BAD FAITH PROSECUTION

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There is no shortage of claims by parties that their prosecutions are politically motivated, racially motivated, or just plain arbitrary. In our increasingly polarized society, such claims are more common than ever. Donald Trump campaigned on promises to lock up Hillary Clinton for her handling of State Department-related emails, but he subsequently complained that the special counsel's investigation of his campaign's alleged contacts with Russian operatives was a politically motivated witch hunt. Kenneth Starr's pursuit of investigations of Bill Clinton evoked similar arguments of political motivation.[1]

The advent of "progressive" prosecutors will no doubt increase claims of bad faith prosecution, given their announcements of crimes they will and will not prosecute. Typically, they promise not to prosecute for lesser violations such as prostitution and drug possession.[2] *Although crime victims generally cannot complain that a perpetrator was not prosecuted, non-prosecution policies could strengthen claims of bad faith prosecution when prosecutors nevertheless prosecute some individuals for such delicts. In addition, candidates' and officials' statements that they intend to pursue certain individuals or groups may bolster claims of bad faith—as evidenced in Donald Trump's*

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[1] See, e.g., Angela J. Davis, The American Prosecutor: Independence, Power, and the Threat of Tyranny, 86 Iowa L. Rev. 393, 397 (2001) (using the Starr investigation as a point of departure for discussing prosecutorial abuses generally).

[2] See Memorandum from Alvin L. Bragg, Jr., District Attorney, Cnty. of New York (Jan. 3, 2022), https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf [https://perma.cc/A336-ERT6] (announcing a policy to decline prosecution for, inter alia, marijuana misdemeanors, failing to pay a fare for public transportation, aggravated unlicensed operation, and prostitution); Jeffrey Bellin, Theories of Prosecution, 108 Calif. L. Rev. 1203, 1205–06 (2020) (providing examples of progressive prosecutors' policies).

arguments of political motivation for investigations by New York Attorney General Letitia James.[3]

[3] See Complaint at 6, 11, 29, Trump v. James, No. 21-cv-01352, 2022 WL 1718951 (N.D.N.Y. May 27, 2022) (seeking declaratory and injunctive relief inter alia under 42 U.S.C. § 1983 to limit the investigation, and relying on numerous statements by James as a candidate and as the New York Attorney General with respect to Trump); *Trump v. James*, 2022 WL 1718951, at *19–20 (dismissing the complaint based on *Younger* [*v. Harris*, 401 U.S. 37 (1971),] abstention); id. at *13 (stating that the plaintiffs had not established that the subpoena enforcement action was commenced for a retaliatory purpose). Within days of the complaint being dismissed, the plaintiffs appealed. See Trump v. James, No. 21-cv-01352, 2022 WL 1718951 (N.D.N.Y. May 27, 2022), *appeal docketed*, No. 22-1175 (2d Cir. May 31, 2022).

INTRODUCTION

The varying cries of "foul" raise questions as to what should count as a politically motivated, racially motivated, or generally bad faith prosecution. The pitfalls of too easy or too difficult a standard for showing selective prosecution are evident. The investigation and prosecution of Paul Manafort might not have occurred absent his political visibility, but one may not necessarily think that his evasion of income taxes should therefore be excused.[4] On the other hand, the fact that Yick Wo violated San Francisco's ordinance against operating a laundry in a wooden building should not preclude a claim of discriminatory prosecution.[5]

The Supreme Court has required relatively high standards for claims of race- or speech-motivated prosecution. Under *Armstrong v. United States*, defendants in criminal cases must make a significant showing to obtain discovery as to discriminatory purpose and effect.[6] And under *Hartman v. Moore*, plaintiffs seeking damages for a previous prosecution must allege the absence of probable cause in addition to bad motivation.[7]

Many have condemned the standards used by the Supreme Court as unduly limiting bad faith prosecution claims[8] and as inconsistent with

[4] See United States v. Manafort, 314 F. Supp. 3d 258, 272 (D.D.C. 2018) (refusing to suppress evidence from an allegedly overbroad search).

[5] See Yick Wo v. Hopkins**,** 118 U.S. 356, 373–74 (1886) ("[T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities . . . with a mind so unequal and oppressive as to amount to a practical denial . . . of that equal protection of the laws . . . ."). But cf. Gabriel J. Chin, Unexplainable on Grounds of Race: Doubts About *Yick Wo*, 2008 Ill. L. Rev. 1359, 1369–70, 1373, 1376 (arguing that the decision was based on an invasion of property rights and was not about discriminatory prosecution, although later cases attributed that meaning to *Yick Wo*).

[6] 517 U.S. 456, 459–61, 463–65, 469–70 (1996).

[7] 547 U.S. 250, 260–61 (2006). There are, of course, other ways for checking prosecutorial abuse such as elections and criminal process. The criminal process provides for possible determinations by grand juries and judges that probable cause is lacking, including by way of motions for acquittal and appeals for insufficiency of evidence.

[8] See, e.g., Alison Siegler & William Admussen, Discovering Racial Discrimination by the Police, 115 Nw. U. L. Rev. 987, 991 (2021) (criticizing difficulties of proof); John S. Clayton, Policing the Press: Retaliatory Arrests of Newsgatherers After *Nieves v. Bartlett*, 120 Colum. L. Rev. 2275, 2294–96 (2020); William J. Stuntz, *Bordenkircher v. Hayes*: Plea Bargaining

ordinary standards for proving cases of unconstitutional motivation.[9] After all, if we look beyond the setting of criminal prosecutions, the Court has made it comparatively easier to vindicate rights in the face of constitutionally improper motivations. The Court in *Mt. Healthy City School District Board of Education v. Doyle* famously introduced a two-part test that requires, upon a showing by the plaintiff that a constitutionally improper motivation prompted his termination, the defendant to prove that the plaintiff's termination would in any event have come to pass.[10]

In other words, the *Mt. Healthy* test—which has spread beyond its original First Amendment setting—more readily allows a claimant to have her claim heard on the merits.[11] Why should a similar approach not hold sway in the setting of criminal prosecutions? We have a succinct answer to this question: the same approach should not apply because the setting of criminal prosecutions is fundamentally different.

and the Decline of the Rule of Law, *in* Criminal Procedure Stories 351, 369 (Carol S. Steiker ed., 2006); Richard H. McAdams, Race and Selective Prosecution: Discovering the Pitfalls of *Armstrong*, 73 Chi.-Kent L. Rev. 605, 618 (1998); Anne Bowen Poulin, Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After *United States v. Armstrong*, 34 Am. Crim. L. Rev. 1071, 1073–74 (1997); Melissa L. Jampol, Goodbye to the Defense of Selective Prosecution, 87 J. Crim. L. & Criminology 932, 963 (1997).

[9] See Hartman v. Moore, 547 U.S. 250, 267 (2006) (Ginsburg, J., dissenting, joined by Breyer, J.); Kristin E. Kruse, Comment, Proving Discriminatory Intent in Selective Prosecution Challenges—An Alternative Approach to *United States v. Armstrong*, 58 SMU L. Rev. 1523, 1536 (2005) (recommending use of the employment discrimination framework from cases such as *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); cf. Nieves v. Bartlett, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part) (in a damages case alleging an arrest in retaliation for speech, arguing that a showing of lack of probable cause should not be required by the Court because a constitutional violation did not require such a showing); id. at 1737 (Sotomayor, J., dissenting) (arguing that the standards of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), strike the proper balance between government interests and individual rights).

[10] 429 U.S. 274, 286–87 (1977).

[11] Under the 1991 amendments to Title VII, a plaintiff can prevail on the liability phase if the plaintiff shows that a factor such as race was "a motivating factor for an employment practice"; the defendant has a burden of persuasion at the remedy phase if the defendant wishes to show that the adverse employment action would have occurred for an alternative reason. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2018); see also George Rutherglen, Employment Discrimination Law 53–54 (5th ed. 2021) (discussing aforementioned statutes). The Court, however, has eschewed burden shifting under certain other employment discrimination statutes, see id.; Gross v. FBL Fin. Servs., 557 U.S. 167, 178–79 (2009) (not applying burden shifting in a case under the Age Discrimination in Employment Act, 29 U.S.C. § 623(a) (2018)); id. at 179 (questioning the burden shifting approach generally). There may be some question, then, of whether the Court will continue to use the burden shifting framework where statutes do not specifically require it.

To take up this argument, we first provide what we hope is a useful taxonomy of different types of claims of bad faith prosecution and the procedural settings in which they arise. We also describe the standards of proof in the different procedural settings. We then address criticisms that the standards of proof for bad faith prosecutions unduly deviate from the ordinary standards for proving unconstitutional motivation. We suggest that there are good reasons for requiring higher standards for showing bad faith prosecution as compared to other areas of alleged illicit motivation such as employment discrimination. There may be a presumption that criminal behavior, rather than bad faith, is the reason for prosecution of nontrivial violations.[12] And despite the academic chorus reprobating prosecutorial discretion,[13] greater judicial scrutiny of prosecutorial motives may be less helpful than safeguards within prosecutors' offices—as Professor Barkow has argued.[14] This does not mean that prosecutors' offices should be immune from scrutiny, but it may suggest that

[12] Cf. McAdams, supra note 8, at 653 ("Perhaps the more fundamental basis for hostility to selective prosecution claims is that they are presented by the guilty.").

[13] See, e.g., William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 511–12, 579–81 (2001) (arguing that prosecutorial discretion leads to over-criminalization but suggesting difficulties with eliminating such discretion); Stuntz, supra note 8, at 379 (arguing that prosecutorial discretion gives too much power to prosecutors, upsetting our system of checks and balances); Leslie B. Arffa, Note, Separation of Prosecutors, 128 Yale L.J. 1078, 1082 (2019) (noting that many see prosecutorial power as a central problem of the American criminal justice system); Hon. J. Harvie Wilkinson, In Defense of American Criminal Justice, 67 Vand. L. Rev. 1099, 1104–05, 1129–31 (2014) (describing critiques of prosecutorial discretion and citing authority).

[14] See Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869, 908–09 (2009); Wilkinson, supra note 13, at 1132 (providing reasons for prosecutorial discretion); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379–81 (1973) (detailing reasons why judicial review of prosecutorial discretion would be undesirable); cf. Hannah Shaffer, Prosecutors, Race, and the Criminal Pipeline, U. Chi. L. Rev. (forthcoming 2023) (manuscript at 1–2) (suggesting that limiting prosecutorial discretion or blinding them to defendants' race may inadvertently offset prosecutors' giving less weight to the criminal records of Black defendants than white defendants in decisions affecting incarceration); id. (manuscript at 25–26, 37, 45, 54) (not attributing the lesser weight to records of Black defendants to progressive elected prosecutors, although finding that beliefs of individual prosecutors affected results). Our views thus could be characterized as a "checks and balances" approach, under which prosecutors' offices adopt organizational structures that reduce incentives and opportunities to pursue constitutionally improper motives, rather than a "separation of powers" approach—that is, an approach that involves other branches of government—to regulate prosecutorial discretion. See Daniel Epps, Checks and Balances in the Criminal Law, 74 Vand. L. Rev. 1, 4–5 (2021) (contrasting checks and balances approaches with separation of powers approaches); id. at 73–74 (recommending separation of functions within prosecutors' offices, as suggested by Barkow).

Armstrong's and *Hartman*'s hurdles to opening up judicial review of prosecutorial motives are appropriate.

In addition, we discuss the special difficulties of addressing political and racial motivations in the prosecutorial setting. While all deplore politically motivated prosecutions, there are difficulties in drawing lines between appropriate and inappropriate political influences on prosecutorial policies and decisions,[15] which in turn suggests high standards of proof. What is more, the Court assumes that disparate racial impact evidence may hold reduced probative value in the prosecution context, given the difficulties of determining the populations of those who might have been prosecuted but were not.[16]

We also address other arguable inconsistencies between the standards for bad faith prosecution claims and related areas and offer resolutions. (1) In damages (*Hartman*) cases, the plaintiff must make a showing of no-probable-cause that is not required when a motion is brought in a criminal proceeding (*Armstrong* cases), but we conclude that the difference is warranted. (2) In retaliatory arrest claims, the Court in *Nieves v. Bartlett* allowed for an exception to the no-probable-cause showing for minor crimes that rarely evoke enforcement,[17] but it is unclear whether such an exception exists for *Hartman* retaliatory prosecution claims. We suggest recognition of such an exception for bad faith prosecution claims. (3) Some lower federal courts have more easily allowed discovery with respect to claims in criminal cases of discriminatory "enforcement" as distinguished from *Armstrong* discriminatory "prosecution" motions.[18] We suggest that the experience with broader discovery warrants continuing caution in loosening discovery for bad faith prosecution claims. (4) Lower federal courts have prescribed somewhat different elements for damages claims under various theories in the nature of malicious prosecution.[19] For example, there is an issue of whether

[15] Cf. Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019) (discussing that agency decisions are often informed by politics).

[16] See Sandra G. Mayson, Bias In, Bias Out, 128 Yale L.J. 2218, 2257–58 (2019) (referring to studies suggesting some crimes may be committed disproportionately by different groups); Jennifer L. Skeem & Christopher T. Lowenkamp, Risk, Race and Recidivism: Predictive Bias and Disparate Impact, 54 Criminology 680, 690 (2016) (noting the debate as to whether differential participation or differential selection causes racial disparities in criminal justice).

[17] 139 S. Ct. 1715, 1724, 1727 (2019).

[18] See, e.g., United States v. Washington, 869 F.3d 193, 220–21 (3d Cir. 2017); infra note 70 (describing differing views in the circuit courts).

[19] See Erin E. McMannon, The Demise of § 1983 Malicious Prosecution: Separating Tort Law from the Fourth Amendment, 94 Notre Dame L. Rev. 1479, 1485, 1493 (2019)

malicious prosecution claims brought under the Fourth Amendment require proof of subjective bad motivation.[20] We suggest a way to make the standards more uniform across different types of claims.[21]

Finally, we show how the rise of progressive prosecutors may make proof of bad faith prosecutions easier. That is because policies of non-prosecution will provide claimants with more comparators for making out their claims.

Part I discusses what we mean by bad faith prosecution, and we provide a taxonomy of bad faith prosecution claims arising under different constitutional provisions and as they arise in particular procedural settings. Although we principally focus on claims that a prosecution was motivated by race or speech, we also describe other theories that may support a claim of bad faith prosecution. Part II describes the standards of proof for bad faith prosecution claims as they arise in different procedural contexts. Part III addresses criticisms that these standards are too high and inconsistent with other claims involving subjective ill will and provides rationales for the elevated standards for bad faith prosecution. Part IV briefly considers whether certain other inconsistencies in the doctrine suggest changes to requirements for proving bad faith prosecutions. Part V discusses the possible impact of progressive prosecutors on claims of bad faith prosecution.

I. TYPES OF BAD FAITH PROSECUTIONS

A. Race and Speech Motivation

By bad faith or selective prosecution, we mean one initiated or pursued for certain reprobated motivations. The main categories of selective prosecutions thus include those motivated by race or similar categories, such as sex or national origin, and those motivated to retaliate for speech, political activity, or engaging in other constitutionally protected activities.

(discussing varying standards and citing cases and secondary authority); Lyle Kossis, Malicious Prosecution Claims in Section 1983 Lawsuits, 99 Va. L. Rev. 1635, 1646–48 (2013) (discussing various standards).

[20] See, e.g., Hernandez-Cuevas v. Taylor, 723 F.3d 91, 99–101 (1st Cir. 2013) (alluding to differences among the circuits).

[21] Compare Kossis, supra note 19, at 1662–63 (favoring use of common law elements), with McMannon, supra note 19, at 1504 (disfavoring use of common law elements in favor of a Fourth Amendment-based framework).

In *Yick Wo v. Hopkins*,[22] the Supreme Court found an equal protection violation when the City of San Francisco only enforced its prohibition on operating laundries in wooden buildings against persons of Chinese origin while granting waivers to others.[23] Speech motivation was at issue in *Dombrowski v. Pfister*,[24] in which the Court upheld a federal court injunction against the prosecution of civil rights activists whom the State accused of failing to register as members of a communist organization.[25] Retaliation for the exercise of other constitutionally protected rights such as the right to appeal a criminal conviction also counts as a form of selective prosecution. In *Blackledge v. Perry*, for example, the Court held that a prosecutor violated due process when he increased the charge from a misdemeanor to a felony after the defendant had invoked his right to appeal.[26] For convenience, we refer to the various categories of class-based motivation as race motivation and to the various categories of retaliation for the exercise of constitutional rights as speech motivation.[27]

A more general claim that one was treated less favorably than similarly situated defendants, however, will generally not suffice. In *Oyler v. Boles*, the petitioners claimed that prosecutors' obtaining sentences under the West Virginia habitual offender statute violated equal protection because prosecutors had not sought enhanced sentences for many other similarly

[22] 118 U.S. 356 (1886).

[23] Id. at 374 ("And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted."); see also supra note 5.

[24] 380 U.S. 479 (1965).

[25] Id. at 492–93. The prosecutions were under the Louisiana Subversive Activities and Communist Control Law. The prosecutions were allegedly pursued to harass and discourage activities to combat racial discrimination. Id. at 489–90.

[26] 417 U.S. 21, 27–28 (1974) (involving the prosecutor's raising misdemeanor charges to felony charges after the defendant invoked his right to appeal by way of a trial de novo). One could distinguish cases involving retaliation for the exercise of constitutional rights within the criminal process from cases involving retaliation for exercise of noncriminal constitutional rights. We are more focused on the latter.

[27] While speech-type claims of retaliation for the exercise of constitutional rights are based on different constitutional theories from race-type claims, the proof of claims of constitutionally reprobated motivation is essentially similar and warrants their treatment together. See, e.g., Michael G. Collins, Section 1983 Litigation 422–23 (5th ed. 2016) (indicating the burdens of proof were the same for claims of improper motivation under the Equal Protection Clause and for First Amendment retaliation).

situated defendants.[28] The Court noted that the petitioners had not shown that prosecutors knew of the disparities but that even

> the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.[29]

B. Claims of Bad Motivation Not Necessarily Tied to Speech or Race

This article primarily focuses on prosecutions allegedly motivated by race and speech. Some categories of potential illicit motivation that are not necessarily based on race and speech are sketched below: *Shaw* claims; shock-the-conscience claims; and class-of-one claims.

Younger exception (Shaw) claims. Despite the Court's indication in *Oyler* that mere unusual treatment will not state a claim, case law allows for relief in cases of "prosecutorial 'harassment' and with the absence of any reasonable hope of success on the merits."[30] The Court in *Younger v. Harris* recognized bad faith prosecutions as an exception to the general disallowance of federal court interference with ongoing state prosecutions and did not apparently require that the bad faith be tied to speech or race.[31] Lower courts have entertained claims of such general bad faith. For example, in *Shaw v. Garrison*, the U.S. Court of Appeals for the Fifth Circuit enjoined Orleans Parish District Attorney ("DA") Jim Garrison's perjury prosecution of businessman Clay Shaw in the wake of a jury's acquitting Shaw of conspiracy to assassinate President Kennedy.[32] The court relied on the DA's unlikelihood of success on the merits given his

[28] 368 U.S. 448, 454–55 (1962) (indicating that petitioner put on evidence "that from January, 1940, to June, 1955, there were six men sentenced in the Taylor County Circuit Court who were subject to prosecution as Habitual offenders, Petitioner was the only man thus sentenced during this period").

[29] Id. at 456.

[30] Michael G. Collins, The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Court Proceedings, 66 N.C. L. Rev. 49, 60–61, 60 n.53 (1987) (indicating that discriminatory or retaliatory animus is not always required); id. at 61 & n.56.

[31] 401 U.S. 37, 53 (1971) ("There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment.").

[32] 467 F.2d 113, 113 (5th Cir. 1972). After a forty-day trial, the jury unanimously acquitted Shaw after deliberating for fifty-five minutes. Id. at 115.

epic failure to prove the conspiracy claims and his interest in promoting books he was writing on the Kennedy assassination.[33]

Issues remain as to the continued viability of *Shaw*-type claims, where the allegations are not tied to a particular constitutional prohibition such as speech or race.[34] Recent cases involving Donald Trump's efforts to obtain injunctive and declaratory relief to quash or narrow subpoenas seem to manifest the continuing existence of a category of general bad faith, although Trump included claims of political- or speech-based motivations.[35] The Supreme Court countenanced Trump's § 1983 federal court action[36] to enjoin state grand jury subpoenas in *Trump v. Vance*, stating, "[t]he policy against federal interference in state criminal proceedings, while strong, allows 'intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith.'"[37]

Substantive due process claims. Although *Shaw* claims seem to subsist, the Court has been skeptical of general substantive due process claims to

[33] Id. at 118 (recounting the district court's determinations as to the numerous problems with the prosecution).

[34] See Morris v. Robinson, No. 16-cv-01000, 2017 WL 1102737, at *5, *7 (W.D. Tex. Mar. 24, 2017) (indicating that a freestanding bad faith claim as defined in *Younger* analysis or a malicious prosecution constitutional claim was not recognized in the Fifth Circuit in light of *Albright v. Oliver*, 510 U.S. 266 (1994), but that, in some cases, a shock-the-conscience Fourteenth Amendment claim might work), *report and recommendation adopted*, No. 16-cv-01000, 2017 WL 4506812 (W.D. Tex. July 11, 2017), *aff'd*, 710 F. App'x 238 (5th Cir. 2018); Flowers v. Seki, 45 F. Supp. 2d 794, 805–06 (D. Haw. 1998) (stating that falling within *Younger*'s bad faith exception did not give the plaintiff a cause of action); cf. Castellano v. Fragozo, 352 F.3d 939, 942 (5th Cir. 2003) (rejecting a general malicious prosecution claim under § 1983).

[35] Cf. Frampton v. City of Baton Rouge, No. 21-cv-00362, 2022 WL 90238, at *48–49, *48 n.448 (M.D. La. Jan. 7, 2022) (enjoining prosecution of contempt proceedings that were found to be in retaliation for First Amendment activity, using standards from *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979)).

[36] See Trump v. Vance, 395 F. Supp. 3d 283, 292–93 (S.D.N.Y. 2019) (indicating that Trump had clarified his complaint to indicate that the suit was under § 1983, but dismissing complaint on *Younger* grounds), *aff'd in part, rev'd in part*, 941 F.3d 631 (2d Cir. 2019) (affirming the denial of a preliminary injunction, but reversing the *Younger*-based dismissal and remanding), *aff'd*, 140 S. Ct. 2412 (2020), *remanded to* 977 F.3d 198 (2d Cir. 2020), *stay denied*, 141 S. Ct. 1364 (2021).

[37] Trump v. Vance, 140 S. Ct. 2412, 2428 (2020) (quoting Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975)). And in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2026 (2020), Trump sought to enjoin or narrow House of Representatives subpoenas on the ground that the investigators "lacked a valid legislative aim and instead sought these records to harass him, expose personal matters, and conduct law enforcement activities beyond its authority." The Court entertained the action and provided guidelines to the lower courts for evaluating the claim. Id. at 2035–36.

challenge an alleged malicious prosecution.[38] Some courts nevertheless still consider shock-the-conscience damages claims addressing prosecution. These claims will generally involve some form of subjective bad faith.[39]

Class-of-one equal protection claims. There is some question of whether a "class-of-one" equal protection claim should be allowed in the selective prosecution setting. Outside of the prosecution context, the Supreme Court upheld a class-of-one equal protection claim in *Village of Willowbrook v. Olech*, when a zoning board sought to exact a thirty-three-foot easement from the property owner although it had consistently required only fifteen feet from others.[40] The Court in *Engquist v. Oregon Department of Agriculture*, however, held that a class-of-one theory should not apply when a public employee alleged arbitrary adverse treatment, given the individualized discretion involved in employment decisions and the lack of clear standards against which to measure variations in treatment.[41] Based on *Engquist*, the Seventh Circuit has reasoned that the highly discretionary decisions to prosecute should not be subject to class-of-one claims for selective prosecution.[42] The theory, however, still has some currency elsewhere.[43]

[38] See generally Albright v. Oliver, 510 U.S. 266 (1994) (holding that substantive due process did not provide a basis for relief when the plaintiff had been charged with a nonexistent crime of selling a substance that looked like an illegal drug). As the Court would later describe *Albright* in *Manuel v. City of Joliet*, 137 S. Ct. 911, 918 (2017), five Justices in two opinions said Albright's claim was under the Fourth Amendment.

[39] Cf. County of Sacramento v. Lewis, 523 U.S. 833, 854 (1998) (holding that scienter is generally required for shock-the-conscience claims).

[40] 528 U.S. 562, 563–65 (2000).

[41] 553 U.S. 591, 602–04 (2008).

[42] See, e.g., Avila v. Pappas, 591 F.3d 552, 554 (7th Cir. 2010) (rejecting a class-of-one claim for an employee who was prosecuted after threatening to "go postal" with respect to a discipline proceeding); cf. Flowers v. City of Minneapolis, 558 F.3d 794, 799–800 (8th Cir. 2009) (indicating that a class-of-one theory was not available for police officers' "decisions regarding whom to investigate and how to investigate").

[43] See, e.g., Meredith v. County of Jefferson, No. 18-cv-00105, 2019 WL 1437821, at *18–19 (W.D. Pa. Apr. 1, 2019) (holding that a class-of-one claim as well as a First Amendment retaliation claim should not have been dismissed, with respect to proceedings brought against a teacher for alleged emotional abuse of a child based on a forty-second encounter in which the teacher told the student he should not be at his locker); Alfaro v. Labrador, No. 06-cv-01470, 2009 WL 2525128, at *8–11 (E.D.N.Y. Aug. 14, 2009) (holding that plaintiff's claim of a class-of-one violation survived summary judgment when it was alleged that the town had not otherwise enforced its zoning code through search warrants and police raids); Bryant v. City of Goodyear, No. 12-cv-00319, 2013 WL 4759251, at *8–9 (D. Ariz. Sept. 4, 2013) (not dismissing plaintiff's selective prosecution claim that he alone was pursued as to discrepancies in time sheets which were explicable given off-the-grid time for street crime units); Grapski

Fourth Amendment-based claims. Fourth Amendment claims are not a central focus of this Article because subjective ill will often is neither necessary nor sufficient to establish such claims.[44] Claims focused on initial searches and seizures can be raised in criminal cases without showing officers' subjective ill will. In addition, the damages claims under *Monroe*[45] and *Bivens*[46] that address initial searches and seizures do not require subjective bad faith, although they do typically require a showing of a violation of clearly established law (objective bad faith) to negate officers' qualified immunity.

In *Manuel v. City of Joliet*,[47] however, the Court indicated that the Fourth Amendment could be the basis for a § 1983 damages claim that extended beyond the defendant's first appearance and through pretrial detention.[48] Manuel remained in jail for forty-eight days after the police and a lab technician allegedly falsified evidence that the pills Manuel possessed were a controlled substance. The majority held that the

v. Barcia, No. 10-cv-00140, 2011 WL 3477041, at *15 (N.D. Fla. Aug. 9, 2011) (refusing to dismiss a class-of-one claim where there were multiple instances of singling out the plaintiff as to various interactions with city officials); Sloup v. Loeffler, No. 05-cv-01766, 2008 WL 3978208, at *14–21 (E.D.N.Y. Aug. 21, 2008) (refusing to grant summary judgment as to the plaintiff's substantive due process, class-of-one claim and selective enforcement claims with respect to requiring the plaintiff to remove fishing equipment from town's harbor areas). See generally Alex M. Hagen, Mixed Motives Speak in Different Tongues: Doctrine, Discourse, and Judicial Function in Class-of-One Equal Protection Theory, 58 S.D. L. Rev. 197, 206–07 (2013) (discussing inter- and intra-circuit splits as to whether impermissible motive is an element of a valid class-of-one claim); id. at 225, 249 (recommending an illicit intent requirement to bring class-of-one in line with equal protection doctrine generally).

[44] See, e.g., Kentucky v. King, 563 U.S. 452, 464 (2011) (rejecting a "bad faith" approach that looked to whether officers deliberately created exigent circumstances to avoid the warrant requirement and reiterating that Fourth Amendment standards are generally objective).

[45] Monroe v. Pape, 365 U.S. 167 (1961).

[46] See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 388 (1971); see also Kossis, supra note 19, at 1648–49, 1652, 1656 (discussing whether a general § 1983 malicious prosecution claim should exist and recommending a substantive due process or Fifth Amendment grand jury source); McMannon, supra note 19, at 1498 (recommending a Fourth Amendment source).

[47] 137 S. Ct. 911 (2017).

[48] Id. at 918–20, 920 n.8. The Court stated that "once a trial occurred, the Fourth Amendment drops out: A person challenging the sufficiency of evidence to support both a conviction and any ensuing incarceration does so under the Due Process Clause of the Fourteenth Amendment." Id. at 920 n.8 (citing Jackson v. Virginia, 443 U.S. 307, 318 (1979)). There is uncertainty as to whether *Manuel* supports a claim where there is no detention after the initial appearance.

probable cause hearing and grand jury indictment did not interrupt Manuel's Fourth Amendment seizure claim.[49]

The Court, however, indicated that the *Manuel* Fourth Amendment claim only extended to injuries up to trial.[50] It suggested that *Jackson v. Virginia*[51] could provide a source for injury from trial and beyond.[52] *Brady*-type claims for withholding or falsifying evidence[53] would also provide a likely theory for such claims because many are based on knowing fabrication and withholding of significant evidence.[54]

Shaw and shock-the-conscience claims possibly could be packaged as *Manuel* claims, given that the plaintiffs are likely to allege a lack of probable cause either initially or while the case remains pending. Some

[49] Id. at 919–20.

[50] See id. at 920 n.8 (indicating the Fourth Amendment claim ended with trial).

[51] 443 U.S. 307, 315–17 (1979) (indicating that due process—presumably procedural—required that evidence for a criminal conviction be sufficient for a reasonable trier of fact to find the elements proved beyond a reasonable doubt).

[52] *Manuel*, 137 S. Ct. at 920 n.8.

[53] Brady v. Maryland, 373 U.S. 83, 87 (1963) (failure of government to reveal material exculpatory evidence for trial violated "due process" and led to "unfair trial"); see also Gregory v. City of Louisville, 444 F.3d 725, 732–34, 750–51 (6th Cir. 2006). In *Gregory*, the Sixth Circuit allowed for a Fourth Amendment claim that overlapped with a *Brady* claim for an exonerated prisoner who alleged that persons involved in his prosecution overstated the positiveness of the victim's identification, had withheld information that two of five hair strands did not match Gregory's, and did not reveal the occurrence of two similar rapes while the defendant was in custody. See id.; see also Bledsoe v. Bd. of Cnty. Comm'rs, 501 F. Supp. 3d 1059, 1118–19 (D. Kan. 2020) (allowing Fourth Amendment claims as to fabricating and withholding evidence prior to trial and substantive due process and shock-the-conscience claims thereafter); id. (holding procedural due process claims were barred by *Parratt v. Taylor*, 451 U.S. 527 (1981)); Brandon L. Garrett, Innocence, Harmless Error, and Federal Wrongful Conviction Law, 2005 Wis. L. Rev. 35, 70 & n.175 (indicating that *Brady* has provided an umbrella for claims involving forensic evidence, confessions, and identifications, and that the majority of circuits had upheld civil claims based on *Brady* violations); cf. Castellano v. Fragozo, 352 F.3d 939, 956–57 (5th Cir. 2003) (indicating *Parratt* did not bar a claim that manufactured evidence and use of perjured testimony led to conviction). *Brady*-type claims generally cannot be brought against prosecutors who were acting in their prosecutorial capacity. The claims are not Fourth Amendment claims. Although the failure to disclose material exculpatory evidence can violate the Constitution without bad faith, see *Brady*, 373 U.S. at 87, claims of due process violations in failure of the government to preserve evidence that possibly might have been exculpatory generally requires bad faith. See Arizona v. Youngblood, 488 U.S. 51, 57–58 (1988).

[54] See McDonough v. Smith, 139 S. Ct. 2149, 2155 (2019) (discussing accrual of a claim based on loss of liberty due to fabricated evidence and assuming without deciding such a claim existed); cf. Franks v. Delaware, 438 U.S. 154, 171–72 (1978) (upon a proper showing, a defendant could attack allegedly knowingly false statements in a warrant affidavit); Garrett, supra note 53, at 94, 97 (discussing fabrication of evidence as a somewhat separate category and that a majority of circuits had upheld § 1983 claims for fabricated confessions).

questions remain as to the elements of Fourth Amendment-based and other malicious prosecution-type damages claims.[55] We discuss those questions below.

II. STANDARDS OF PROOF IN DIFFERENT SETTINGS

Selective prosecution claims may show up in a variety of procedural settings, such as in a motion brought by a defendant within a criminal proceeding, an action for an injunction against a prosecution, petitions for habeas corpus, and damages actions. The standards for allowing a claim to proceed beyond initial allegations may vary in the different contexts. The most evident contrast is between claims arising in the original criminal proceeding and post-proceeding damages claims. We thus focus for now on claims brought within a pending prosecution (*Armstrong*[56] claims) and claims brought as separate damages actions (*Hartman*[57] claims).

*A. Claims Brought Within Pending Prosecutions (*Armstrong *Claims)*

When motions are brought to dismiss a pending prosecution, the motions will often fail when a defendant seeks discovery from prosecutors.[58] In *United States v. Armstrong*, defendants charged with conspiring to sell crack cocaine challenged their federal prosecutions as racially discriminatory.[59] The Court stated that, as in ordinary equal protection cases, a defendant would need to show both a racial purpose and effect.[60] Purpose apparently requires evidence beyond mere knowledge of disparate effects on the part of prosecutors.[61] And effects

[55] See infra text accompanying notes 198–210. See generally McMannon, supra note 19 (discussing issues of elements of claims both before and after *Manuel*).

[56] United States v. Armstrong, 517 U.S. 456 (1996).

[57] Hartman v. Moore, 547 U.S. 250 (2006).

[58] An example of the type of discovery that might be sought is provided in *Armstrong*, where the district court had ordered the government

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

517 U.S. at 459.

[59] Id. at 456.

[60] Id. at 465.

[61] Cf. id. at 470–71 (discussing the defendant's showing of impacts on African Americans).

would generally require showings of similarly situated defendants who were not prosecuted (comparators).[62]

This showing might seem fairly consistent with ordinary equal protection standards. But *Armstrong* used these standards not only to sketch the elements of the selective prosecution claim, but also as a hurdle to discovery from the prosecution. In *Armstrong*, the Court found insufficient to warrant discovery the affidavits tending to indicate that federal prosecutors primarily brought crack cocaine prosecutions against African American defendants, while white defendants accused of crack offenses were more typically prosecuted in state courts.

Lower courts treat *Armstrong* as requiring some showing of both effect and bad motivation before allowing discovery. As to effect, the defendant would normally need to identify comparators who meet two basic conditions. First, a valid comparator must have "engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant,"[63] in order to ensure that "any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan."[64] Second, a valid comparator will have faced evidence "as strong or stronger than that against the defendant."[65] Roger Stone, for example, offered as comparators Jerome Corsi and Randy Credico, both of whom he said had lied during the Mueller investigation and yet were not prosecuted for doing so.[66] The court noted differences between the cases and also cited to the Mueller Report's statement that prosecutors had not pursued charges against some individuals "due to evidentiary hurdles to proving falsity" or because the Office of Special Counsel determined that the individuals "ultimately provided truthful information and that considerations of culpability, deterrence, and resource[-p]reservation weighed against prosecution."[67]

[62] Id. at 465–66, 469–70.

[63] United States v. Stone, 394 F. Supp. 3d 1, 31 (D.D.C. 2019) (quoting United States v. Smith, 231 F.3d 800, 810 (11th Cir. 2000)).

[64] Id.

[65] Id.

[66] Id. at 32.

[67] Id. at 32–33 (citing 1 Robert S. Mueller, III, U.S. Dep't of Just., Report on the Investigation into Russian Interference in the 2016 Presidential Election 198–99 (2019)).

Beyond comparators, the defendant also needs some evidence of motivation.[68] As is true in other equal protection claims, the claimant will need to show the motivation of the particular decision-maker that the court deems relevant. For example, in *Trump v. Vance*, in which Trump sought in federal court to limit state court subpoenas allegedly based, inter alia, on political motivation, the Second Circuit said that "motivations of unspecified 'Democrats' [could] not be imputed to the District Attorney without specific factual allegations."[69] As discussed below, some lower courts have reduced the showing necessary to obtain discovery if the defendant frames the issue as one of selective enforcement rather than selective prosecution.[70] This different standard has particularly appeared in some cases involving Bureau of Alcohol, Tobacco, and Firearms ("ATF") sting operations. The Third Circuit in *United States v. Washington* said, "'[p]rosecution' refers to the actions of prosecutors (in their capacity as prosecutors) and 'enforcement' to the actions of law enforcement and those affiliated with law-enforcement personnel."[71]

*B. Damages Cases for Selective Prosecution (*Hartman *Claims)*

Selective prosecution claims also appear as § 1983 or *Bivens* damages actions, in which plaintiffs allege that a prior prosecution was motivated

[68] See United States v. Bass, 536 U.S. 862, 863 (2002) (per curiam) (evidence of both effect and intent required); United States v. Cannon, 987 F.3d 924, 937, 939 (11th Cir. 2021) (same); Att'y Gen. of U.S. v. Irish People, Inc., 684 F.2d 928, 934, 946 (D.C. Cir. 1982) (requiring a showing of motivation as well as a showing of comparators who were not required to register under the Foreign Agents Registration Act, 22 U.S.C. §§ 611–621); *Stone*, 394 F. Supp 3d at 35.

[69] 977 F.3d 198, 214 (2d Cir. 2020).

[70] See, e.g., United States v. Washington, 869 F.3d 193, 221 (3d Cir. 2017) (in a case involving a stash house sting operation, allowing discovery on some evidence of discriminatory effect, but the proffer "must be strong enough to support a reasonable inference of discriminatory intent and non-enforcement"); United States v. Sellers, 906 F.3d 848, 855 (9th Cir. 2018) (on appeal from a criminal conviction, prescribing this lower standard for a similar sting); United States v. Alcaraz-Arellano, 441 F.3d 1252, 1264 (10th Cir. 2006) (using the *Armstrong* standards for discovery in a case alleging racially discriminatory stops); cf. United States v. Jackson, No. 16-cr-02362, 2018 WL 6602226, at *23 (D.N.M. Dec. 17, 2018) (indicating that the Third and Seventh Circuits had adopted the lower standard, but the Tenth Circuit had not); United States v. Hare, 820 F.3d 93, 101 (4th Cir. 2016) (even assuming a more lenient standard, the defendants in this stash house sting case had not shown they were entitled to additional discovery). The Seventh Circuit later indicated a preponderance of the evidence standard rather than a clear and convincing evidence standard should be used on the merits of a selective enforcement, as opposed to a selective prosecution, including on § 2255 habeas. See Conley v. United States, 5 F.4th 781, 791–92 (7th Cir. 2021).

[71] 869 F.3d at 214.

by speech or race. In *Hartman v. Moore*, after the government unsuccessfully prosecuted Moore for alleged participation in a bribery scheme,[72] he sued postal inspectors who he claimed had retaliated against him for his protected lobbying activities in attempting to convince the Post Office to adopt his product.[73] The Court required that the plaintiff plead and prove the lack of probable cause for the charges in addition to alleging illicit motivation and adverse action.[74] The no-probable-cause determination was necessary to show that the retaliatory motivation by the defendant postal inspectors caused the (absolutely immune) prosecutor to bring the action:

> [A] plaintiff like Moore must show that the non-prosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging. Thus, the causal connection required here is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another.[75]

If the plaintiff could make such a showing, the ordinary standards of proof under *Mt. Healthy City School District Board of Education v. Doyle*[76] would apply. The plaintiff would need to show adverse action and evidence of bad motivation. The defendant would generally offer other evidence for his actions. The trier of fact would be instructed that if they found bad motivation as well as other reasons for the action, the defendant would bear the burden to show by a preponderance of the evidence that his actions would have occurred even in the absence of bad motivation.[77]

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[72] See Moore v. Hartman, Nos. 92-cv-02288, 93-cv-00324, 1993 WL 405785, at *2 (D.D.C. Sept. 24, 1993).

[73] Hartman v. Moore, 547 U.S. 250 (2006).

[74] Id. at 260–61.

[75] Id. at 262 (footnote omitted).

[76] 429 U.S. 274, 286–87 (1977).

[77] See *Hartman*, 547 U.S. at 265 ("But a retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause supporting the prosecutor's decision to go forward are reasonable grounds to suspend the presumption of regularity behind the charging decision."); cf. Nieves v. Bartlett, 139 S. Ct. 1715, 1725 (2019) ("But if the plaintiff [in a retaliatory arrest case] establishes the absence of probable cause, then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing

In *Nieves v. Bartlett*, the Court required a plaintiff alleging a retaliatory arrest also to allege no-probable-cause,[78] although such claims do not involve filtering causation through a non-party prosecutor as in *Hartman*.[79] The Court, however, allowed an exception to the requirement "for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so."[80] In such cases, the plaintiff would need to make a threshold showing of "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."[81] This showing resembles that required in *Armstrong* motions, which also can proceed without a showing of no-probable-cause.[82]

C. Injunctive Cases

Armstrong claims and *Hartman* claims are the more typical procedural contexts for allegations of bad faith prosecutions. Sometimes, however, a defendant brings an injunctive action in federal court seeking to enjoin an ongoing state prosecution.[83] In some cases, a claimant seeks to enjoin

that the [arrest] would have been initiated without respect to retaliation." (internal quotation marks omitted) (citations omitted)).

[78] *Nieves*, 139 S. Ct. at 1724.

[79] Id.

[80] Id. at 1727.

[81] Id.

[82] See id. at 1739 (Sotomayor, J., dissenting) (arguing that the majority put too much emphasis on comparators as distinguished from other possible proof). The *Nieves* exception would also be consistent with some lower courts' allowing class-of-one damages claims, often involving local administrative enforcement. They generally involve a showing of minor violations for which others have not been pursued. See supra note 43; see also Clayton, supra note 8, at 2317 (arguing that *Nieves* unduly restricts news-gatherers' claims); Brenna Darling, Comment, A Very Unlikely Hero: How *United States v. Armstrong* Can Save Retaliatory Arrest Claims After *Nieves v. Bartlett*, 87 U. Chi. L. Rev. 2221, 2250–51 (2020) (arguing that direct evidence of bad motivation should allow for discovery in retaliatory arrest claims). In the arrest context, a plaintiff may be aware of others engaged in similar conduct at the time the plaintiff was arrested, thus making comparators somewhat more available than in prosecution cases; cf. *Nieves*, 139 S. Ct. at 1740 ("I suspect that those who can navigate this requirement predominantly will be arrestees singled out at protests or other large public gatherings, where a robust pool of potential comparators happens to be within earshot, eyeshot, or camera-shot.").

[83] See, e.g., Dombrowski v. Pfister, 380 U.S. 479, 482 (1965) (ruling on a request for an injunction restraining prosecution for alleged communist activity); Shaw v. Garrison, 467 F.2d 113, 115 (5th Cir. 1972) (affirming the grant of an injunction against prosecution of a perjury charge).

investigative subpoenas.[84] In *Younger v. Harris*, the Court treated the ability to raise defenses in an ongoing state prosecution as generally providing an adequate remedy at law, but allowed for the possibility of an injunction when the prosecution posed a threat of great and irreparable harm going beyond the harm of having to undergo the criminal proceeding to raise one's objections.[85]

As a general matter, injunction claims in addition to calling for a showing of great and irreparable harm will tend to follow *Armstrong* standards, which do not require a no-probable-cause showing.[86]

D. Habeas Corpus

Habeas also presented an avenue in the past for claims of selective prosecution, including the successful claim of discrimination against laundry owners of Chinese origin in *Yick Wo v. Hopkins*.[87] In *Yick Wo*, the petitioners had operated in wooden buildings in technical violation of the law, and their convictions did not prevent relief.[88]

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[84] See, e.g., Trump v. Vance, 140 S. Ct. 2412, 2416 (2020).

[85] 401 U.S. 37, 48–49, 53–54 (1971).

[86] Where race or speech motivation is alleged, lower courts have required high showings of motivation but have not necessarily required a showing of lack of probable cause or lack of a realistic hope of success on the merits. See, e.g., Cullen v. Fliegner, 18 F.3d 96, 103–04 (2d Cir. 1994) (indicating that the plaintiff in a suit to enjoin school district disciplinary proceedings need not show the lack of a reasonable expectation of a favorable outcome in a case alleging bad faith where retaliation for the exercise of First Amendment rights was also shown). The *Cullen* case involved a teacher's electioneering too close to a polling place, but the defendants had failed to mark the one hundred feet as required by law. Id. at 101–02; see also Lewellen v. Raff, 843 F.2d 1103, 1112 (8th Cir. 1988) (affirming the grant of an injunction where the trial court had found racial and political motivation, despite evidence that the defendant had some involvement in an intra-family agreement that a witness would not testify); Wilson v. Thompson, 593 F.2d 1375, 1377 (5th Cir. 1979) (remanding a case in which officials reinstated dormant misdemeanor charges resulting from a scuffle with deputies, after one of the parties filed a civil suit); id. at 1379 ("Indeed, the plaintiffs have conceded, both below and on this appeal, that based on the testimony the deputies gave at the preliminary hearing, the State had sufficient evidence to go to trial and to sustain a jury verdict of guilt."). Nor presumably would a class-of-one claim—assuming it was cognizable—require a no-probable-cause showing, because the central allegation is that enforcement was not pursued against comparable others. But a claim such as that in *Shaw v. Garrison* of harassment with no reasonable hope of success on the merits by its terms requires a showing similar to no-probable-cause. 467 F.2d 113 (5th Cir. 1972).

[87] 118 U.S. 356 (1886) (reviewing denials of habeas in the federal court and in the state court).

[88] Id. at 373–74; see also Oyler v. Boles, 368 U.S. 448 (1962) (reviewing state court's denial of habeas to prisoners claiming uneven prosecutorial application of the state's habitual offender statute).

The courts continue not to require a showing of no-probable-cause in the habeas cases raising selective prosecution.[89] Habeas, however, presents its own set of hurdles. Failure to raise the claim in the original criminal proceeding will often bar such claims, whether brought by state or federal prisoners.[90] And even if properly preserved, the current federal habeas statute requires state prisoners to show that the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[91] As to federal prisoners whose claims are under § 2255, a federal habeas court generally will not reconsider a claim already raised and considered on direct appeal.[92] If the claim was not raised, however, it may be treated as procedurally defaulted.[93]

Some federal prisoners under § 2255 have raised selective prosecution claims by arguing ineffective assistance of counsel[94] as a way around a

[89] See, e.g., Dowdell v. United States, No. 07-cr-00010, 2011 WL 2270466, at *8 (W.D. Va. May 3, 2011) (rejecting selective prosecution claim without reference to a no-probable-cause standard).

[90] See Booker v. United States, No. 04-cr-00226, 2009 WL 1974466, at *2 (W.D. Mich. July 7, 2009) (holding that the petitioner could not bring a claim for selective prosecution in a § 2255 proceeding that he had not raised on his direct appeal); cf. Conley v. United States, 5 F.4th 781, 788, 801 (7th Cir. 2021) (rejecting a selective enforcement claim on the merits in a § 2255 case in which the government had waived the prisoners' procedural default).

[91] 28 U.S.C. § 2254(d). Section 2254(e) further provides that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." See Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1320 (7th ed. 2015) (discussing deference to state fact findings).

[92] See Janice L. Bergmann, Another Bite at the Apple: A Guide to Section 2255 Motions for Federal Prisoners 125 (2009).

[93] Id. at 127. Cause and prejudice or a fundamental miscarriage of justice allow both federal and state prisoners a way around procedural defaults. See id. at 128; cf. id. at 139–40 (assuming that the restrictions in *Teague v. Lane*, 489 U.S. 1060 (1989), apply in § 2255 proceedings); Welch v. United States, 136 S. Ct. 1257, 1264 (2016) (noting that the parties assumed that the *Teague* framework applied in a § 2255 proceeding); Chaidez v. United States, 568 U.S. 342, 344–45, 345 n.1 (2013) (holding that on a writ of *coram nobis* seeking to collaterally attack her convictions, *Teague* barred raising a claim that counsel was ineffective for failing to tell the client the immigration consequences of the plea); Fallon et al., supra note 91, at 1357–58 (discussing unlikelihood of reconsideration of a claim previously presented).

[94] Thomas v. United States, No. 10-1793, 2011 U.S. App. LEXIS 26679, at *4–6 (6th Cir. May 4, 2011) (denying a certificate of appeal; holding that counsel was not ineffective for failing to raise a selective prosecution claim as to overrepresentation of African Americans

procedural default bar.[95] In such cases, the habeas courts tend to review the evidence the petitioner presents as to selective prosecution but have generally found it wanting.[96]

III. CRITICISMS OF THE STANDARDS OF PROOF AND RESPONSE

Although *Hartman* damages actions have a no-probable-cause requirement missing from *Armstrong* motions, the standards in both contexts have much in common. Both present outset barriers to a future merits determination of whether bad motivation was a but-for cause for a prosecution. The criticisms of both have centered on the difficulties they pose to proving that unconstitutional motivation caused adverse action, particularly as compared to other contexts where speech or race motivation may be at issue. And at a more general level, the critics take the position that the benefits of rooting out possible constitutional violations outweigh the costs of allowing more selective prosecution claims to proceed to discovery and future merits determinations.[97]

Armstrong, it is said, made "claims of selective or discriminatory prosecution almost impossible to bring."[98] Bill Stuntz and others

selected for federal as opposed to state prosecution; he had not made a showing of similarly situated non-African Americans in the district or of purpose); United States v. Long, Nos. 12-cr-00418, 18-cv-00423, 2021 WL 1210252, at *4 (E.D. Pa. Mar. 31, 2021) (in a § 2255 claim, rejecting a claim of ineffective assistance in failing to raise a selective enforcement claim, because a request for discovery would have been denied).

[95] Bergmann, supra note 92, at 128–29 (procedural default will not bar an ineffectiveness claim); id. at 133 (ineffectiveness may be cause for a procedural default).

[96] See, e.g., United States v. Finnell, No. 13-cv-00397, 2019 WL 4894492, at *2 (N.D. Ind. Oct. 4, 2019) (rejecting a § 2255 claim for ineffective assistance based on failure to bring selective enforcement-type challenges to the prosecution). The prisoner had pleaded and was limited to raising ineffectiveness claims, but the court did look at the merits of the selective enforcement claim. Id. at *1–2.

[97] Cf. McAdams, supra note 8, at 613 ("The easier it is to prove selective prosecution, the more occasions there will be when courts mistakenly find selective prosecution where none actually exists (a Type I error). The more difficult the standard of proof, on the other hand, the more occasions there will be when courts mistakenly find no selective prosecution when it does exist (a Type II error). The same is true of discovery: a lenient standard will cause more prosecutors to face the burdens of discovery in support of meritless claims; a rigorous standard will cause more cases of selective prosecution to go undetected.").

[98] Barkow, supra note 14, at 886 (footnote omitted); McAdams, supra note 8, at 618 ("For certain offenses, even when prosecutors select defendants on the basis of race, the similarly situated requirement will be effectively impossible to meet."); cf. Stephen Rushin & Griffin Edwards, An Empirical Assessment of Pretextual Stops and Racial Profiling, 73 Stan. L. Rev. 637, 641, 650–51 (2021) (arguing that the difficulty of meeting selective enforcement standards precluded relief for most cases of pretextual stops based on racial profiling). But cf.

described *Armstrong* as presenting "a classic Catch-22" in that "defendants must, in effect, prove discrimination in order to get the evidence necessary to prove discrimination."[99] It is said that *Armstrong* "created an insuperable discovery standard" that results in "an abstract right without a remedy."[100]

In damages cases, criticism has centered on requiring the element of no-probable-cause for selective prosecution claims. Critics point out that speech motivation, when it is a but-for cause of adverse action, is a constitutional violation,[101] even if officials have probable cause to believe that the complainant committed an offense. Indeed, *Armstrong* indicates as much since it does not require a no-probable-cause showing as to speech and race motivation. In claims of unconstitutional motivation in the employment context, moreover, the fact that an employee violated a work rule does not prevent the employee from showing that the employer's action would not have occurred but for race or speech motivation. For example, in *Mt. Healthy City School District Board of Education v. Doyle*, the plaintiff teacher had made inappropriate statements and gestures to students and had also called a radio station about a proposed school dress policy.[102] The Court indicated that a trier of fact could make a determination as to whether the failure to renew the teacher's contract would have occurred even had he not called the radio

McAdams, supra note 8, at 662–64 & nn.166–77 (providing some successful state and federal cases).

[99] Stuntz, supra note 8, at 369; Steven Alan Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U. Pa. L. Rev. 1365, 1373–74 (1987) (criticizing the requirement to present evidence of discrimination to obtain discovery); Poulin, supra note 8, at 1073–74 (criticizing *Armstrong* as creating too high a barrier to discovery, and arguing that opening up discovery even though many such claims would ultimately be unsuccessful would serve as a kind of soft enforcement to encourage constitutional compliance); Jampol, supra note 8, at 963 (arguing for a more lenient standard for discovery in selective prosecution cases). For discussion of selective prosecution motions brought in the wake of 9/11, see Thomas P. McCarty, Note, *United States v. Khan*, 461 F.3d 477 (4th Cir. 2006): Discovering Whether "Similarly Situated" Individuals and the Selective Prosecution Defense Still Exist, 87 Neb. L. Rev. 538, 558 (2008) (favoring a stringent discovery standard "to keep sensitive Government information from falling into the hands of terrorists," but also criticizing use of too stringent a similarly-situated standard for comparisons); id. at 566–67 (pointing out the government's newfound interest in pursuing Neutrality Act violations against supporters of a Cambodian group after some of the post-9/11 claims of selective prosecution).

[100] Siegler & Admussen, supra note 8, at 991.

[101] See Nieves v. Bartlett, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part).

[102] 429 U.S. 274, 281–82 (1977).

station.[103] Similarly, it is argued that a plaintiff who presents some evidence of motivation but as to whom there is probable cause should be allowed to go to a trier of fact on the causation issue under *Mt. Healthy* standards.[104]

A. The Significance of Criminal Violations

The most obvious reason for the extra hurdles for showing bad faith prosecution is that a defendant's criminal activity may presumptively be said to have caused the prosecution.[105] The governmental interest in enforcing laws against conspiracy to sell drugs in *Armstrong* is a much more convincing reason for adverse government action than, for example, the government's interest in taking adverse action against an employee who made an obscene gesture to two students in *Mt. Healthy*. Indeed, one might argue that, at least for serious crimes, the government interest in enforcement might outweigh concerns as to unequal enforcement.[106]

In response to the argument that criminal behavior is often a more convincing reason for adverse action than a workplace infraction, the critics of *Armstrong* and *Hartman* argue that the strength of the alternative explanation need not evoke special hurdles. If a complainant is shown to have engaged in unlawful behavior that as a rule would lead to an arrest—likely a more serious infraction—then he is unlikely to prevail on a claim that speech or race motivation was the but-for cause of adverse action. For example, Justice Gorsuch in *Nieves v. Bartlett* disfavored requiring an element of no-probable-cause in a claim for a speech retaliatory arrest, stating:

> [I]f the officer had probable cause at the time of the arrest to think the plaintiff committed a serious crime of the sort that would nearly always

[103] Id. at 287.

[104] See Hartman v. Moore, 547 U.S. 250, 267 (2006) (Ginsburg, J., dissenting, joined by Breyer, J.); see also *Nieves*, 139 S. Ct. at 1737 (Sotomayor, J., dissenting) (arguing that *Mt. Healthy* standards strike the proper balance between government interests and individual rights); Kruse, supra note 9, at 1536 (2005) (recommending use of the employment discrimination framework).

[105] See *Nieves*, 139 S. Ct. at 1724 (in the arrest context, stating that the absence of probable cause will "as in retaliatory prosecution cases—generally provide weighty evidence that the officer's animus caused the arrest, whereas the presence of probable cause will suggest the opposite").

[106] Cf. McAdams, supra note 8, at 653 ("A few critics of selective prosecution claims have voiced this concern—that the 'victim' still deserves criminal punishment whatever the motives of the prosecutors." (footnote omitted)).

> trigger an arrest regardless of speech, then (absent extraordinary circumstances) it's hard to see how a reasonable jury might find that the plaintiff's speech caused the arrest. In cases like that, it would seem that officers often will be entitled to dismissal on the pleadings or summary judgment.[107]

Justice Sotomayor in dissent also surmised that major crimes generally would end up not meeting the requisite causation standard.[108]

If criminal behavior can be expected in most cases to supply a convincing reason for a prosecution, however, it is reasonable to treat probable cause as the presumptive reason for prosecution that requires some showing to overcome. When the Court has faced circumstances that it believes present a very convincing alternative reason for allegedly badly motivated action, it has sometimes found ways to prevent the case from moving forward and opening up discovery absent some additional showing. In *Bell Atlantic Corp. v. Twombly*, the Court held the antitrust conspiracy complaint insufficient given that the alleged (non-conclusory) facts failed to take the case beyond the assumption of to-be-expected parallel behavior.[109] And in *Ashcroft v. Iqbal*, the Court determined that it was appropriate to grant a motion under Federal Rule of Civil Procedure 12(b)(6) when a post-9/11 detainee alleged that Attorney General Ashcroft and Federal Bureau of Investigation ("FBI") Director Mueller adopted a policy of designating detainees as of high interest and subject to restrictive confinement because of the detainees' being Arab Muslims.[110] The Court determined that the case had not stated a legally sufficient illicit motivation claim against Ashcroft and Mueller because Arab Muslims were an appropriate focus for the investigation.[111]

The dismissal of the *Twombly* and *Iqbal* complaints is comparable to *Armstrong*'s requirement of a sufficient initial showing on the merits to obtain further discovery. So too *Hartman*'s no-probable-cause requirement for damages dissipates alternative causation.

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[107] 139 S. Ct. at 1732; see also Gullick v. Ott, 517 F. Supp. 2d 1063, 1072 (W.D. Wis. 2007) (in a claim for retaliatory arrest prior to *Nieves*, holding that probable cause more appropriately should just go to whether the plaintiff has proved his case under ordinary standards rather than preventing the claim from proceeding).

[108] See *Nieves*, 139 S. Ct. at 1736 (Sotomayor, J., dissenting).

[109] 550 U.S. 544, 564–66 (2007).

[110] 556 U.S. 662, 680–81 (2009). For discussion of selective prosecution motions brought in the wake of 9/11, see McCarty, supra note 99, at 548–57.

[111] *Iqbal*, 556 U.S. at 682.

Where enforcement actions involve somewhat lesser crimes, however, the cases may look more like the employment cases, where some misfeasance is not a presumptive hurdle to showing that illicit motivation caused adverse action.[112] This suggests that in *Hartman* claims, it may make sense to allow an exception to the no-probable-cause showing, similar to that for retaliatory arrest claims in *Nieves*, where officials enforce some law that they typically exercise their discretion not to pursue.[113] It is noteworthy that *Armstrong* motions, which do not require a no-probable-cause showing, have been most successful as to minor crimes such as Sunday closing laws where knowledge of general non-prosecution may be widespread and comparators easier to identify.[114]

B. Exercise of Discretion

That government interests in enforcing the criminal law are high and that probable cause generally presents a presumptive case of alternative causation help to explain the obstacles to selective prosecution claims. After all, where there is no probable cause, damages cases proceed under *Mt. Healthy* standards. But there are other reasons that suggest that selective prosecution cases ought to be difficult to pursue.

One reason on which the Court has relied is respect for discretion. Historically the courts distinguished officials' ministerial decisions from their discretionary decisions. Ministerial decisions were those under rules that the executive had a plain official duty to follow. Failure to follow ministerial rules could evoke mandamus relief and damages liability. Discretionary decisions typically involved a variety of factors without a

[112] The high rate of dismissal of misdemeanors and non-prosecution policies as to minor crimes may provide evidence in such cases. See generally Issa Kohler-Hausmann, Misdemeanorland: Criminal Courts and Social Control in the Age of Broken Windows Policing 2, 4, 74 (2018) (indicating that the increase in misdemeanor arrests under New York City's broken windows policy led to disproportionately fewer criminal convictions and jail sentences, but rather put arrestees into a managerial system seeking to determine if they would again get into trouble).

[113] *Nieves*, 139 S. Ct. at 1727 ("[W]e conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.").

[114] See McAdams, supra note 8, at 662–64 & nn.166–77 (citing state and federal cases); Poulin, supra note 8, at 1099 (citing cases where defendants provided comparators); id. at 1102–03 (citing cases where defendants could not establish a control group). Note too that the class-of-one claims that survive summary judgment have generally involved unusual enforcement for minor crimes. See supra note 43.

precise metric for applying them. Discretionary decisions by the executive historically were often insulated from judicial scrutiny, whether by way of injunctive or damages actions.[115]

Numerous factors go into prosecutorial charging decisions, including many individualized determinations, such that they may readily be characterized as discretionary rather than ministerial.[116] The reliance on discretion, however, comes up against objections that prosecutors exercise too much discretion and that the courts have developed means to examine many decisions that once resisted significant review because they were discretionary—as in *State Farm*-style review of agency rulemaking.[117]

Before addressing the arguments for greater review, it is appropriate to consider some of the oft-stated reasons for judicial deference to prosecutorial discretion. Judicial respect for prosecutorial discretion offers many benefits for defendants[118]—as suggested by the non-prosecution policies of progressive prosecutors with respect to certain minor crimes.[119] Prosecutors may also decide not to charge particular defendants based on their individual mitigating circumstances or based on perceived overbreadth of the law as applied in the particular case.[120] The presumptive un-reviewability of decisions not to pursue enforcement actions protects individual liberty and property.[121]

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[115] See Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Rsrv. L. Rev. 396, 410, 422–29 (1987).

[116] Davis, supra note 1, at 409–10 (describing multiple factors).

[117] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 41–42 (1983).

[118] See McCleskey v. Kemp, 481 U.S. 279, 311 (1987) ("Discretion in the criminal justice system offers substantial benefits to the criminal defendant.").

[119] See supra note 2; Jeffrey Bellin, The Power of Prosecutors, 94 N.Y.U. L. Rev. 171, 174 (2019) (questioning the "increasingly frenetic claims about prosecutorial preeminence"); Bellin, supra note 2, at 1206 (noting move to lauding the discretion of progressive prosecutors); Shaffer, supra note 14, at 3–4 (suggesting that prosecutorial discretion may reduce racial disparities in sentencing, because some prosecutors will discount the significance of Black defendants' criminal records).

[120] See, e.g., Stephanos Bibas, The Need for Prosecutorial Discretion, 19 Temp. Pol. & C.R. L. Rev. 369, 371, 373–74 (2010); Wilkinson, supra note 13, at 1132 (providing reasons for prosecutorial discretion).

[121] See, e.g., Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers." (citation omitted)); In re Flynn, 961 F.3d 1215, 1221–22 (D.C. Cir. 2020) (exploring prosecutors' motivations for dismissing the prosecution in this case because it would interfere with the executive branch); Bibas, supra note 120, at 372 (lauding discretion of prosecutors not to prosecute).

Where individualized decisions involve multiple factors, moreover, inconsistency among similar cases may be inevitable. As the Court has explained:

> There are some forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.[122]

Also, as noted above, the Seventh Circuit similarly refused to employ a class-of-one theory in claims of selective prosecution.[123]

In addition, prosecutors may consider factors that are thought to be particularly inappropriate for judicial scrutiny and also factors whose revelation may damage law enforcement. As the Court stated in *Wayte v. United States*:

> This broad discretion rests largely on the recognition that the 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. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.[124]

[122] Engquist v. Or. Dep't of Agric., 553 U.S. 591, 594, 603 (2008) (declining to recognize a class-of-one equal protection claim for public employment involving repeat player supervisors).

[123] See supra note 42 and accompanying text.

[124] 470 U.S. 598, 607–08 (1985).

Any defense of prosecutorial discretion, however, swims against a tide of academic commentary condemning excessive prosecutorial discretion.[125] It is generally thought that prosecutors exercise too much discretionary power.[126] The statutory definitions of crimes and punishments are less of a constraint than one might assume, because few cases go to trial and the large number of overlapping criminal laws allows prosecutors to choose crimes and sentences in making a particular charging decision.[127] Mandatory minimum sentences for some crimes as well as the weight judges accord to prosecutors' sentencing recommendations may give prosecutors undue leverage in plea bargaining.[128] Such arguments have led to calls for a variety of reforms, including for simplified criminal codes and for the repeal of mandatory sentences.[129] But according to Professor Barkow, "[p]erhaps the most common suggestion for controlling [federal] prosecutorial abuses is to have greater federal court oversight over plea bargaining, charging, and cooperation decisions."[130] And of course decisions as to charging and plea bargaining may be central to claims of selective prosecution.

Professor Barkow, however, has evaluated calls for more judicial review as the antidote for undue discretion and has persuasively argued that separation of functions within prosecutors' offices would be a more effective solution.[131] Judicial supervision would run into "concern[s]

[125] See Wilkinson, supra note 13, at 1104–05, 1129–31 (describing critiques of prosecutorial discretion and citing authority); Kate Stith, The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion, 117 Yale L.J. 1420, 1422 (2008) ("A central campaign of the modern age—extending far beyond sentencing and the criminal justice system—has been to reduce the discretion of government officials."); Arffa, supra note 13, at 1082 (noting that many see prosecutorial power as a central problem of the American criminal justice system).

[126] See, e.g., Stuntz, supra note 13, at 579; cf. Bibas, supra note 120, at 369 (enumerating problems of overlapping criminal statutes, overcharging as a plea bargaining chip, and discretion as to sentencing recommendations).

[127] Stuntz, supra note 8, at 379 ("Law does not govern criminal justice. The menu has grown too large; prosecutors have too many options.").

[128] Barkow, supra note 14, at 877–78.

[129] Id. at 872 & nn.12–13.

[130] Id. at 907 (also citing authority for this suggestion); Stephanos Bibas, Prosecutorial Regulation Versus Prosecutorial Accountability, 157 U. Pa. L. Rev. 959, 969–70 & nn.36–38 (2009) (citing authority supporting judicial supervision). See generally David Alan Sklansky, The Nature and Function of Prosecutorial Power, 106 J. Crim. L. & Criminology 473, 520 (2016) (concluding that reform has been difficult because we expect prosecutors to intermediate "between law and politics, rules and discretion, courts and police, advocacy and objectivity"); id. at 514–20 (noting general lack of success of reform proposals).

[131] Barkow, supra note 14, at 873–74; see also Bibas, supra note 130, at 964, 969–74 (discussing problems with judicial review of prosecutorial discretion, and recommending inter

about the judiciary's role in law enforcement."[132] The many nonjudicial factors would likely confound effective review; prosecutors would generally be able to justify their decisions "in reasons of strategy or budget limitations."[133] She points out that even some proponents of such an enhanced judicial role recognize the need for prosecutorial secrecy as to aspects of their decisions, such as "if the prosecutor declines to bring a case because the evidence is too expensive or because a witness is recalcitrant."[134]

In effect, Barkow is arguing that the kind of discretionary decisions that prosecutors make lend themselves more to review by other prosecutorial officials than by the courts. Barkow particularly recommended separation of functions within the Department of Justice ("DOJ"), such that officials not involved in investigating or pursuing a particular case review decisions as to charging, bargaining, and cooperation.[135] This would bring in the judgment of persons unbiased by their prior involvement in and desire to win a particular case.[136] Such

alia changes within prosecutors' offices); Bibas, supra note 120, at 374 (criticizing the judiciocentric bias of the academy); id. at 373–74 (recommending development of an "office-wide culture of guided discretion" including development of office-wide policies); cf. Wilkinson, supra note 13, at 1135 (arguing against increasing judicial oversight of prosecutorial charging decisions). But cf. Andrew Manuel Crespo, The Hidden Law of Plea Bargaining, 118 Colum. L. Rev. 1303, 1358–60 (2018) (discussing some states' allowance of judicial dismissals of charges based on equitable grounds); Anna Roberts, Dismissals as Justice, 69 Ala. L. Rev. 327, 330 (2017) (discussing this phenomenon).

[132] Barkow, supra note 14, at 908.

[133] Id. at 909.

[134] Id. at 908–09 (citing Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 204 (1969)). Barkow has described practices of the U.S. Attorney's Office for the Southern District of California in San Diego, in which prosecutors in charge of a case present memoranda as to proof and possible weaknesses in cases to other prosecutors. See Barkow, supra note 14, at 915 (discussing "indictment review"). Such evaluations seem more appropriate for internal review than for court revelation. See also Sklansky, supra note 130, at 518–19 (in discussing why recommendations for greater public transparency of prosecutorial decisions have not taken hold, pointing to several problems with such transparency).

[135] Barkow, supra note 14, at 901. Barkow's recommendations primarily address federal prosecutors. Some prosecutors' offices already separate functions of screening and trial. See Marc L. Miller & Ronald F. Wright, The Black Box, 94 Iowa L. Rev. 125, 129 (2008) (finding an office common law as to charging patterns in the Orleans Parish District Attorney's Office); cf. Crespo, supra note 131, at 1387–89 (indicating that in state courts, the sub-constitutional law includes procedural rules that help to rein in prosecutorial discretion).

[136] See Barkow, supra note 14, at 896–97 (suggesting the reforms would help to combat the loss of objectivity from involvement in the case).

review might improve adherence to higher level priorities and policies, and perhaps improve consistency as among cases.[137]

Other scholars have suggested alternative avenues for reining in prosecutorial discretion, including citizen review boards[138] and publication of prosecutorial policies.[139] Such proposals, although not without problems,[140] are not necessarily precluded by enhancing internal checks within prosecutors' offices. And in common with Barkow's proposal, they recommend avenues besides increasing judicial scrutiny of prosecutorial decisions.[141]

Barkow's proposals address problems of undue prosecutorial discretion generally, although they presumably might also reduce the play for illicit factors such as speech and race.[142] Even when such checks are in place, however, one would want to allow some judicial checks on illicit motivation. And this is what the Court allows to a limited extent in *Armstrong* and *Hartman*. On a sufficient preliminary showing, *Armstrong* allows discovery, and *Hartman* allows damages cases to proceed on a showing of no-probable-cause. But allowing claims to proceed based on weak allegations of illicit motivation opens up the prospect of more

[137] Id. at 914 (arguing why U.S. Attorneys might be amenable to such reforms); see also Bibas, supra note 130, at 1001–02 (arguing internal reforms promoting some centralization would help assure adherence to general policies). But cf. Arffa, supra note 13, at 1117–18, 1120, 1129 (noting benefits of decentralized power within the DOJ, in terms of decreasing politicization and facilitating local participation); id. at 1105–06 (discussing difficulties of implementing top-down directives in the salient areas of sentencing and marijuana regulation); id. at 1126 (suggesting that institutional reforms might best be achieved within each U.S. Attorney's office).

[138] See, e.g., Epps, supra note 14, at 76–77 (suggesting that civil review boards could improve criminal process); Davis, supra note 1, at 463 (recommending that the federal and state legislatures should pass legislation providing for prosecutorial review boards).

[139] See, e.g., Epps, supra note 14, at 75–76 (suggesting that greater media scrutiny and access to data could improve criminal process).

[140] Barkow, supra note 14, at 911 (suggesting that public oversight would not necessarily be effective); id. at 912 (suggesting that deterrence could be compromised by announcement of policies and that announcement of policies could lead to allegations before courts that prosecutors had deviated from the guidelines, thus bringing back the problems of judicial scrutiny).

[141] See supra note 13 and accompanying text; cf. Laura I. Appleman, The Plea Jury, 85 Ind. L.J. 731, 734 (2010) (proposing that the "defendant allocute to a petit jury, instead of a trial court, during the plea process" and that the same jury "with some limited judicial oversight" could "accept or reject the plea").

[142] See Barkow, supra note 14, at 920 (indicating that attention to racial disparities in law enforcement might provide political circumstances favorable to her suggested reforms).

widespread and unhelpful judicial scrutiny of prosecutorial deliberations.[143]

C. The Difficulty of Teasing Out Illicit Political Motivation

Although the courts entertain *Armstrong* motions alleging illicit political considerations, a problem remains as to the indefiniteness of the line between appropriate and inappropriate political considerations.[144] One may readily agree with the statement: "In all cases, prosecutors should make charging and other discretionary decisions that are neutral and free from partisanship."[145] But many aspects of prosecutorial decision-making have political dimensions, as indicated by the Court's respect for the nonjudicial discretion involved in prosecutorial decisions. And one may not want to allow a prosecution to be too easily attacked because of an allegation of political considerations.

Head prosecutors generally are recognized to be political officials. The Attorney General is appointed by the President with advice and consent of the Senate and is freely removable by the President,[146] although there

[143] Constitutional violations not receiving full remediation in the courts due to concerns for undue judicial interference with other branches is not an uncommon feature of constitutional doctrine. See, e.g., H. Jefferson Powell, Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law, 86 Wash. L. Rev. 217, 243–51 (2011); see also id. at 264–65 (favoring an interpretation of *Engquist* as a case of judicial under-enforcement of a nonarbitrariness norm where "it would be extremely difficult for courts to vindicate the constitutional norm without undue interference in the functioning of the political branches"); Lawrence G. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1213 (1978) (discussing that the Court, due to its institutional concerns, may fail to enforce a constitutional provision to "its full conceptual boundaries"); Russell M. Gold, Beyond the Judicial Fourth Amendment: The Prosecutor's Role, 47 U.C. Davis L. Rev. 1591, 1599–1600 (2014) (giving prosecutorial discretion apart from certain suspect classes as an example of under-enforcement of constitutional norms to protect courts' institutional role); David E. Pozen, Constitutional Bad Faith, 129 Harv. L. Rev. 885, 910 (2016) (indicating there was extreme under-enforcement of good faith in constitutional law).

[144] See, e.g., Att'y Gen. of the U.S. v. Irish People, Inc., 684 F.2d 928, 934 (D.C. Cir. 1982) (indicating that a request from allies was an appropriate consideration in requiring an Irish Republican-oriented newspaper to register under the Foreign Agent Registration Act); Arffa, supra note 13, at 1117 ("The balance between political control and politicization remains a fine one.").

[145] See Anthony S. Barkow & Beth George, Prosecuting Political Defendants, 44 Ga. L. Rev. 953, 991 (2010).

[146] See Barkow, supra note 14, at 902 (despite arguing for more separation of certain DOJ functions, indicating that U.S. Attorneys and the Attorney General should not be under such restrictions); id. ("The U.S. Attorney is the political appointee who is accountable to the President and therefore most accountable to the public, and he or she is charged with ensuring that decisions within his or her district reflect the law enforcement objectives of the

have been norms of Justice Department independence.[147] The same is true of U.S. Attorneys.[148] State and local prosecutorial officials generally are elected, and their campaigns may discuss the types of crimes they will and will not pursue.[149] All of these officers may properly set policies as to enforcement priorities and resource allocation—the sort of nonjudicial factors that the Court considers more appropriate for executive rather than judicial consideration. Decisions whether to devote significant resources to pursuing persons who entered the Capitol on January 6, 2021, are an example. And such policies necessarily filter into decisions whether to prosecute individuals.

In addition, prosecutors may appropriately consider the salience and deterrent value of pursuing particular defendants. Given media and political opponents' desire to find dirt, prosecutors are likely to have more information as to possible misbehavior of politicians than as to others, and pursuing high-level wrongdoers has deterrent value.[150] Separating these

administration. He or she therefore must be permitted to participate at all stages of a case without limit because important policy-making decisions may be implicated at all stages."); Arffa, supra note 13, at 1116 (noting the ongoing debate "about the appropriate level of executive influence over federal criminal law enforcement" (footnote omitted)).

[147] Adrian Vermeule, Conventions of Agency Independence, 113 Colum. L. Rev. 1163, 1201–03 (2013) (discussing objections to wholesale replacement of U.S. Attorneys during the George W. Bush administration); Bob Bauer, The Survival of Norms: The Department of Justice and the President's 'Absolute Rights', Lawfare (Jan. 1, 2018, 10:00 AM), https://www.lawfareblog.com/survival-norms-department-justice-and-presidents-absolute-rights [https://perma.cc/F5BL-4PRU] (criticizing Trump's attacks on norms of independence of the DOJ).

[148] See 28 U.S.C. § 541 (providing for presidential appointment of U.S. Attorneys for four-year terms). If a vacancy opens in a district, the Attorney General may appoint an interim replacement U.S. Attorney for a term of up to 120 days. Id. § 546(a), (c). If the interim U.S. Attorney's term expires before a presidential nominee is confirmed, then the judges of the federal district court are empowered to appoint the U.S. Attorney for the district. Id. § 546(d). For discussion of prosecutions under the auspices of a U.S. Attorney appointed by the federal district court, see Jonathan Remy Nash, Nontraditional Criminal Prosecutions in Federal Court, 53 Ariz. St. L.J. 143, 163–66 (2021).

[149] Cf. Bibas, supra note 130, at 961 ("At best, campaign issues boil down to boasts about conviction rates, a few high-profile cases, and maybe a scandal."); Sklansky, supra note 130, at 475–76 (noting criticisms of prosecutors for being too politically responsive and not politically responsive enough); id. at 519 (stating that we want prosecutors "to mediate between democratic responsiveness and detached objectivity").

[150] Cf. Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist., Nos. 10-cv-02414, 12-cv-02457, 2016 WL 3213553, at *27 (E.D. Cal. June 8, 2016) (indicating that it is not necessarily illegitimate to respond to complaints from competitors and politicians, and that a jury could go either way as to whether the response was motivated by politics or a desire to remedy perceived violations).

factors from illicit speech motivation remains difficult, as evidenced in the investigations of Bill Clinton and Donald Trump.[151]

An additional problem arises when speech provides evidence of a criminal violation—a difficulty to which the Court has alluded. In *Wayte*, the Court upheld the DOJ's use of a "passive" prosecutorial policy as to non-registrants for the Selective Service.[152] It prosecuted those who wrote to the government that they were not registering and did not respond to subsequent government entreaties to register. This policy foreseeably led to disproportionate prosecution of more vocal draft resisters. In upholding the policy, the Court stated that "the letters written to Selective Service provided strong, perhaps conclusive evidence of the nonregistrant's intent not to comply—one of the elements of the offense."[153] Beyond that, "prosecuting visible nonregistrants was thought to be an effective way to promote general deterrence, especially since failing to proceed against publicly known offenders would encourage others to violate the law."[154] Similarly, Roger Stone's media pronouncements predicting the release of damaging information as to political opponents provided evidence of interactions with foreign governments and lying to Congress.[155]

The but-for determination of causation by illicit motivation is complicated where the same utterances by a defendant may provide both proof of crime and proof of retaliation.[156] It is one thing to ask a trier of fact to determine, as in *Mt. Healthy*, whether the adverse action would have occurred based on Doyle's using an obscene gesture toward two students, even had he not engaged in the First Amendment-protected behavior of calling a radio station about the school's proposed dress policy. But it is more problematic to ask if law enforcement would have

[151] See Editorial, The Challenge of Pursuing Mr. Trump, Wash. Post, July 4, 2021, at A20 ("Investigating former President Donald Trump inevitably was going to be challenging. Prosecutors must show that no one is above the law but also that no one will be targeted for political motives."); cf. Comm. on Ways & Means v. U.S. Dep't of Treasury, 45 F.4th 324, 333 (D.C. Cir. 2022) (dismissing Trump parties' challenges to a congressional committee's request for tax documents and stating that "[t]he mere fact that individual members of Congress may have political motivations as well as legislative ones is of no moment," then further elaborating that "[i]ndeed, it is likely rare that an individual member of Congress would work for a legislative purpose without considering the political implications").

[152] Wayte v. United States, 470 U.S. 598, 614 (1985).

[153] Id. at 612–13.

[154] Id. at 613.

[155] See United States v. Stone, 394 F. Supp. 3d 1, 36 n.30 (D.D.C. 2019).

[156] Reichle v. Howards, 566 U.S. 658, 668 (2012) ("Like retaliatory prosecution cases, then, the connection between alleged animus and injury may be weakened in the arrest context by a police officer's wholly legitimate consideration of speech.").

proceeded based on the licit consideration of the suspect's statements even absent alleged illicit consideration of the same statements.

The problem of allegations of political motivation finds a parallel in review under the Administrative Procedure Act ("APA")[157] generally, where the precise role that politics can legitimately play is broader than in prosecution but still somewhat difficult to define. As Chief Justice Roberts stated in *Department of Commerce v. New York*, a challenge to the Trump Administration's decision to include a citizenship question on the census:

> [A] court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons. . . . Relatedly, a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities. Agency policymaking is not a "rarified technocratic process, unaffected by political considerations or the presence of Presidential power." . . . Such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others).[158]

To deal with the difficulty of defining when politics edge into an invalid consideration in the agency context, the Court has built special hurdles to discovery. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Court said review of an administrative record should normally be based on the materials considered by the agency, and discovery into agency motivations should only be had upon an initial showing of bad faith.[159] Review of agency action thus generally occurs by looking at the reasons offered by the agency rather than by looking at underlying motivations. But a sufficient showing from other sources of information

[157] See 5 U.S.C. §§ 551, 553–559, 701–706 (statutory provisions for judicial review under the APA).

[158] Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019) (citations omitted) (quoting Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981)).

[159] 401 U.S. 402, 420 (1971); see also Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) (indicating that judicial review should normally be based on the record that the agency provides).

may open discovery into agency motivation.[160] *Armstrong* operates similarly for selective prosecution cases.[161]

D. The Difficulty of Determining Race Motivation

If some political motivations may play a marginally legitimate role in prosecutions, the same cannot be said about racial motivations.[162] Nevertheless, there may be reasons for fairly high standards for attempting to show race motivation in prosecution.

As a general matter, a disparate impact on a protected group standing alone does not prove an equal protection violation. The Court stated in *Washington v. Davis*:

> [a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average [B]lack than to the more affluent white.[163]

In the context of general regulatory laws, then, evidence of adverse impacts and even knowledge of such impacts may have less value in proving intentions than in others. And proof of purpose tends to focus on particular decision-makers with respect to a particular challenged decision, rather than increasing the scope of inquiry to a broad range of actors and social conditions that may have contributed to disparate impacts.

The incidence of prosecution is an area in which the Court has indicated that disparate results of the application of criminal law offer little proof of illicit purpose. In *Armstrong*, for example, the defendants argued that African Americans were prosecuted for federal crack cocaine offenses at

[160] Chief Justice Roberts's opinion in *Department of Commerce v. New York* sought to preserve both high barriers to discovery as well as a bad faith exception by indicating that the district court had been too quick to order discovery based on bad faith at the time the government had agreed to produce 12,000 more pages of materials, but that the new materials themselves indicated that such discovery was justified. 139 S. Ct. at 2574.

[161] *Armstrong* helps to protect attorney work product. See United States v. Armstrong, 517 U.S. 456, 463 (1996).

[162] Uncertainties, however, remain as to the role motivations otherwise questionable may play in immigration, foreign policy, and international affairs.

[163] 426 U.S. 229, 248 (1976).

higher rates than whites. The Court noted, however, that one could not assume that different races committed the same offenses at the same rates. Indeed, such evidence as was available from convictions suggested that certain crimes are committed more by certain races than others.[164]

In prosecution, the courts will generally lack a benchmark for determining the "qualified" population in terms of prosecution[165]—thus differing from determination of the qualified pool in employment cases.[166] As Professors Skeem and Lowenkamp have said, "[t]he proportion of racial disparities in crime explained by differential participation versus differential selection is hotly debated."[167] There is evidence that arrest data for violent crime is a relatively accurate reflection of differential participation but is less accurate for public order and drug use crimes.[168] Such studies, moreover, do not readily translate

[164] *Armstrong*, 517 U.S. at 469–70 (1996); see also Mayson, supra note 16, at 2257–58 (referring to studies suggesting some crimes may be committed disproportionately by different groups). We note that one might reasonably expect conviction rates for certain crimes—especially enterprise crimes that involve stable groups over time—to vary among racial, ethnic, and national (and other) groups within a jurisdiction, insofar as people are more likely to engage in criminal activities with those whom they know and believe they can trust. (We are grateful to Rachel Harmon for this point.)

[165] Rushin & Edwards, supra note 98, at 659–62 (discussing the "benchmark problem" for traffic stops); see also United States v. Brown, 299 F. Supp. 3d 976, 1008–12 (N.D. Ill. 2018) (discussing the competing statistics submitted on a claim of discriminatory enforcement in stash house sting cases); cf. Siegler & Admussen, supra note 8, at 1043 (arguing for state court discovery rules that would allow the benchmark group for discovery on a selective law enforcement claim to be "the general population of the relevant geographic area reflected in publicly available census data," and the relevant geographic area to be "the geographic area policed by the law enforcement agency that arrested or cited the defendant"); id. at 1045–46 (analogizing to employment discrimination cases); id. at 1047 (arguing statistical significance should not be required).

[166] Evidence of qualified populations is also fairly readily available as to use of peremptory challenges in jury selection. See Batson v. Kentucky, 476 U.S. 79, 97 (1986) (indicating that exclusion of minorities from the particular venire may be evidence of discrimination).

[167] Skeem & Lowenkamp, supra note 16, at 684.

[168] Id. at 690; Mayson, supra note 16, at 2254–56 & nn.127–28. But see Katherine Y. Barnes, Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling, 54 Duke L.J. 1089, 1119 (2005) (statistically analyzing traffic stop data to show that, while race was correlated with the likelihood of drug trafficking, it also meant that Black motorists subject to search were more likely to be innocent than white motorists). Indeed, one might expect to find it easier to set a benchmark for crimes where victims will ordinarily file reports with the police (such as robbery), as opposed to crimes where police reports are likely to be rare (such as bribery) or crimes that will likely go by the wayside absent police observation and arrest (such as open-container law violations).

into a determination that a particular prosecution was racially motivated.[169]

Where does that lead in the context of bad faith prosecution? It perhaps suggests that the Court's emphasis on close comparators helps to narrow the focus on violations known to a particular set of decision-makers. It is true that such data will be somewhat incomplete.[170] But it gives a claimant some opportunity to go forward with claims where the prosecution is for an offense known to be rarely prosecuted[171] or where the claimant is singled out in a situation in which others are engaged in the same activity.[172]

IV. QUESTIONS AS TO DIFFERENCES IN STANDARDS

A. Requirements for Showing No-Probable-Cause in Hartman *Cases Versus* Armstrong *Claims*

Thus far we have defended the use of high standards for discovery for selective prosecution claims in criminal cases as well as a general requirement of a showing of no-probable-cause for damages cases. There is reason to place hurdles to such claims despite the more lenient standards in other unconstitutional motivation cases, such as those involving employment. As we have discussed, these reasons include the

[169] United States v. Jackson, No. 16-cr-02362, 2018 WL 6602226, at *17–18 (D.N.M. Dec. 17, 2018) (in a selective enforcement case, discussing why the statistical showing was inadequate to show discriminatory effect); cf. United States v. Bass, 536 U.S. 862, 863–64 (2002) (per curiam) ("Even assuming that the *Armstrong* requirement can be satisfied by a nationwide showing (as opposed to a showing regarding the record of the decisionmakers in respondent's case), raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*.").

[170] See, e.g., McAdams, supra note 8, at 628 (indicating that even to show correlation, one would need to know not merely that prosecutors had not prosecuted similar whites, but also the rates at which prosecutors did not prosecute both similarly situated whites and Blacks).

[171] See id. at 662–63 & nn.166–67.

[172] Cf. Stemler v. City of Florence, 126 F.3d 856, 874 (6th Cir. 1997) ("The defendant officers are unable, and indeed have not even attempted, to demonstrate that there is any conceivable rational basis for a decision to enforce the drunk-driving laws against homosexuals but not against heterosexuals."). *Stemler* was a pre-*Hartman*, pre-*Nieves* § 1983 case, and the court said Stemler had a good selective enforcement § 1983 claim despite the presence of probable cause. Stemler was arrested and prosecuted for allegedly being slightly over the blood alcohol limit when a very drunk person, whom the police did not arrest, said Stemler was a lesbian. Id. at 861–63, 873–74; see also Nieves v. Bartlett, 139 S. Ct. 1715, 1740 (2019) (Sotomayor, J., dissenting) (discussing possible availability of comparators as to public gatherings where a pool of comparators may be available).

presumption of alternative causation as to nontrivial criminal violations, the intrusiveness and uncertain benefits of judicial exploration of prosecutorial motivations, the difficulty of drawing lines as to political influences on prosecution, and the Court's assumptions that disparate impact evidence may hold reduced probative value in the prosecution context.

While the high standards for bad faith prosecution may be justified, there still may be arguments that various doctrinal inconsistencies should be reduced. The most apparent inconsistency is that *Armstrong* motions do not require the complainant to show a lack of probable cause, while *Hartman* cases generally require the plaintiff to allege a lack of probable cause.

As noted above, however, *Armstrong* presents hurdles to selective prosecution claims that are in some ways comparable to the no-probable-cause showing in *Hartman*.[173] In *Armstrong*, discovery from the prosecutor is not allowed without a solid initial showing of selective prosecution. Analogously, *Hartman* will often prevent a case from proceeding beyond the plaintiff's pleading as to the selective prosecution claim if there was probable cause to pursue charges.

What is more, it is not unusual to have higher standards for damages than injunctive-type claims in civil rights actions. Prosecutors thus enjoy absolute immunity from damages claims for their prosecutorial actions, even though they are not immune from injunctions under *Ex parte Young*[174] or under *Younger v. Harris*[175] exceptions. And executive officers generally enjoy qualified immunity from damages relief but no immunity from injunctive relief. Professors Jeffries and Rutherglen have suggested that it is perhaps desirable that money damages be reserved for "extreme or egregious constitutional violations."[176] A requirement of no-probable-cause for *Hartman* cases provides such a screen.

[173] Cf. *Nieves*, 139 S. Ct. at 1732–33 (Gorsuch, J., concurring in part and dissenting in part) (pointing out that probable cause does not necessarily negate speech retaliation, but also that "our precedent suggests the possibility that probable cause may play a role in light of the separation of powers and federalism" and discussing *Armstrong*).

[174] 209 U.S. 123, 155–56 (1908).

[175] 401 U.S. 37, 53 (1971).

[176.] John C. Jeffries, Jr. & George A. Rutherglen, Structural Reform Revisited, 95 Calif. L. Rev. 1387, 1405 (2007) ("Money damages are most likely to prove effective against extreme or egregious constitutional violations and least likely to work well against borderline misconduct that might reasonably have been committed in good faith. That is certainly true under current doctrine, which adopts more or less exactly that rule.").

B. Minor Crimes Exception: Nieves *Versus* Hartman

Another inconsistency in standards is that the no-probable-cause requirement as to retaliatory arrest in *Nieves* has an exception "for circumstances where officers have probable cause . . . but typically exercise their discretion not to [arrest]."[177] *Hartman*, however, does not explicitly provide such an exception for claims arguing speech- or race-based prosecution.

In discussing a hypothetical arrest for jaywalking in *Nieves*, Chief Justice Roberts said, "In such a case, because probable cause does little to prove or disprove the causal connection between animus and injury, applying *Hartman*'s rule would come at the expense of *Hartman*'s logic."[178] This suggests the possibility of a *Nieves*-type exception to *Hartman*'s no-probable-cause requirement, although *Hartman*'s requirement was partly based on the need to show that the alleged retaliation carried over from investigators to prosecutors.[179] We noted above that the government interests in law enforcement become weaker in cases of trivial delicts that do not generally occasion enforcement by police or prosecutors. Thus, one might argue that a *Nieves*-type exception should be available as to selective prosecution. Such an exception would also comport with some courts' allowance of § 1983 class-of-one malicious prosecution-type claims, where the plaintiffs may have committed low-level offenses that were not typically prosecuted under the circumstances a plaintiff alleges.

There are, however, some arguments against such a modification. Many trivial arrests of the type that Chief Justice Roberts referred to may not result in prosecution.[180] And to the extent such cases are not dropped, an *Armstrong* motion remains available even where there is probable cause.[181] In addition, the array of charges a prosecutor might bring (and for which perhaps a plaintiff might seek damages from investigative

[177] 139 S. Ct. at 1727.

[178] Id.

[179] Hartman v. Moore, 547 U.S. 250, 261–62 (2006).

[180] Cf. Wingate v. Fulford, 987 F.3d 299, 304 (4th Cir. 2021) (in a § 1983 case, indicating that the prosecutor dropped a case resulting from an arrest under a county failure to identify ordinance).

[181] What is more, selective enforcement by law enforcement officials—in addition to selective prosecution by prosecutors—can be a basis for a motion in a pending prosecution. See infra notes 182–87 and accompanying text. *Armstrong*-type motions for selective enforcement give criminal defendants an option for proving claims without the requirement of showing no-probable-cause as is generally required in damages actions, such as *Nieves*.

officials as in *Hartman*) is presumably wider and more complex than the public order charges that police use in street arrests. For example, it is difficult to say that the requirement to register as a foreign agent, even if often unenforced, is comparable to Chief Justice Roberts's jaywalking example.[182] Overall, however, a *Nieves*-type exception for *Hartman* claims seems justified,[183] given the lesser interest in criminal law enforcement and the presumably high standards of proof a plaintiff will need to meet.

C. Discovery in Selective "Enforcement" Versus Selective Prosecution Armstrong *Claims*

As discussed above, a consistent objection to *Armstrong* is that it requires fairly good evidence of selective prosecution to obtain discovery from prosecutors relevant to selective prosecution. Commentators treat this as a Catch-22.[184] Some circuits, however, allow for an easier route to discovery where the claim can be characterized as selective enforcement of law (e.g., in pursuing stings) as opposed to selective prosecution.[185] "Prosecution" refers to actions by prosecutors in a prosecutorial capacity while law "enforcement" refers to the action of law enforcement personnel.[186] The courts using this distinction argue that the courts generally accord prosecutors greater presumptions of constitutional behavior in the exercise of their discretion and that law enforcement officers regularly testify and are subject to attacks on their credibility.[187]

Selective enforcement cases enlarging discovery, however, suggest caution. A number of the investigations at issue involved ATF's widely criticized stings in which agents or informants proposed armed robberies of fictitious drug stash houses.[188] The stings were good candidates for

[182] See, e.g., Att'y Gen. of the U.S. v. Irish People, Inc., 684 F.2d 928, 934, 946 (D.C. Cir. 1982) (raising an ultimately unsuccessful challenge to the DOJ's enforcement of the Foreign Agents Registration Act, 22 U.S.C. § 611 et seq.).

[183] One might possibly need to retain a favorable termination requirement to avoid conflicts with existing judgments or orders. Cf. infra text accompanying note 209 (discussing *McDonough v. Smith*, 139 S. Ct. 2149 (2016), where a malicious prosecution claim did not accrue until favorable termination).

[184] See supra notes 98–100 and accompanying text.

[185] It is not clear the Court in *Armstrong* contemplated such a division.

[186] United States v. Washington, 869 F.3d 193, 214 (3d Cir. 2017).

[187] See id. at 217, 219.

[188] See, e.g., id. at 218 n.112; Conley v. United States, 5 F.4th 781, 787–88 (7th Cir. 2021) (criticizing the stings and indicating the practice had been discontinued in Chicago).

selective enforcement claims given the government's role in eliciting the criminal activities and given that the defendants were predominantly African American.

When the courts allowed discovery under the laxer standards, multiple rounds of intrusive discovery often ensued. The ultimate results, however, were mixed. In a set of Chicago-based cases, after extensive discovery, there was a consolidated hearing on the merits of multiple cases before nine judges. The U.S. Attorney's office offered favorable deals before a decision on the merits,[189] such that the defendants' attorneys achieved results helpful to their clients, and such airing of complaints could encourage greater care by law enforcement officials.[190]

The one opinion on the merits resulting from the hearing, however, determined that selective enforcement had not been proved.[191] This was

[189] Siegler & Admussen, supra note 8, at 1024–25; see also United States v. Paxton, No. 13-cr-00103, 2018 WL 4504160, at *2–3 (N.D. Ill. Sept. 20, 2018) (indicating distaste for the stash house cases and that the court would take this into consideration in sentencing). The Chicago U.S. Attorney also dropped some stash house cases. Michael Tarm, Federal Prosecutors Drop Dozens of Stash House Sting Charges, Associated Press (Jan. 30, 2015), http://apnews.com/article/c9fc6fbadd604a01961030b907708a68 [https://perma.cc/68KK-SGZK]; see also Erin Degregorio, Federal Litigation Clinic Wins Motion in "Reverse Stash House Sting" Case, Fordham L. News (Feb. 11, 2020), https://news.law.fordham.edu/blog/2020/02/11/federal-litigation-clinic-wins-motion-in-reverse-stash-house-sting-case/ [https://perma.cc/VXV6-YEPN] (reporting obtaining habeas in a stash house case, but based on a vagueness claim about a statutory crime).

[190] Cf. Siegler & Admussen, supra note 8, at 1026 n.228 (referring to the dismissal by U.S. Attorney after the grant of discovery in *United States v. Mumphrey*, 193 F. Supp. 3d 1040, 1042 (N.D. Cal. 2016), a case not involving a stash house sting). *Mumphrey* involved several defendants' selective enforcement claims arising from Operation Safe Schools, in which federal officers and the San Francisco Police Department conducted and filmed multiple drug buys in the Tenderloin district. 193 F. Supp. 3d at 1042. The district court found that the defendants' statistics would meet even an *Armstrong* standard for discovery. Id. at 1048. The defendants, inter alia, presented "[c]harging data (between January 1, 2013, and February 28, 2015) from the San Francisco Superior Court . . . with respect to drug-trafficking crimes in the Tenderloin. . . . The data reflected that 61.4% of those arrested and charged were African American." Id. All of the thirty-seven defendants charged from the two sweeps at issue were African American. Id. The court did not allow discovery, however, on the selective prosecution claims. Id. at. 1069. Some successes have been achieved in cases involving traffic stops. See State v. Soto, 734 A.2d 350, 352 (N.J. Super. Ct. Law Div. 1996) (suppressing evidence of drug possession from traffic stops). But cf. Chavez v. Ill. State Police, 251 F.3d 612, 656 (7th Cir. 2001) (affirming dismissal of a § 1983 case claiming racially discriminatory car stops as part of operation aimed at interdicting drug trafficking); id. at 644 (finding problems with use of Illinois census data with respect to travelers on the interstate).

[191] United States v. Brown, 299 F. Supp. 3d 976, 991–93, 1003, 1026 (N.D. Ill. 2018). The decision involved two cases. Id. at 985; cf. Poulin, supra note 8, at 1073–74 (arguing that

not for want of a sympathetic judge. Then-Chief District Judge Castillo roundly condemned the ATF's stash house stings and had allowed four waves of discovery stretching from 2013 to 2018.[192] The criminal trials remained unscheduled during this time.[193] Ultimately, however, the court found problems with the criminal defendants' expert's statistics—including his selecting for comparison a population of 292,000 in an eight-county area.[194] And the court rejected a claim that alleged deviation from ATF guidelines evidenced racial animus, given the criminal histories and access to firearms of individuals involved.[195] Other federal courts that reached the merits in stash house cases also rejected the claims.[196]

The stash house cases thus illustrate problems of disparate impact evidence in the criminal enforcement context. These results may also support Professor Barkow's conclusion that courts will often find officials' explanations for focusing on certain individuals to be sufficient—in these cases even when there is extensive discovery. And prosecutors' explanations may be more likely to prove convincing than those of law enforcement officers.[197]

opening up discovery in selective prosecution claims would encourage constitutional compliance even if defendants did not win on the merits).

[192] *Brown*, 299 F. Supp. 3d at 984–86, 991–92. No doubt, some law enforcement departments as well as prosecutors' offices will drop prosecutions rather than undergo this type of discovery.

[193] Id. at 1026.

[194] Id. at 1009–10 (finding problems with comparison group of 292,000 individuals in eight counties); id. at 1003–04 (noting problems with assuming all 94 defendants were recruited individually by the ATF when initial targets chose their cohorts).

[195] Id. at 1021–22. The Seventh Circuit later indicated a preponderance of the evidence standard, rather than a clear and convincing evidence standard, should be used on the merits of a selective enforcement claim, as opposed to a selective prosecution claim, including on § 2255 habeas. See Conley v. United States, 5 F.4th 781, 791–93 (7th Cir. 2021).

[196] See United States v. Washington, No. 13-cr-00171, 2021 WL 120958, at *10–19, *22–28 (E.D. Pa. Jan. 13, 2021), *on remand from* United States v. Washington, 869 F.3d 193 (3d Cir. 2017) (involving four rounds of discovery, and ultimately rejecting the selective enforcement claim); cf. United States v. Jackson, No. 16-cr-2362, 2018 WL 6602226, at *19–27 (D.N.M. Dec. 17, 2018) (describing elaborate proceeding and evaluating evidence before disallowing further discovery); Bonita R. Gardner, Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement, 12 Mich. J. Race & L. 305, 328 (2007) ("Race-based challenges to Project Safe Neighborhoods prosecutions have generally failed in efforts to meet the *McCleskey* [*v. Kemp*, 481 U.S. 279 (1987),] intent standard.").

[197] The disparate standards for discovery, and the Seventh Circuit's recent prescription of a lower standard of proof for selective enforcement claims, will lead defendants to attempt to frame their claims as selective enforcement rather than selective prosecution. See *Conley*, 5

D. Varying Elements Among Malicious Prosecution-Type Damages Claims

The federal courts have often said that there is no general § 1983 malicious prosecution damages claim because not all such claims state constitutional violations,[198] but specific constitutional theories may support damages claims. We have focused on race and speech claims, and have also alluded to *Shaw*, substantive due process, class-of-one, and Fourth Amendment *Manuel* claims. Some questions arise as to the elements of such claims, given different theories and constitutional bases. But despite some differences among the circuits,[199] the elements for such damages claims—putting aside class-of-one claims—tend to converge around the traditional elements for malicious prosecution: subjective bad faith, lack of probable cause, and favorable termination.[200] These elements may be required for damages claims even if a constitutional violation can occur without all of them.

Absence of probable cause. Armstrong claims in the course of prosecution indicate that a violation of equal protection and the First Amendment may occur even where probable cause exists. Nevertheless, *Hartman* requires a showing of no-probable-cause when plaintiffs seek damages for speech and race claims. We have discussed the reasons for requiring a lack of probable cause above. Plaintiffs in *Shaw* and shock-the-conscience claims will also generally allege a lack of probable cause or a lack of a reasonable hope of success (either initially or as the cases

F.4th at 791–93; cf. Nero v. Mosby, 890 F.3d 106, 118–20 (4th Cir. 2018) (discussing the distinction between prosecutorial functions and other functions and interpreting prosecutorial functions broadly).

[198] In referring to malicious prosecution claims, we mean claims that do not primarily focus on initial searches and seizures, but rather that extend beyond initial appearance. Cf. Wallace v. Kato, 549 U.S. 384, 390 (2007) (indicating that a false arrest claim covers only the time up until the issuance of process or arraignment, and malicious prosecution covers thereafter); Manuel v. City of Joliet, 137 S. Ct. 911, 915 (2017) (differentiating claims that extended beyond an initial determination of probable cause).

[199] See McMannon, supra note 19, at 1485–87, 1493 (describing variety in the circuits as to constitutional sources and elements and citing authority).

[200] See Kossis, supra note 19, at 1662 (favoring the use of common law elements). The Court in *Manuel* indicated that common law malicious prosecution elements would guide, but not always control, § 1983 damages claims. 137 S. Ct. at 921; see also Heck v. Humphrey, 512 U.S. 477, 484 (1994) (using common law elements as to a § 1983 damages claim in the nature of malicious prosecution); Thompson v. Clark, 142 S. Ct. 1332, 1337–38 (2022) (using a malicious prosecution analogy and, looking to tort law as of 1871, concluding that the favorable termination element did not require that the termination include some affirmative indication of innocence).

develop) as part of their showing of harassment or of conscience-shocking behavior. If such *Shaw* and shock-the-conscience cases are packaged as Fourth Amendment *Manuel* claims, they could generally meet the no-probable-cause requirement.

Subjective ill will. The speech and race claims by definition meet an illicit motivation requirement. *Shaw* claims and shock-the-conscience claims will also entail ill-will—whether they are alleged as independent claims or under *Manuel*'s Fourth Amendment theory.[201]

This leaves the question whether a Fourth Amendment malicious prosecution claim that does not fit into a category already presupposing subjective ill will nevertheless requires subjective ill will—an issue as to which lower courts have disagreed.[202] But in any event, Fourth Amendment malicious prosecution claims characteristically involve fabrication or withholding of significant evidence,[203] which in turn implies subjective *mala fides*.[204] Thus, when the First Circuit in *Hernandez-Cuevas v. Taylor* did not require a malice showing in a case

[201] *Manuel* involved both an arrest as well as continued pre-trial detention lacking probable cause. There may be an issue as to whether custody or continuing custody are required for Fourth Amendment malicious prosecution claims. Cf. McDonough v. Smith, 139 S. Ct. 2149, 2156 n.4 (2019) (indicating that the plaintiff suffered a loss of liberty from being restricted from travel while charges were pending, although he was not incarcerated). Several cases indicate that an arrest even without continued custody seems to suffice. See, e.g., Laskar v. Hurd, 972 F.3d 1278, 1285, 1295, 1297 (11th Cir. 2020) (allowing a Fourth Amendment malicious prosecution damages claim against two members of an audit team who were alleged to have recklessly or maliciously caused Laskar's arrest and prosecution); Gallo v. City of Philadelphia, 161 F.3d 217, 224–25 (3d Cir. 1998) (indicating that detention was not required for a claim that investigators caused plaintiff's prosecution for arson without probable cause). If there is no arrest, the Fourth Amendment claim may fail. See Becker v. Kroll, 494 F.3d 904, 914–16 (10th Cir. 2007) (holding that the plaintiff had not suffered a Fourth Amendment seizure, although she had been charged criminally, when she had not been arrested or imprisoned).

[202] Compare Hernandez-Cuevas v. Taylor, 723 F.3d 91, 99–101 (1st Cir. 2013) (indicating that it was joining four circuits in holding that malice was not required), with Grider v. City of Auburn, 618 F.3d 1240, 1256 (11th Cir. 2010) (using common law elements for a Fourth Amendment malicious prosecution claim). See also Brief for Respondents at 8, Manuel v. City of Joliet, 137 S. Ct. 911 (2017) (No. 14-9496) (noting the different approaches and citing these cases).

[203] See, e.g., Jones v. Clark County, 959 F.3d 748, 752–55 (6th Cir. 2020). Such claims may be brought against prosecutors whose actions are deemed investigative—as in participation in fabricating evidence. See, e.g., Bledsoe v. Bd. of Cnty. Comm'rs, 501 F. Supp. 3d 1059, 1070 n.5 (D. Kan. 2020).

[204] The state of mind requirements also tend to negate qualified immunity. See, e.g., *Jones*, 959 F.3d at 760. A Fourth Amendment claim separate from a prosecution would need to show not just a lack of probable cause but a clear lack, to overcome qualified immunity. See Anderson v. Creighton, 483 U.S. 635, 638–41 (1987).

involving alleged fabrication of identification evidence, it observed that in practice the divergent approaches toward requiring malice would be hard to distinguish.[205]

It thus might make sense to require a subjective element in almost all malicious prosecution-type cases, no matter what constitutional theory is alleged. Such unification might simplify some of the extended battles over sufficiency of pleading. The main difference among the cases would be how the plaintiff might fill in the subjective bad faith component—e.g., speech or race motivation in some cases, knowingly withholding significant exculpatory evidence in others.

Favorable termination. The favorable termination requirement helps to assure that a damages claim will not conflict with the resolution of a criminal case.[206] The Court in *Manuel* noted that "all but two of the ten Courts of Appeals that have recognized a Fourth Amendment claim like his have incorporated a 'favorable termination' element,"[207] and remanded the issue for consideration to the Seventh Circuit in determining when the claim accrued for the statute of limitations.[208] In *McDonough v. Smith*, the Court analogized a due process claim of prosecution based on fabricated evidence to a malicious prosecution claim, such that the claim did not accrue until favorable termination.[209] And in *Thompson v. Clark*, the Court determined that a § 1983 Fourth Amendment malicious prosecution claim, by analogy to malicious

[205] 723 F.3d at 101–02 (indicating that the plaintiff would need to demonstrate "that evidence was, in fact, constitutionally unacceptable because the officers formulated evidence essential to the probable cause determination with a mental state similar to common law malice").

[206] See Heck v. Humphrey, 512 U.S. 477, 484 (1994); Thompson v. Clark, 142 S. Ct. 1332, 1338 (2022).

[207] Manuel v. City of Joliet, 137 S. Ct. 911, 921 (2017); see also Brief for Respondents at 8, *Manuel*, 137 S. Ct. 911 (No. 14-9496) (indicating that after *Albright v. Oliver*, 510 U.S. 266 (1994), "all courts of appeals to consider the issue adopted a favorable-termination element as part of a Fourth Amendment malicious prosecution [and] many did so because it was an element at common law" (citations omitted)).

[208] *Manuel*, 137 S. Ct. at 922. On remand, the Seventh Circuit determined that the limitations period did not run until the wrongful incarceration stopped, but also refused to use a malicious prosecution analogy. Manuel v. City of Joliet, 903 F.3d 667, 670 (7th Cir. 2018). But cf. Savory v. Cannon, 947 F.3d 409, 417 (7th Cir. 2020) (en banc) (using the malicious prosecution analogy and concluding that favorable termination was an element of the claim, such that the statute of limitations had not passed).

[209] 139 S. Ct. 2149, 2156 (2019); id. at 2155 (assuming without deciding that a due process right was at issue in the fabricated evidence claim).

prosecution torts in 1871, did not require that the favorable termination imply innocence.[210]

Different elements for class-of-one cases? While speech, race, *Shaw*, shock-the-conscience, and Fourth Amendment claims might easily be unified under traditional malicious prosecution requirements, the class-of-one cases do not lend themselves to such unification. While they entail a subjective bad faith element, they cannot meet a no-probable-cause requirement because they involve idiosyncratic enforcement of low-level proscriptions. The same would be true if the Court recognized a *Nieves*-type exception in malicious prosecution cases for lesser violations that did not generally result in charges (which can encompass speech and race motivation claims).

In addition, the favorable termination requirement might not work well in such cases—as where the plaintiff paid fines for some minor violation. Thus, to the extent the courts recognize class-of-one claims, the elements might be idiosyncratic enforcement of a low-level proscription caused by subjective bad faith.

V. PROGRESSIVE PROSECUTORS AND SELECTIVE PROSECUTION CLAIMS

Recent years have seen a proliferation in the election of so-called progressive prosecutors—that is, prosecutors elected on a platform of not pursuing prosecutions of lower-level crimes, and taking steps to remedy what they perceive to be the disproportionate effects of the criminal justice system on people of color.[211] The number of progressive

[210] 142 S. Ct. at 1338–39, 1341. In addition to the historical evidence, the Court reasoned that "[t]he question of whether a criminal defendant was wrongly charged does not logically depend on whether the prosecutor or court explained why the prosecution was dismissed." Id. at 1340. Such a requirement might also foreclose claims when the government's claim was weaker and dismissed without explanation before trial. Id. The dissent objected to use of the malicious prosecution analogy. Id. at 1341–43 (Alito, J., dissenting, joined by Thomas & Gorsuch, JJ.).

[211] For media coverage, see, e.g., Allan Smith, Progressive DAs Are Shaking up the Criminal Justice System. Pro-Police Groups Aren't Happy, NBC News (Aug. 19, 2019), https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286 [https://perma.cc/V7L2-AGAT]; Cheryl Corley, Newly Elected DAs Vow to Continue Reforms, End Policies Deemed Unfair, NPR (Nov. 26, 2020), https://www.npr.org/2020/11/26/938425725/newly-elected-das-vow-to-continue-reforms-end-policies-deemed-unfair [https://perma.cc/5RS6-E8E5]; see also Sam Raskin, Philadelphia to Bar Cops from Pulling over Drivers for Minor Traffic Violations, N.Y. Post (Oct. 31, 2021), https://nypost.com/2021/10/31/philadelphia-to-stop-pullovers-for-minor-traffic-violations/ [https://perma.cc/CHL4-4VKC] ("The measure is aimed at easing tensions between police and [B]lack Philadelphians . . . .").

prosecutors will increase if President Joe Biden accedes to the wishes of some on the progressive left in his choices for U.S. Attorneys.[212] Leaving normative questions about progressive prosecutors to the side,[213] we focus here on how the decision by a progressive prosecutor to pursue prosecution might interact with malicious prosecution constitutional jurisprudence. We advance two claims here: First, all else equal, it will likely be easier for an individual facing prosecution (or having been convicted following prosecution) by a progressive prosecutor to find comparators who were not prosecuted, and thus easier for such an individual to bring a successful selective prosecution claim. Second, to the extent that a progressive local prosecutor's decision not to prosecute prompts a state attorney general to exercise her prerogative under state law to displace the local prosecutor and pursue prosecution,[214] that intervention by the attorney general might itself be subject to challenge for selective prosecution.

A progressive prosecutor's practices are likely to make it easier for a would-be selective prosecution plaintiff to bring a successful claim. This is because, all else equal, there are likely to be more comparators to

[212] See Harper Neidig, Biden Under Pressure to Pick New Breed of Federal Prosecutors, Hill (July 11, 2021), https://thehill.com/homenews/administration/562364-biden-under-pressure-to-pick-new-breed-of-federal-prosecutors [https://perma.cc/HD5L-47A8].

[213] For discussion, see, e.g., Symposium, Progressive Prosecution: Legal, Empirical, and Theoretical Perspective, 110 J. Crim. L. & Criminology 685 (2020); Symposium, Prosecutorial Elections: The New Frontline in Criminal Justice Reform, 19 Ohio St. J. Crim. L. 1 (2021); Kay L. Levine, Should Consistency Be Part of the Reform Prosecutor's Playbook?, 1 Hastings J. Crime & Punishment 169 (2020).

[214] Statutes may allow another government official to appoint a special prosecutor—often, in the case of a state, the state attorney general. See Tyler Q. Yeargain, Comment, Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials, 68 Emory L.J. 95, 97–98 (2018). This authority is sometimes available where the local prosecutor is unavailable to pursue prosecution, and sometimes where the local prosecutor refuses to prosecute and the other government official disagrees with that decision. See Jonathan Remy Nash, Secondary Prosecutors and the Separation-of-Powers Hurdle, 77 N.Y.U. Ann. Surv. Am. L. 33, 49–51 (2022) (offering a taxonomy of justifications for such appointments). Courts also have some powers to appoint special prosecutors. See Fed. R. Crim. P. 42(a)(2) (allowing the federal court to appoint a special prosecutor to pursue charges of criminal contempt where either the DOJ declines the court's request to prosecute the matter or "the interest of justice requires the appointment of another attorney"); Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 793–802 (1987) (upholding the constitutionality of such appointments); see also Julia Jacobs & Robert Chiarito, Dan K. Webb Is Named Special Prosecutor in Jussie Smollett Case, N.Y. Times (Aug. 24, 2019), https://www.nytimes.com/2019/08/23/arts/television/jussie-smollett-special-prosecutor.html [https://perma.cc/5FWA-XUAC] (noting that the judge appointed the special prosecutor after the district attorney had improperly failed to recuse herself from the decision not to prosecute).

vindicate the plaintiff's claim. This is so for several reasons. First, a progressive prosecutor will likely consider more crimes to be "lesser offenses" that are generally unworthy of prosecution. But, as we have discussed above, lesser crimes generally provide stronger settings in which to pursue selective prosecution claims because of the greater availability of viable comparators.

Second, even with respect to crimes where a progressive prosecutor often might still maintain prosecutions, a progressive prosecutor might likely bring *fewer* prosecutions. And, to the extent that is the case, there will be, all else equal, more comparators to support selective prosecution claims by those who do face prosecution.[215]

It bears noting, however, that our conclusion here rests upon an implicit, but important, assumption: we have assumed up to this point that the judges hearing selective prosecution claims would define comparators without regard to the prosecutor's preferences, i.e., that a judge would examine whether a plaintiff and comparator are sufficiently similar without regard to the progressive prosecutor's preferences. But what if the judge thought it appropriate to view matters through the prosecutor's eyes, or himself shared the prosecutor's preferences (in other words, to use the vernacular, if the judge is a "progressive judge")? [216] Such a judge might perceive, better than a typical prosecutor, distinctions between putative defendants that the progressive prosecutor saw. That, in turn, might limit the viability of selective prosecution claims by limiting the availability of "successful" comparators.

We turn now to the issue of the power that many state attorneys general enjoy: the power to displace a local prosecutor who is unwilling to pursue a prosecution.[217] A state attorney general—especially one who

[215] To the extent there is a problem of selective non-prosecution, it may be self-correcting. The more a prosecutor engages in selective non-prosecution, the greater the number of comparators available to those who faced actual prosecution and want to bring challenges. In short, a prosecutor who otherwise might be inclined to engage in selective non-prosecution might decide otherwise, out of concern that selective non-prosecution might empower challenges to prosecutions the prosecutor did pursue.

[216] See Tom McCarthy & Daniel Strauss, Biden Under Pressure from Progressives as He Prepares to Pick First Judges, Guardian (Mar. 2, 2021), https://www.theguardian.com/us-news/2021/mar/02/joe-biden-judge-picks-federal-courts-supreme-court [https://perma.cc/69TE-CX8A]; Sahil Kapur, With Public Defenders as Judges, Biden Quietly Makes History on the Courts, NBC News (Oct. 18, 2021), https://www.nbcnews.com/politics/congress/new-public-defenders-joe-biden-quietly-makes-history-courts-n1281787 [https://perma.cc/8RJQ-HCPD].

[217] See supra text accompanying note 214.

fundamentally disagrees with a local prosecutor's progressive approach—might be especially inclined to exercise this power.[218] Thus, a criminal defendant might find herself convicted—after the local prosecutor declined prosecution—with the attorney general (or a delegate thereof) having served as prosecutor. The question then arises: How does one construct the relevant set of comparators?

One possible answer is that one should use the same comparators as one would use were the defendant to have been prosecuted by the local prosecutor. But another possibility is that one should look instead at the set of individuals whom the attorney general could have prosecuted. If that is true, then perhaps one should assemble the set of comparators more broadly by looking at similarly situated defendants the attorney general could have chosen to prosecute *statewide*. If so, that will once again broaden the set of comparators, again facilitating a selective prosecution claim.

CONCLUSION

Succeeding in claims of bad faith prosecution is difficult, but it should be. While it is common in the legal academy to assume that any barriers to remedies for alleged constitutional violations should be lowered, there are good reasons to require bad faith prosecution claimants to overcome hurdles such as initial showings for discovery in criminal cases and showings of no-probable-cause in most damages cases.[219] Perhaps, too, the vociferous calls for the judiciary to rein in prosecutorial discretion will become quieter as progressive prosecutors rely on such discretion.

[218] See Nash, supra note 214, at 53–54.

[219] Though it lies beyond the scope of this Article, we note that, in evaluating a claim of bad faith prosecution, a court conceivably could consider the extent to which the relevant prosecutor's office has in place structures designed to minimize the incentive and opportunity to engage in bad faith prosecutions. Cf. Epps, supra note 14, at 75–78 (recommending transparency that can enhance media scrutiny, and citizen review boards, as ways to check unbridled prosecutorial discretion); Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 Stan. L. Rev. 29, 52 (2002) (noting the value of "principled screening practices" in minimizing biased or selective prosecutions).