circuit have ever found that a strike was discriminatory . . . .”).
Report challenged the floodgates concern, arguing that it was necessary to lower the burden for raising race-based objections to peremptory challenges given that “the history of racial discrimination and need for strict regulation are well-established.” The ACLU also pointed out the difficulty of proving race discrimination under Batson. A similar justification was given for using the lower “objective observer” standard of proof for a New Jersey anti-corruption law.

The issue our Rule seeks to address—race discrimination by law enforcement—is likewise well documented. It is clear from the recent wave of selective law enforcement challenges in federal stash house cases that the Armstrong standard makes it extremely difficult for defendants to obtain discovery, let alone prove such claims on the merits. Critics might argue that the Rule overcorrects because laws are often enforced disproportionately against people of color. As a result, the Rule’s standard will almost always be met when a defendant is a person of color. However, the Rule’s “reasonable inference” standard does not open the floodgates by allowing discovery in every case because defendants must be targeted for a particular crime or as part of a law enforcement operation that creates a sufficiently large selected group. This limits the Rule’s application to only a subset of cases. Finally, while the Rule relaxes the discovery standard, it does not prevent a court from weeding out potentially meritless claims by applying Armstrong’s demanding two-pronged standard at the merits stage of a selective law enforcement challenge.

Another possible objection is that our proposed Rule would be outside the power of a state court’s rulemaking authority. That authority is commonly limited by either statutory or constitutional provisions. Like the discriminatory jury selection has not been realized”); Bellin & Semitsu, supra note 248, at 1077 (“The current [Batson] framework makes it exceedingly difficult for judges to reject even the most spurious of peremptory strikes . . . .”); id. at 1092 (“Our analysis reveals that of 269 federal decisions between 2000 and 2009, the reviewing court granted a new trial in only eighteen cases—6.69% of the total.”).


Id. at 29.


352 See supra note 105.

353 See supra Section II.B.
federal Rules Enabling Act,\textsuperscript{354} many state statutes, constitutions, and cases prohibit courts from changing substantive rights.\textsuperscript{355}

The proposed Rule does not violate state courts’ rulemaking authority because it does not create a new substantive discovery right for defendants. Rather, it merely elaborates on the pathways for obtaining relevant evidence. In the federal context, the Supreme Court has upheld the authority of district courts to promulgate local rules unless they conflict with an Act of Congress or the Federal Rules of Criminal Procedure, they are constitutionally unfounded, or the subject matter governed by the rule is not within the power of the district court to regulate.\textsuperscript{356} States interpret the authority of their courts to promulgate rules in the same way, as many state discovery provisions are based on the federal rules.\textsuperscript{357} For example, a California court has explained that “courts may institute only those local rules that are ‘not inconsistent with law or with the rules adopted and prescribed by the Judicial Council.’”\textsuperscript{358}

The Rule we propose does not conflict with existing state court rules because state rules regarding the scope of discovery in criminal cases set a

\textsuperscript{354} 28 U.S.C. § 2072 (limiting federal courts’ ability to “prescribe general rules of practice and procedure” to rules that do not “abridge, enlarge, or modify any substantive right”).

\textsuperscript{355} For examples of state statutes, see TENN. CODE § 16-3-403; TEX. GOV’T CODE § 22.109; NEV. REV. STAT. § 2.120.2; and WIS. STAT. § 751.12. For examples in state constitutions, see MO. CONST. art. V, § 5; ALA. CONST. amend. 328, § 6.111; and OHIO CONST. art. IV, § 5(B). For examples of state court decisions, see State v. Beam, 828 P.2d 891, 892 (Idaho 1992), which states that the Idaho Supreme Court’s rulemaking power relates to procedural, not substantive matters. For a fifty-state survey of state rules enabling acts, see Clark v. Austin, 101 S.W.2d 977, 996–1003 (Mo. 1937).

\textsuperscript{356} Whitehouse v. U.S. Dist. Ct. for D.R.I., 53 F.3d 1349, 1355 (1st Cir. 1995) (“[T]he Supreme Court has upheld the authority of district courts to promulgate local rules unless 1) the rule conflicts with an Act of Congress; 2) the rule conflicts with the Federal Rules of Criminal Procedure; 3) the rule is constitutionally infirm; or 4) the subject matter governed by the rule is not within the power of the district court to regulate.” (first citing Frazier v. Heebe, 482 U.S. 641, 654 (1986) (Rehnquist, C.J., dissenting); then citing Miner v. Atlas, 363 U.S. 641, 651–52 (1960); and then citing Story v. Livingston, 38 U.S. 359, 368 (1839))).

\textsuperscript{357} See Notes of Advisory Committee on Rules—1974 Amendment, FED. R. CRIM. P. 16 (“[Rule 16] is intended to prescribe the minimum amount of discovery to which parties are entitled. It is not intended to limit the judge’s discretion to order broader discovery . . . .”); State v. McIntosh, 58 P.3d 716, 724 (Kan. 2002) (explaining that the Kansas criminal discovery rule is “based on Fed. R. Crim. Proc. 16” and “is not all-inclusive”); Green v. State, 835 S.E.2d 238, 243 n.10 (Ga. 2019) (observing that Federal Rule of Criminal Procedure 16 “includes language materially similar to” Georgia’s criminal discovery statute); State v. Peters, No. E2014-02322-CCA-R3-CD, 2015 WL 6768615, at *6 (Tenn. Crim. App. Nov. 5, 2015) (“In determining whether the requested discovery is material, this Court has looked to federal authority interpreting the analogous Federal Rule of Criminal Procedure 16(a).”).

\textsuperscript{358} In re Harley C., 249 Cal. Rptr. 3d 783, 788 (Ct. App. 2019) (quoting CAL. GOV’T CODE § 68070(a)); see also, e.g., Trib. Rev. Pub’l’g Co. v. Thomas, 120 F. Supp. 362, 370 (W.D. Pa. 1954) (describing a Pennsylvania statute authorizing state courts to establish rules so long as “such rules shall not be inconsistent with the Constitution and laws of this commonwealth”).
floor, not a ceiling, on how much discovery courts may order. Nor is there much risk of a constitutional conflict. The Rule would only pose a potential constitutional conflict when a state court has held that Armstrong’s discovery standard applies to selective law enforcement claims. Most states have not independently decided whether Armstrong applies to selective law enforcement claims brought under their state constitution. The few states that have applied Armstrong to the selective law enforcement context have done so only in response to claims under the federal Equal Protection Clause. In those states, there is no conflict so long as the Rule is limited to the state constitution’s equal protection provision.

CONCLUSION

“Sunlight is said to be the best of disinfectants.” Yet, for too long, Armstrong’s shadow has obscured any meaningful scrutiny of racial discrimination by law enforcement officers. Although the police have thousands of interactions with citizens each day, applying the Armstrong standard allows their enforcement choices to go unchecked. There must be a legal mechanism for criminal defendants to root out racial discrimination, whether by federal agents who run fake stash house operations that predominantly target people of color or police officers who stop drivers of color at disproportionate rates. Without access to discovery, there is no way to police the police in criminal cases.

Our legal system does not afford law enforcement officers the same privileges as prosecutors, but that distinction has long gone unrecognized in the doctrine. Three federal courts of appeals have now acknowledged this distinction and have taken the important step of lowering the standard for

360 Only the Arizona Supreme Court has independently decided this question under its state’s constitution. See supra notes 240–244 and accompanying text.
361 See supra notes 233–239 and accompanying text.
363 See supra notes 9–12 and accompanying text.
364 See, e.g., Harris, supra note 105, at 267 (“[I]nterviews reveal that African-Americans strongly believe that they are stopped and ticketed more often than whites, and the data from Ohio and elsewhere show that they are right.”). One of the first successful selective law enforcement claims was brought in State v. Soto, 734 A.2d 350, 352 (N.J. Super. Ct. Law Div. 1996), where the court held that defendants had established a prima facie case of selective enforcement of traffic laws. Soto, which was handed down two months before Armstrong, had far-reaching effects within New Jersey. It led to a review of the law enforcement practices of the New Jersey State Police, which led a New Jersey judge to conclude “that defendants perceived to be African-American, Black or Hispanic are entitled to discovery [regarding racial profiling] for motor vehicle stops that originated as a result of observations made by [New Jersey] State Troopers.” State v. Lee, 920 A.2d 80, 82 (N.J. 2007).
defendants seeking discovery in support of claims of racially selective law enforcement. Other federal and state courts should follow suit. The Chicago stash house litigation in Leslie Mayfield’s case and others demonstrates that a lower discovery standard has an immense impact on criminal defendants and advances the integrity of the legal system.

But federal courts alone will not bring us out of Armstrong’s shadow. State courts see many more criminal cases than federal courts and have a role in reform as well. Our innovative state court Rule would ensure that defendants with meritorious claims can obtain the information they need to shed light on discrimination by the police. The Rule would thus safeguard the equal protection principles that undergird our system and strengthen our commitment to racial justice.