Michigan Journal of Race and Law

Volume 12

2007

# Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement

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# SEPARATE AND UNEQUAL: FEDERAL TOUGH-ON-GUNS PROGRAM TARGETS MINORITY COMMUNITIES FOR SELECTIVE ENFORCEMENT

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*The U.S. Department of Justice has initiated a nationwide program called Project Safe Neighborhoods that purports to aggressively enforce gun laws by working with local and state law enforcement agencies to identify individuals who should receive "harsher than normal" sentencing. This program targets African American communities, and it involves enforcement of only two of twenty federal firearms laws. Statistics bear out that the federal government ignores other criminal activity and other criminals engaged in the same activity as those targeted by Project Safe Neighborhoods.*

*The impact of Project Safe Neighborhoods has been great. The federal government devoted more than $900 million in support of the program, and intensive efforts have resulted in a seventy-three percent increase in federal firearms prosecutions from 2000–2005. Narrowly-focused, discriminatory firearms prosecutions make worse the already troubling rates of incarceration for African American males.*

*There have been several challenges to Project Safe Neighborhoods' prosecutions on the basis that they involve race-based selective enforcement. Courts have applied selective prosecution law to require proof of disparate impact and discriminatory intent. But these tests should not govern where the program has not only a disparate impact, but involves the egregious practice of singling out African Americans for the express purpose of jailing them longer than other defendants.*

*Project Safe Neighborhoods singles out African Americans by targeting only those communities in which African Americans live. Generally, courts have not considered geography under equal protection analyses. But the Supreme Court recognized as early as 1879 in Missouri v. Lewis, 101 U.S. 22, that "a distinct territorial establishment and jurisdiction might be intended as, or might have the effect of, a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district." The reality of segregation in our communities should not be ignored by the federal government in*

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*making prosecutorial decisions to target only distinct communities for enforcement of the law.*

*Moreover, the narrow focus of Project Safe Neighborhoods violates principles of federalism, undermines the explicit goals of federal sentencing guidelines to ensure that similarly situated defendants are treated similarly, and denies African Americans the most fundamental assurance under the Due Process Clause of the Fifth Amendment—non-separate and equal treatment under the law.*

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## INTRODUCTION

The numbers are disturbing. The rate of incarceration for African American males has reached epidemic proportions. In today's tough-on-crime atmosphere, is this simply the result of strict enforcement of the

laws—the "do the crime and you'll do the time" cause and effect?[1] Or, as many scholars have insisted, is there some discrimination in the enforcement of the law that contributes to the disproportionately high incarceration level of African American males?[2] Whatever one's position, it is undeniable that the increased rate of incarceration for African American males over the past twenty years has had a devastating impact on African American communities.[3]

The latest program to have an unquestionably disproportionate impact on African Americans is Project Safe Neighborhoods, the federal government's tough-on-guns program. Project Safe Neighborhoods is a collaborative law enforcement effort between local, state and federal law enforcement agencies and prosecutors' offices. The concept "is disarmingly simple: federal, state and local law enforcement officers and prosecutors working together to investigate, arrest and prosecute criminals with guns to get the maximum penalties available under state or federal law."[4] That is, teams of local, state and federal law enforcement agencies and prosecutors' offices coordinate in making charging decisions for those caught with guns. Local law enforcement officers who arrest individuals with guns refer those cases either directly to federal investigators or prosecutors, or to state prosecutors who may then present the cases to federal prosecutors. The decision about whether to prosecute the case federally or in state courts is based on where the sentence will be harsher. The stated goal is to ensure that the defendants targeted by the program get "the longest sentences possible."[5]

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1. *See, e.g.*, MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 49 (1995) (arguing that the rates of incarceration of African American men correlate with their levels of offending); *see also* WILLIAM WILBANKS, THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM 5 (1987) (arguing that the perception of the criminal justice system as racist is a myth).

2. *See* CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR 66-219 (1993) (arguing that minorities receive unfair treatment at all levels of the court system); *see also* Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660 (1996).

3. Evidence shows incarceration is closely associated with low wages, unemployment, family instability, recidivism, and restrictions on political and social rights. *See* Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOCIOLOGICAL REV., 151–169, 151, 153 (2004) (discussing correlation of class and criminal processing). *See also* JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 89-92 (1996) (theorizing that high rates of incarceration and the violent ethos of the prison system have come to shape behavior on the streets and to undermine respect for the law).

4. Attorney General John Ashcroft, Prepared remarks at Project Safe Neighborhoods National Conference, Philadelphia, Pa (Jan. 30, 2003), http://www.usdoj.gov/archive/ag/speeches/2003/013003agpreparedremarks.htm [hereinafter remarks].

5. Press Release, Debra W. Yang, L.A. Law Enforcement Officials Roll-Out Project Safe Neighborhoods (Dec. 18, 2003) *http://www.*usdoj.gov/usao/cac/pr2003/176.html.

Given the level of cooperation involved and the sharp increase in federal gun prosecutions as a result of the program, Project Safe Neighborhoods has been touted as a comprehensive, efficient and successful operation. In reality, the program is a narrowly-applied, reactive effort aimed at low-level criminals. It is an easily satisfied numbers operation. And Project Safe Neighborhoods targets African American communities. Those caught with a gun in one of these communities will be met with the full weight of federal law and find themselves facing sentences that are almost uniformly longer than those imposed under comparable state law. The person caught with a gun in other communities, if prosecuted at all, will certainly not end up in federal court to face its harsher penalties.

This Article examines the Project Safe Neighborhoods program and considers whether its disproportionate application in urban, majority-African American cities (large and small) violates the guarantee of equal protection under the law. This Article will start with a description of the program and how it operates—the limited application to street-level criminal activity in predominately African American communities. Based on preliminary data showing that Project Safe Neighborhoods disproportionately impacts African Americans, the Article turns to an analysis of the applicable law. Most courts have analyzed Project Safe Neighborhoods' race-based challenges under selective prosecution case law, which requires a showing by the defendant that the program had a discriminatory impact and was effectuated with the intent to discriminate. But this case law is not definitive. Project Safe Neighborhoods is a program that operates to treat African Americans separately and unequally. The program targets African American neighborhoods and thus targets African Americans. Under well-established law, where a program effectively classifies citizens by race, it is presumptively invalid and can be upheld only upon an extraordinary justification.

The presumed justification for Project Safe Neighborhoods' focus on a few select federal laws in African American communities is to combat the high rates of crime in these communities. The policy of treating individuals who happen to live in these high-crime areas more harshly than those who live elsewhere is not compelling, nor is the program narrowly tailored to accomplish the goal of tough enforcement. The goal of tough enforcement could easily be met using race-neutral standards.

Moreover, the program makes bad public policy. It targets criminal activity concurrently enforceable by state governments, and does so at the cost of failing to enforce exclusive federal gun laws. It undermines the goals of uniformity in sentencing—the notion that similarly-situated individuals should be treated similarly—by singling out a segment of the population for the explicit purpose of treating them differently. And that the segment of the population so singled out is African American raises serious questions about the fairness and integrity of a government that promises equal protection under the law. The program involves separate

*and* unequal treatment. If this is not violative of equal protection, then what is?

## I. MORE ABOUT PROJECT SAFE NEIGHBORHOODS

Project Safe Neighborhoods was officially announced in May 2001.[6] But the program is not as new as its inception date suggests. In April 1991, Attorney General Richard Thornburgh, under the administration of (the first) George Bush, announced "Project Triggerlock," which would use federal firearms statutes to "protect the public by putting the most dangerous offenders in prison for as long as the law allows."[7] The purpose of the project was to identify repeat and violent offenders who used guns and to prosecute them in federal court.[8] The project was implemented in several jurisdictions across the country. Within six months after Triggerlock's announcement, 2651 defendants were charged nationwide.[9] The ATF further responded with "Operation Achilles Heel", an effort to work with state and local authorities to round up more than 600 of the nation's "most violent criminals."[10] Project Triggerlock continued through the end of the Bush administration and into the Clinton Administration.[11]

But the real genesis of Project Safe Neighborhoods was a program in Richmond, Virginia, called Project Exile. In 1997, the United States Attorney's Office in the Eastern District of Virginia began aggressively prosecuting handgun offenses.[12] At that time, Richmond was among the 10 cities with the highest per capita murder rates.[13] According to Helen Fahey, then U.S. Attorney for the Eastern District of Virginia, the reasons for pursuing the cases federally were threefold: (1) most offenders could be held without bail under federal bond statutes; (2) offenders would be subject to mandatory minimum sentences under federal law, resulting in stiff penalties; and (3) the offender would not serve time in his community, but would be "exiled" to federal prison.[14] Under the project, "all

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6. *See* Press Release, White House Project Safe Neighborhoods Fact Sheet,(May 14, 2001), http://www.whitehouse.gov/news/releases/2001/05/2001 0514-2.html.

7. Daniel C. Richman, *"Project Exile" and The Allocation of Federal Law Enforcement Authority*, 43 ARIZ. L. REV. 369, 374 (2001) quoting Tracy Thompson, *Gun Crimes Targeted by Prosecutors: National Effort Seen As Partly Political*, Wash. Post, Apr. 11, 1991, at A14.

8. Richman, *supra* note 7,at 374.

9. *Id.* at 375.

10. *Id.*

11. *Id.*

12. *See* Gene Healy, *There Goes the Neighborhood: The Bush-Ashcroft Plan to "Help" Localities Fight Gun Crime*, *in* GO DIRECTLY TO JAIL–THE OVERCRIMINALIZATION OF ALMOST EVERYTHING 94 (Gene Healy ed., 2004).

13. *Id.*, (citing Toni Heinzl, *Richmond's Project Exile Criticized by Attorneys, Federal Judge*, FORT WORTH STAR-TELEGRAM, Sept. 17, 2000, at 21).

14. Healy, *supra* note 12, at 95 (*citing* Helen F. Fahey, Testimony before the Senate Judiciary Committee, Mar. 22, 1999).

felons with guns, guns/drug cases and guns/domestic violence cases in Richmond [would be] federally prosecuted, without regard to numbers or quantities."[15]

The numbers attributed to the project were impressive. By March 1999, two years after the program's inception, 512 guns had been seized, and federal prosecutors had secured 438 indictments and 302 convictions with an average sentence of more than 53 months.[16] There was a thirty-three percent reduction in the homicide rate between 1997 and 1998, giving Richmond its lowest rate since 1987.[17] Whether this decline was a result of Project Exile's success is debatable as gun-related homicides and other violent crime dropped significantly across the country during the same period, and criminologists do not agree about the cause of that decline.[18]

Project Exile was lauded by a diverse group of politicians and citizens groups. It was supported by Democrats and Republicans alike. Those usually opposed on the issue of laws governing the use of guns were united. Charlton Heston, president of the National Rifle Association ("NRA"), honored the "fearless prosecutors" of Project Exile during hearings on the project in November 1999.[19] The NRA contributed $125,000 to Richmond's Project Exile advertising programs.[20] The NRA's nemesis, gun-control advocate Sarah Brady[21], also endorsed the program.[22]

But a three-judge panel of the Eastern District of Virginia court early on expressed concern about the prosecutorial discretion exercised in diverting cases to federal court through Project Exile in light of the disparate impact on African Americans.[23] At the point of challenge in that case,

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15. Healy, *supra* note 12, at 94, (quoting David Schiller, Project Exile, *available at* http://www.vahv.org/Exile).

16. Healy, *supra* note 12, at 95.

17. Richman, *supra* note 7, at 380–81.

18. Healy, *supra* note 12, at 111.

19. Richman, *supra* note 7, at 372, (citing Charlton Heston, Congressional Testimony on Project Exile before the House Government Reform Subcomm. (Nov. 4, 1999) http://www.nraila.org/news/19991104-CrimeControlJustice-002.html).

20. Healy, *supra* note 12, at 95.

21. Sarah Brady has been active in the gun control movement since the mid-1980s after her husband, James Scott Brady, former White House Press Secretary for President Ronald Reagan, sustained a permanently disabling head wound during an assassination attempt on President Reagan's life on March 30, 1981. She is chair of the Brady Campaign to Prevent Gun Violence and the Brady Center to Prevent Gun Violence. *See generally* Brady Center to Prevent Gun Violence website http://www.bradycenter.org.

22. Healy, *supra* note 12, at 94.

23. *See* United States v. Jones, 36 F. Supp. 2d 304, 311 n.9 (E.D.Va. 1999) ("Project Exile would be vulnerable on selective prosecution grounds if African American defendants were routinely diverted from state to federal prosecution while prosecutors allowed similarly situated Caucasian defendants to remain in state court. . . . [T]he Court takes this opportunity to express its concern about the discretion afforded individuals who divert cases from state to federal court for prosecution under Project Exile. . . . The inability of

*United States v. Jones*, the parties stipulated that perhaps as many as ninety percent of Project Exile defendants were African American.[24] The district court expressed concern as well about the "serious questions respecting basic principles of federalism."[25] Constrained by equal protection and selective prosecution case law, the court nevertheless denied defendant's claim for relief.

The district court's reservations carried little impact and apparently generated no pause outside the courtroom. Project Exile was heralded as a success and became the footprint for Project Safe Neighborhoods.[26] In May 2001, President Bush expanded the program, unveiling Project Safe Neighborhoods as a national initiative. The administration committed more than $900 million for the project over the first three years.[27] Initial funding was used to hire 207 new assistant United States attorneys and 400 new ATF agents.[28] These prosecutors would bring federal gun charges for offenses that would normally be handled in state courts.[29] The program also aimed to promote gun prosecutions at the state and local levels. The president's proposal dedicated an additional $75 million to hiring and training approximately 600 full-time state and local prosecutors.[30] There were to be other components to the program, including community outreach programs, but "Safe Neighborhoods' central goal [was] to raise the number of firearm prosecutions in America."[31] From 2000–2005, federal gun prosecutions nationwide increased by seventy-three percent.[32] According to President Bush, "this Nation must enforce the gun laws which exist on the books."[33]

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prosecutors to explain the procedure clearly is disquieting and casts some doubt on the assertion that race places no role in deciding whether a particular case is to be federally prosecuted.")

24. *Id.* at 311.

25. *Id.* at 313.

26. *See* Healy, *supra* note 12, at 110.

27. Remarks, *supra* note 4.

28. *Id.*

29. Healy, *supra* note 12, at 96.

30. *Id.*

31. Healy, *supra* at 96.

32. Attorney General Alberto R. Gonzales, Transcript of Attorney General Alberto R. Gonzales' One-Year Anniversary Speech, Washington, D.C. (Feb. 15, 2006). *See also* Project Safe Neighborhoods: Executive Summary, http://www.psn.gov/about/execsumm.html.

33. Healy, *supra* note 12, at 96; *see also Letter from* President George W. Bush to United States Attorneys, (Nov. 27,2001) Letters to U.S. Attorneys from the President of the United States, the Attorney General and the Director of the Bureau of Alcohol, Tobacco and Firearms, Project Safe Neighborhoods Tool Kit http://www.ojp.usdoj.gov/BIA/psngrants/psn_toolkit.pdf.

But the Achilles' heel[34] of Project Safe Neighborhoods is this: only a select few of the "gun laws which exist on the books" have been enforced and only in a select few of the communities across this Nation.

### A. *What Are the "Gun Laws Which Exist on the Books" and How are They Being Enforced?*

With rare exceptions, only two of twenty federal gun laws are enforced under Project Safe Neighborhoods. In 2003, eighty-seven percent of all firearm-related cases brought by federal prosecutors involved only two charges: under 18 U.S.C. § 922(g), which prohibits those with a felony record from possessing a firearm ("felons-in-possession");[35] and under 18 U.S.C. § 924(c), which enhances sentences for those caught with guns "during and in relation to any crime of violence or drug trafficking crime."[36] Both of these laws are directed at the "end-users" of the firearm, as opposed to the gun dealer, seller or intermediary who supplied the firearm.

The other twenty major federal gun crimes—including gun trafficking, corrupt gun dealers, stolen guns, selling to minors, obliterating serial numbers, and lying on the background check form—are almost never prosecuted.[37] Prosecutions against gun suppliers continue to decline or remain below 2000 levels. Even though more than 125,000 people were found to have submitted false information on background check forms in 2003, only 532 cases were filed. In 2003, only thirty-two prosecutions were brought against corrupt firearms dealers, a decline of eleven percent since 2000.[38]

This is so despite the fact that one of Project Safe Neighborhood's purported goals is to target the sources of firearms. A January 2002 United States Attorney's Bulletin noted the goal of "heightened enforcement of all federal laws against illegal gun traffickers, as well as corrupt federal firearms licensees that supply them, with an emphasis on those gun traffickers who supply illegal firearms to violent organizations and juveniles."[39] Attorney General John Ashcroft spoke about the need for a

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34. No pun or reference to the previously-noted ATF operation intended.

35. 18 U.S.C. § 922(g) also prohibits from possessing a firearm: fugitives, unlawful drug users or addicts, those with mental defects, unlawful aliens, those discharged from the Armed Forces under dishonorable conditions, those who have renounced their U.S. citizenship, who is subject to a court restraining order or for those convicted of a misdemeanor crime of domestic violence.

36. 18 U.S.C.A § 824 (c)(1)(A).

37. *Americans for Gun Safety Foundation, The Enforcement Gap: Federal Strategy Neglects Sources of Crime Guns, at 2 (Oct. 2004) http://w3.agsfoundation.com/media/AGS-enf.pdf.*

38. *Id.*

39. John A. Calhoun, *Project Safe Neighborhoods: America's Network Against Gun Violence*, 50 U.S. Atty's Bull. no.1 at 2(Jan. 2002).

comprehensive strategy that focuses not just on street-level criminals. In a speech given at a Project Safe Neighborhoods conference in 2004, Ashcroft stated that:

> [Project Safe Neighborhoods] is not just a prosecution program—it is a comprehensive program. We are achieving our goals of reducing illegal gun possession and abuse by not stopping at merely prosecuting the gun-toting criminals. We are cutting off the supply of illegal guns at the source by targeting those who put these illegal guns out on the streets and into the hands of criminals.[40]

Given that just over one percent of the federally licensed firearms dealers ("FFLs") in America are linked to more than fifty-seven percent of the guns recovered in crime and traced,[41] prosecuting gun suppliers would seem logical. Corrupt gun dealers were, according to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the source of 40,365 illegal guns recovered during a two-year period in the late 1990s (32.1 percent of all guns recovered during investigations).[42]

But the numbers belie the claim that the program is comprehensive in terms of the types of crimes charged. As noted, eighty-seven percent of all firearm-related cases brought by federal prosecutors involved only two charges. These two categories of cases both target street-level gun-toters who may or may not have been engaged in violent or dangerous activity.[43] For fiscal year 2003, only 4.2 percent of cases were brought for lying on Firearm Purchase Form, 1.88 percent for Stolen Firearms, 1.5 percent for Trafficking, 0.7 percent for Obliterated Serial Numbers, 0.3 percent for Corrupt Firearms Dealers, and 0.2 percent for Supplying Firearms to Minor or Near a School.[44]

Criminal cases against corrupt gun dealers declined by eleven percent between 2000 and 2004, and from 2000–2003, only 120 cases were brought under the three federal statutes that deal with corrupt gun stores.

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40. Attorney General John Ashcroft, Prepared Remarks for the Project Safe Neighborhoods National Conference, Kansas City, Mo. (June 16, 2004) http://www.atf.gov/press/fy04press/062204ag_psn.htm.

41. Brian J. Siebel, *Gun Industry Immunity: Why the Gun Industry's 'Dirty Little Secret' Does Not Deserve Congressional Protection*, 73 UMKC L. REV. 911 (2005).

42. Americans for Gun Safety Foundation, *supra* note 37, at 8 (citing Bureau of Alcohol, Tobacco, Firearms and Explosives, Commerce in Firearms in the United States, at 25 (Feb. 2000)).

43. One of the criticisms of Project Exile was that the program targeted individuals regardless of their propensity for violence. A federal judge in Richmond noted that "Ninety percent of these [Exile] defendants are probably no danger to society." Healy, *supra* note 12, at 106 (quoting Toni Heinzl, *Richmond's Project Exile Criticized by Attorneys, Federal Judge, Fort Worth Star-Telegram*, Sept. 17, 2000, at 21).

44. Americans for Gun Safety Foundation, *supra*, note 36 at 11.

During these four years, dealer prosecutions accounted for less than one percent (.32 percent) of all federal gun prosecutions.[45]

Gun trafficking laws are rarely enforced even in those states known for being the source of guns used in crime. In fiscal years 2000–2002, federal prosecutors filed only 26 cases against gun traffickers in Georgia,[46] although that state was known in 2001 to be the leading supplier of guns to criminals in Alabama, Connecticut, Florida, and Massachusetts, and was among the top five crime gun suppliers to New Jersey, South Carolina, Tennessee, New York, North Carolina, Virginia, Michigan, Pennsylvania, Washington, D.C., and Maryland.[47]

In North Carolina, from 2000–2002, there were only 23 federal prosecutions for illegal gun trafficking,[48] though this state too is known to be a leading supplier of crime guns. As of 2003, it was the second largest supplier of guns used in crime in New York, and the fifth largest supplier of handguns used in crime across the country.[49] In 2000, 3,308 crime guns were traced to sources in North Carolina, including 1,421 crime guns used in other states. Of an estimated 22,000 firearms stolen in North Carolina from 2000-2002, there were only 16 federal prosecutions for stealing firearms.[50]

The problem of selective enforcement of the existing laws is exacerbated by the fact that almost every state has laws similar to the two federal laws aimed at street-level criminals, while in many cases *only* the federal government has the power to prosecute gun dealers. Federal prosecutors choose to pursue those crimes that states have both the authority and resources[51] to prosecute, while virtually ignoring those criminals whom the federal government alone can stop.

Every state except Vermont has prohibited felons from possessing firearms and committing a felony with a firearm.[52] But only two states have a law against the interstate trafficking of firearms, twenty-eight states have no law against lying on the firearm purchase background check form, thirty-three states do not require firearm dealers to obtain a state license or register with state authorities, and only nine states have laws that allow law enforcement to review inventory and sales records kept by

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45. *Id.* at 17.

46. Americans for Gun Safety, The Iron Pipeline: Georgia is Nation's Second Leading Gun Trafficking State, at 1 (Aug. 2003), *available at* http://ww2.americansforgunsafety.com/trafficking_report_georgia.pdf.

47. *Id.*

48. North Carolinians Against Gun Violence Education Fund, Shut-off the Iron Pipeline: Stop Gun Trafficking, *available at* http://www.ncgv.org/trafficking.htm.

49. *Id.*

50. *Id.*

51. *See* discussion *infra* Part IV.

52. MILLER *supra* note 3, at 58.

these dealers.[53] This means that in most states exclusive authority to prosecute violations of these gun laws lies with the federal government.

It is arguable that existing gun laws do not go far enough—that more legislation is needed to control the flow of guns. But opponents of gun control argue that the government should focus its law enforcement efforts on those who use guns; that is, the problem is not with the guns, but with those who use them unlawfully. These opponents have effectively won the debate in terms of the national policy. Despite the apparently neutral position that it should focus on enforcing "existing gun laws," the federal government has chosen to turn a blind eye to violators of most of those laws and singularly focuses on street-level gun-toters.

The laws are enforced against only a discrete category of criminals, and against these individuals the government strikes hard. For cases referred under Project Safe Neighborhoods, federal prosecution is not automatic. An assessment is often made to determine whether the penalties are harsher under federal or state laws. The decision where to prosecute is based in large part on where the penalty is harshest. As stated by U.S. Attorney Debra W. Yang from the Central District of California, the goal is "to ensure that these criminals receive the longest sentences possible."[54]

### B. *Who are "These Criminals?"*

The focus on street-level gun activity is coupled with a policy of enforcing those laws in predominately African American communities. Most United States Attorneys offices that implement the Project Safe Neighborhoods program do so in cooperation with only a select few communities within their districts. Despite claims to the contrary, most United States Attorneys offices have far less than a comprehensive gun-enforcement program (again, enforcing only two of twenty federal laws) and additionally target communities in which African Americans are disproportionately concentrated.[55] That is, the program targets African Americans by targeting the communities in which they live.

It is commonly known that America remains deeply divided by race.[56] Citizens of most communities are well aware of those pockets within their broader communities that are predominately African American. Thus, to focus geographically on any given community in America

53. *Id.*

54. YANG, *supra* note 5.

55. *See* discussion *infra* at page 12 and Appendices A and B.

56. Segregation remains high in many metropolitan areas, though it has generally decreased across the country, with an average decline of 5.5 percentage points between 1990–2000. Segregation remains especially marked in the Midwest and Northeast. *See* Edward L. Glaeser and Jacob L. Vigdor, Racial Segregation in the 2000 Census: Promising News, The Brookings Institute Survey Series (April 2001).

comes with requisite knowledge about the race of those citizens who will be impacted. That is, a decision to prosecute in urban, minority communities will necessarily have a different racial impact than prosecuting in predominantly White suburban and rural communities. A review of the communities targeted by Project Safe Neighborhoods makes clear that for most United States Attorneys' offices, the targeted communities are those in which African Americans comprise the majority or are significantly overrepresented in proportion to their representation in this country.

African Americans make up only 12.9 percent of the population in the United States,[57] but more than half of all African Americans in the United States, and sixty percent of African American urban dwellers, live in thirty metropolitan areas.[58] The thirty cities with the largest African American populations are: Boston, Buffalo, Chicago, Cincinnati, Cleveland, Columbus, Detroit, Gary-Hammond-E. Chicago, Indiana, Indianapolis, Kansas City, Los Angeles-Long Beach, Milwaukee, New York, Newark, Philadelphia, Pittsburgh, St. Louis, San Francisco-Oakland, Atlanta, Baltimore, Birmingham, Dallas-Ft. Worth, Greensboro-Winston Salem, Houston, Memphis, Miami, New Orleans, Norfolk-Virginia Beach, Tampa-St. Petersburg, and Washington, D.C.[59] Project Safe Neighborhoods targets every single one of these communities.[60]

Even amongst smaller communities, Project Safe Neighborhoods targets those communities where African Americans are disproportionately represented. Of the fifty-four cities with populations exceeding 100,000 where African Americans make up thirty percent or more of the population,[61] Project Safe Neighborhoods focuses on at least fourty-four of those communities.[62] These communities are the primary, and often even the exclusive, focus of Project Safe Neighborhoods' prosecutions.[63]

Given that African Americans are disproportionately concentrated in these communities, it should come as no surprise that African Americans are disproportionately prosecuted under Project Safe Neighborhoods. It has been argued in several districts that Project Safe Neighborhoods targets African Americans. The preliminary numbers gathered by these districts are disturbing.

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57. Jesse Mckinnon, The Black Population: 2000, U.S. Census Bureau (Aug. 2001) *available at* http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf#search

58. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID–SEGREGATION AND THE MAKING OF THE UNDERCLASS 62 (1993).

59. *Id.*

60. *See* Appendix A (outlining the targeted cities and references from Department of Justice ("DOJ") materials reflecting the cities involved in the Project Safe Neighborhood's project in each U.S. Attorney's office).

61. *See* Appendix B.

62. *Id.*

63. DOJ descriptions of Project Safe Neighborhoods efforts reflect that only certain cities are focused upon, and also reference the Project Safe Neighborhoods "partners" as the local law enforcement agencies in these cities. *See* Appendices A & B.

According to statistics presented in the Eastern District of Michigan, almost ninety percent of those prosecuted under Project Safe Neighborhoods are African American.[64] In the Southern District of New York where Project Exile was implemented, there was testimony showing that more than eighty percent of defendants prosecuted under the project were African American. In the Southern District of Ohio, statistics have shown that of seventy-seven cases known and reviewed under Project Disarm (Cincinnati's Project Safe Neighborhood's initiative), seventy of the defendants were African American, more than ninety percent of all prosecutions under the program.[65] And under Project Exile in Richmond, Virginia, the defendant and prosecution stipulated in an Eastern District case that "as many as 90 percent of the defendants prosecuted under Project Exile are African American."[66]

There is no question that defendants prosecuted under Project Safe Neighborhoods are treated disparately. Cases are reviewed for federal or state prosecution dependent on where the penalty is harsher. Alternatively, the United States Department of Justice explicitly notes that "in some jurisdictions, state prosecutors offer violent gun criminals the option of receiving *higher than usual state sentences* in lieu of federal prosecution, which may carry an even higher sentence. Under that approach, the possibility of severe federal sanctions can be used as an incentive for a defendant to accept a strong state plea bargain."[67]

The upshot is simple: an individual caught in one of the targeted communities will face harsher penalties than an individual caught in a non-targeted community. Presumably, there exist outside of the targeted areas similarly-situated individuals who are spared the "higher than usual" penalties associated with Project Safe Neighborhoods. But such a presumption, however logical, is not alone grounds for a claim of discriminatory enforcement.

## II. COURTS HAVE APPLIED SELECTIVE PROSECUTION LAW TO GOVERN THE INQUIRY IN PROJECT SAFE NEIGHBORHOODS CASES

Because challenges under Project Safe Neighborhoods are raised by criminal defendants who claim to have been singled out for differential

64. *See* United States v. Hubbard, Crim. No. 04-80321, 2006 WL 1374047, at 1 (E.D.Mich. May 17, 2006) (of the 61 federal prosecutions under Project Safe Neighborhoods handled by the Federal Defender's Office, 54 were African American, two were Native American, three were Hispanic or Latino, and two were Caucasian); *see* United States v. Hubbard, Crim. No. 04-80321, 2006 WL 1374047, at 1 (E.D.Mich. May 17, 2006). *See also* United States v. Wallace, 389 F. Supp. 2d 799 (E.D. Mich. 2005).

65. Dan Horn, *Bias Alleged in City Gun Cases: Police, Prosecutors Tougher On Blacks?*, THE CINCINNATI ENQUIRER, Nov. 7, 2003.

66. *See* United States v. Jones, 36 F. Supp. 2d 304, 307 (E.D.Va. 1999).

67. Project Safe Neighborhoods Tool Kit, *supra* note 33, at 2–17 (emphasis added).

treatment in their prosecutions, courts have applied selective prosecution case law. The strict tests that govern the review of selective prosecution challenges make a successful claim nearly impossible. This next section examines the development of selective prosecution case law, and ultimately argues that the traditional tests for selective prosecution should not apply in the context of programs such as Project Safe Neighborhoods where the federal government knowingly targets minority communities.

### A. *The Standard of Review for a Selective Prosecution Claim*

The Supreme Court has held that if an individual is singled out for prosecution based on an unjustifiable standard such as race, religion, or some other arbitrary classification, the prosecution violates the right to equal protection under the law.[68] A defendant's right to equal protection during federal prosecution is secured by the Due Process Clause of the Fifth Amendment.[69] Courts have held, however, that a defendant's equal protection claim that he was singled out on the basis of race for prosecution is a claim for selective prosecution.[70]

A claim of racially selective prosecution requires the same proofs that are necessary to prove an equal protection claim. In a number of early equal protection cases, where there was evidence that a policy or law disproportionately impacted African Americans, circuit courts accepted this as adequate proof that equal protection was not afforded.[71] But in 1976 the Supreme Court held in *Washington v. Davis*[72] that viable equal protection claims based on race must prove discriminatory purpose—actual intent to discriminate—in addition to proof of a disproportionate impact.

The standards for proving an equal protection violation, requiring proof of discriminatory impact and intent, were subsequently required in selective prosecution cases by several appellate courts.[73] In *United States v. Wayte*,[74] the Supreme Court explicitly required proof of strict intent in a selective prosecution case, explaining that a selective prosecution claim is based on equal protection standards, which "require [the] petitioner to

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68. *See* Oyler v. Boles, 368 U.S. 448, 456 (1962).

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

70. *See Jones*, 36 F. Supp. 2d at 310 (a challenge to prosecutorial policy as race-based is evaluated under selective prosecution law because "the tribunal in which prosecution occurs depends upon the exercise of prosecutorial discretion.")

71. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 41 (Oct. 1998), (*citing Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1536–39 (1988)).

72. 426 U.S. 229, 238–48 (1976).

73. Davis, *supra* note 71, at 41–42 (*citing* Delaware v. Holloway, 460 A.2d 976, 978 (Del. Super. Ct. 1983)).

74. 470 U.S. 598 (1985).

show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose."[75]

Selective prosecution claims are very difficult to prove, as there is rarely proof that a prosecutor sought prosecution because of a defendant's race. Moreover, the tests for proving discriminatory impact and purpose are applied under a strenuous standard of review. Prosecutors have broad discretion in making charging decisions and those decisions are rarely disturbed. "The presumption of regularity supports . . . prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. . . ."[76] In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[77]

Separation of powers principles command this high standard for court-based challenges to prosecutorial discretion. The Supreme Court has emphasized that a selective prosecution challenge is essentially a challenge to the decision-making authority of an agency within the Executive Branch. A selective prosecution claim asks a court to exercise judicial power over a "special province" of the Executive.[78] Accordingly, the Court has emphasized that "[t]he Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws. . . . They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully exercised.'. . ."[79] In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "clear evidence to the contrary."[80]

As noted, there have been challenges to Project Safe Neighborhoods' prosecutions on the basis that African Americans are singled out for prosecution in violation of their right to equal protection. The courts in each instance have required proof of discriminatory impact and purpose. The next two sections examine what is required for proving discriminatory impact and purpose in selection prosecution cases. But they also examine the purposes for these tests and why they should not govern the inquiry as to whether the Project Safe Neighborhoods program violates the guarantee of equal protection.

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75. *Id.* at 608.

76. *Armstrong*, 517 U.S. at 464 (citing United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926)).

77. *Id.* at 464 (citing Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

78. *Id.* (citing Heckler v. Chaney, 470 U.S. 821, 832 (1985)).

79. *Id.*, citing U.S. Const. art. II, § 3; *see also* 28 U.S.C. §§ 516, 547.

80. *Id.* at 465.

### B. *Proof of Disparate Impact Requires Proof that there Were Others "Similarly Situated" Who Were Not Prosecuted*

The first test for proving racially selective prosecution—discriminatory impact—requires proof not only that members of defendant's race were disproportionately affected by a prosecution policy, but a defendant must show that similarly situated individuals of a different race were not prosecuted.[81] This requirement was first alluded to in the 1905 Supreme Court case *Ah Sin v. Wittman*.[82]

In that case, Ah Sin, a subject of China, petitioned a California State court for a writ of habeas corpus, arguing that Chinese were singled out for enforcement of a San Francisco County ordinance prohibiting gaming tables in barricaded rooms. He argued that Chinese were singled out, but offered no evidence that the practice was directed exclusively at Chinese, "or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced."[83] Although the Court did not explicitly require proof that there were non-Chinese similarly-situated, subsequent courts interpreted the case to require such proof.[84] I will discuss in Part II.B.2 that this interpretation was perhaps too broad and forecloses viable claims of equal protection under the Due Process Clause. But I will first outline what courts have required to prove that others are similarly-situated in Project Safe Neighborhoods cases, as well as in other race-based challenges to prosecutorial decision-making.

Proving that there are others "similarly-situated" to the complaining defendant is difficult. The Supreme Court has suggested otherwise, observing that "it should not [be] an insuperable task to prove that persons of other races were being treated differently than [the complaining defendants]."[85] In *United States v. Hubbard*, a recent Project Safe Neighborhoods case, a defendant sought to buttress his claim that the program had a discriminatory impact on African Americans with evidence that a non-African American was similarly situated, but was not prosecuted. The court held that the evidence was insufficient.

In *Hubbard*, Hubbard presented evidence that Project Safe Neighborhoods disproportionately impacted African Americans. The evidence that the program has a disproportionate impact on African Americans was significant. In the Eastern District of Michigan, the Federal Defender's Office conducted a study reflecting that of 61 Project Safe Neighborhoods' cases referred to its office, fifty-four defendants were African American, two were Native American, three Hispanic and two were

81. *Id.*
82. 198 U.S. 500 (1905).
83. *Id.* at 507–08.
84. *See Armstrong*, 517 U.S. at 466.
85. *Id.* at 470.

White.[86] That is, eighty-nine percent of the defendants were African American, and ninety-seven percent were non-White.[87] Hubbard produced additional evidence of a White defendant who was not prosecuted in federal court.[88]

Hubbard, who had a felony record, was federally prosecuted for possessing a firearm. He introduced into evidence a clipping from a newspaper describing a non-African American who was arguably similarly situated to him, but who was not prosecuted federally. The clipping reflected the sentence of a defendant in a state court in Michigan with the following description: Newman, Christopher Lee, 30, of 2614 S. St. Anthony, Jackson. Possession of cocaine, with intent to deliver, less than 50 grams; felon in possession of a firearm.[89]

The court held that the article did not establish whether Newman was similarly situated to Hubbard. The court noted that relevant factors for determining similarity include "comparison, for example, of the amounts of crack involved in cases with White defendants, their criminal histories, propensity for violence, and any other facts that might justify the higher sentences in they were prosecuted in federal court."[90] Because Hubbard had no evidence of Newman's criminal history, he had not carried his burden of showing that he was similarly situated to Newman for the purpose of obtaining discovery on the selective prosecution claim.[91]

Presumably it would be difficult for Hubbard to know the criminal history of another defendant, but also relevant is that he could not ascertain whether his criminal history was the basis for the prosecution selecting his case for referral under Project Safe Neighborhoods.[92] Without knowing the basis on which he was selected for prosecution, Hubbard was faced with the near-impossible task of identifying "similarly-situated" individuals who were not selected for prosecution. Hubbard therefore sought discovery on the guidelines used in selecting cases for prosecution under Project Safe Neighborhoods.

Absent perfectly identical crimes by identical individuals, presumably every person can be distinguished on some basis. The Supreme Court so much as acknowledged this near-impossibility in *McCleskey v. Kemp*,[93] a selective prosecution case in which defendant argued that the State of

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86. *See Hubbard*, 2006 WL 1374047 at 2.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 3 (citing United States v. Daniels, 142 F. Supp. 2d 140, 144 (D. Mass. 2001)).

91. *Id.*

92. Hubbard's criminal history was as follows: one conviction for larceny over $100, two convictions for felonious assault, and one conviction for carrying a concealed weapon. *Id.*

93. 481 U.S. 279 (1987).

Georgia discriminatorily selected African Americans for execution. The Court noted: "[t]here are, in fact, no exact duplicates in capital crimes and capital defendants. The type of research submitted [therein] tends to show which of the directed factors were effective, but is of restricted use in showing what undirected factors control the exercise of constitutionally required discretion."[94]

Absent some objective criteria, a defendant is almost fatally challenged to identify a person similarly situated to him. Therefore, as noted, Hubbard requested discovery about the criteria prosecutors use in Project Safe Neighborhoods' prosecutions. Applying a standard for discovery that is practically as demanding as that for proving a substantive selective prosecution claim, the district court denied Hubbard's request for discovery.

### 1. Obtaining Discovery in a Selective Prosecution Case

It is necessary at this point to diverge to the issue of discovery in selective prosecution cases to appreciate the challenge of ultimately proving a selective prosecution claim. The Supreme Court set forth the standards for obtaining discovery in selective prosecution cases in *United States v. Armstrong*. In *Armstrong* the Court reviewed whether two defendants, Armstrong and Hampton, were entitled to discovery on their claims that the federal Government disproportionately prosecuted African Americans under the federal crack cocaine laws. Defendants presented evidence that all of 24 crack cocaine cases defended by the Federal Defenders Office in the Central District of California involved African American defendants.[95] The district court ordered discovery.[96]

In filing a motion for reconsideration, the Government submitted affidavits and other evidence to explain why it had chosen to prosecute defendants, and why the study showing that all defendants federally prosecuted were African American did not support an inference that the Government was singling out African Americans for cocaine prosecution. In addition to affidavit testimony from federal and local agents that race played no role in their investigation, an Assistant United States Attorney explained in an affidavit that the decision to prosecute met the general criteria for prosecution and that defendants were involved in a "fairly substantial crack cocaine ring."[97] The Government submitted sections of a Drug Enforcement Agency report concluding that "[l]arge-scale, interstate

94. *Id.* at 290.
95. *Armstrong*, 517 U.S. at 459.
96. *Id.*
97. *Id.*

trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack cocaine."[98]

To rebut the suggestion that African Americans were disproportionately engaged in this particular type of crime and thus the number of prosecutions would necessarily be skewed against African American defendants, the defendants countered with evidence that crack cocaine was used and trafficked by both African Americans and Caucasians in the Central District of California. They presented an affidavit from an intake coordinator at a drug treatment center stating that there are "an equal number of Caucasian users and dealers to minority users and dealers."[99] There was also affidavit testimony that an equal number of African American and non-African Americans were prosecuted in state courts, reflecting that similarly situated defendants exist, but were not being prosecuted federally where the penalties were substantially more severe than those under state law.[100]

The federal district court ordered discovery, the Ninth Circuit reversed, and an en banc panel of the Ninth Circuit held that discovery should be made. The Supreme Court held that defendants were not entitled to discovery. Given the demanding standards for proving a claim of selective prosecution, the Court held that there must likewise be a rigorous standard for obtaining discovery in aid of such a claim.[101] The Court held that there must be some evidence tending to show the existence of the discriminatory effect element.[102] Specifically, defendants must make a threshold showing that similarly situated defendants of other races could have been prosecuted, but were not.[103]

In establishing a rigorous standard for discovery, the Supreme Court did not discuss how such a standard might differ from that for proving the selective prosecution claim. The Court noted that appellate courts have described the necessary showing "with a variety of phrases" such as "colorable basis," "substantial and concrete basis," "substantial threshold showing," or "reasonable likelihood."[104] But the Court noted: "the many labels for this showing conceal the degree of consensus about the evidence necessary to meet it." The Court then noted:

> In this case we consider what evidence constitutes "some evidence tending to show the existence" of the discriminatory effect element. The Court of Appeals held that a defendant may establish a colorable basis for discriminatory effect without

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 468.
102. *Armstrong*, 517 U.S. at 468.
103. *Id.* at 469.
104. *Id.* at 468.

> evidence that the Government has failed to prosecute others who are similarly situated to the defendant. . . . We think it was mistaken in this view. The vast majority of the Courts of Appeals require the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection clause. . . . As the three-judge panel explained, "selective prosecution implies that a selection has taken place."[105]

The Court failed to explain precisely what "some evidence" or a "credible showing" requires.

### 2. Proof of "Similarly-Situated" Others in Project Safe Neighborhoods Cases

It is useful to examine the development of selective prosecution case law and how the courts came to demand evidence of "similarly-situated" persons in order to question its applicability to the Project Safe Neighborhoods enforcement policy. I will start this analysis with the 1886 Supreme Court case *Yick Wo v. Hopkins*,[106] the first and only case to ever successfully challenge a prosecution policy on the basis that it was racially selective.[107]

Yick Wo, a native of China, operated a laundry business in San Francisco. Although he had operated for twenty-two years, when he tried to renew his license the board of fire wardens notified him that he was in violation of a new city ordinance prohibiting laundries in wooden buildings. Yick Wo was fined, refused to pay the fine, and was arrested.[108] He petitioned the California Supreme Court for a writ of habeas corpus, arguing that he had been "illegally deprived of his personal liberty."[109] The case ultimately went to the United States Supreme Court. In striking down the ordinance as discriminatory, the Supreme Court noted the following facts: 1) of 320 laundries in San Francisco 310 were housed in wooden buildings 2) of 280 who applied for licenses from the fire warden, all but one of the eighty non-Chinese received a license, even though their laundries were in wooden structures, and all 200 Chinese applicants were denied.[110]

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105. *Id.* at 469.
106. 118 U.S. 356 (1886).
107. Davis, *supra* note 71, at 44.
108. *Yick Wo*, 118 U.S. at 359.
109. *Id.* at 356-57.
110. *Id.* at 374.

Twenty years later the Supreme Court decided the case *Ah Sin v. Wittman*,[111] noted above. In *Ah Sin*, the defendant argued that a San Francisco ordinance prohibiting gambling was enforced against Chinese and not against any other races. There was no evidence to support this allegation. The Court distinguished *Yick Wo*, wherein "it was shown that not only the petitioner in that case, but two hundred of his countrymen, applied for licenses and were refused and that all the petitions of those not Chinese, with one exception, were granted."[112] The Court rejected the selective prosecution claim because "[t]here [was] no averment [by Ah Sin] that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, *or that there were other offenders against the ordinance than the Chinese* as to whom it was not enforced."[113]

The *Ah Sin* Court presented the issue squarely as "a matter of proof."[114] Evidence that the law was enforced against Chinese did not necessarily mean that it was not enforced against non-Chinese. Thus, subsequent courts have interpreted *Ah Sin* to require proof that there were persons of a different race similarly-situated to defendant who were not prosecuted.

But proof that others are similarly-situated should not be required in cases such as those prosecuted under Project Safe Neighborhoods where the government singularly targets a minority population for enforcement. The relevant comparison is between those in targeted communities and those who are not.

Given that Project Safe Neighborhoods operates within limited geographic boundaries, one can infer that there are individuals not within those boundaries who are "similarly-situated" to those prosecuted under the program. This is a defensible inference. If federal prosecutors focus exclusively or almost exclusively on minority communities the converse is that prosecutors completely ignore potential claims in other communities. Thus one can reasonably assume that there are others similarly-situated who are not being prosecuted.

The Supreme Court has suggested that ordinarily one cannot make this assumption. The Court noted in *Armstrong* that the "Court of Appeals reached its decision [regarding disparate impact] in part because it started 'with the presumption that people of *all* races commit *all* types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group.'"[115] The Supreme Court rejected this presumption. Citing statistics on the number of convictions

111. 198 U.S. 500 (1905).

112. *Id.* at 507.

113. *Id.* at 507-08 (emphasis added).

114. *Id.* at 508.

115. *Armstrong*, 517 U.S. at 469 (quoting U.S. v. Armstrong, 48 F.3d 1508, 1516-17 (9th Cir. 1995)).

in federal courts for crack cocaine (ninety percent of whom were Black), LSD (93.4 percent of whom were White), and pornography or prostitution (ninety-one percent of whom were White), the Court interpreted the data to reflect the level of criminal activity by members of those racial groups.[116] However the data cited by the Court is nothing more than proof as to who is being prosecuted, not who else might be subject to prosecution. Such "proof" is especially deficient in response to claims that the disparity exists *because* of unequal enforcement of particular laws.

With Project Safe Neighborhoods, the assumption that there are others who could be but are not being prosecuted can and should be made because prosecutors do not even purport to seek equal enforcement. Instead prosecutors seek the harshest penalties available under federal or state law within a finite target area. Thus, the discrimination need not be proven by showing that similarly situated individuals exist outside of the targeted communities. Rather, the discriminatory treatment lies in the subjection of certain classes of citizens to federal scrutiny while others are not subject to such scrutiny. This is, arguably, the proposition for which *Yick Wo* stands.

Imagining a slight variation on the facts in *Yick Wo* is demonstrative. Suppose that wooden structures were not in violation of the ordinance in San Francisco if they contained equipment for putting out fires (the 1880's version of a fire extinguisher). Assume that most such structures were commonly known not to have a fire extinguisher, but the fire wardens looked only at Chinese laundries and claimed ignorance about whether non-Chinese laundries contained the extinguishers. Assume all other facts are the same—that of 320 laundries in San Francisco, 310 were housed in wooden buildings. Now suppose that the fire wardens inspected only Chinese laundries (with one exception) to determine whether they were in compliance with the ordinance. As a result of the limited inspections, of the 280 who applied for licenses from the fire warden, eighty non-Chinese received a license even though their laundries were in wooden structures, while all 200 Chinese applicants were denied. Would the outcome have been different? A review of the Court's analysis suggests not.

The Court in *Yick Wo* noted that the ordinance "divide[d] the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry ... and on the other those from whom that consent is withheld. ..."[117] The Court was impressed with the numbers reflecting that all of those denied licenses were Chinese and all but one non-Chinese re-

116. *Id.* at 469-70.

117. *Yick Wo*, 118 U.S. at 368.

ceived licenses. But the numbers were persuasive not because Yick Wo was able to show that the eighty non-Chinese applicants were "similarly situated." Rather, the Court's concern was that the Chinese applicants were treated differently as a distinct class of citizens.

Under the hypothetical, it would have been impossible for Yick Wo to prove that the non-Chinese applicants were similarly situated because the fire extinguishers would not have been visible, thus Yick Wo could not have proven that these operators were similarly situated to him. But given its express concern with an arbitrary line with clear racial implications, one cannot imagine the outcome of that case being different had the administrators claimed ignorance as to whether the non-Chinese applicants were exempt from the ordinance. Where there is such discriminatory focus in the inquiry—the exclusive subjection of a distinct class of citizens to scrutiny—defendants should not have to show that there were others similarly situated who could have been but were not prosecuted.

This interpretation of *Yick Wo* does not unreasonably broaden its holding. The data in that case strongly suggested differential treatment of Chinese applicants. This interpretation does suggest that *Yick Wo* was not intended to apply so narrowly as to create an impossibility—requiring proof not only that the officials acted differently in focusing on Chinese applicants for inspection, but that there were non-Chinese applicants who could have been but were not inspected (i.e., were similarly-situated). The current test would have required Yick Wo to show that the fire extinguishers were not in the laundries of non-Chinese who were not prosecuted, a near impossibility.

If there is evidence that communities are highly segregated then bringing a case in some but not all districts will have the effect of bringing cases against only African Americans, which should constitute adequate proof of disparate impact.[118] There should be no requirement of proof that there are similarly situated defendants where the standard for prosecutorial selection does not involve looking for other defendants. The discriminatory treatment is the consideration for harsh penalties against those in African American communities, and the failure to consider penalties against those in other communities. But is it also enough to prove the second requirement for a selective prosecution challenge—discriminatory intent?

### C. *Proof of Discriminatory Intent*

Even in those cases where discriminatory impact has been shown, courts have also required proof of discriminatory intent. The Supreme

118. Ultimately it is my position that the disparate impact test should not govern at all, but that the Project Safe Neighborhoods program should be reviewed as one involving an impermissible race-based classification.

Court has narrowly defined what intent in this context means. According to the Court in *McCleskey v. Kemp*, intent requires more than awareness of consequences. "It implies that the decisionmaker [sic]... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[119]

In *McCleskey*, the defendant presented evidence from a statistical study (the "Baldus study") showing that Blacks were more likely than Whites to be executed in the State of Georgia, particularly when the victim was White. Prosecutors were substantially more likely to seek the death penalty against Black defendants involving White victims, having done so in seventy percent of the cases versus thirty-two percent of the cases involving White defendants and White victims. Prosecutors sought the death penalty in fifteen percent of the cases involving Black defendants and Black victims, and in nineteen percent of the cases involving White defendants and Black victims. Notwithstanding this evidence that race was a factor in prosecutors' decisions to seek the death penalty, the Court deemed the evidence insufficient to prove that Georgia state prosecutors acted with a discriminatory purpose.

The Court rejected McCleskey's claim for several reasons. First, the study did not prove that the decision makers discriminated in McCleskey's particular case.[120] "He offer[ed] no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence."[121] Second, the Court questioned whether the conclusion could be drawn from the statistics that race was a factor in any given capital case, and expressed concern that prosecutors did not have an opportunity to explain the statistical disparity.[122] Finally, the statistical evidence was simply insufficient proof of discriminatory purpose. The Court noted that "absent far stronger proof, it is unnecessary to seek such a rebuttal [from prosecutors to the statistics], because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty."[123] The Court "would demand exceptionally clear proof before we would infer that the discretion [of prosecutors] has been abused."[124]

Race-based challenges to Project Safe Neighborhoods prosecutions have generally failed in efforts to meet the *McCleskey* intent standard.

In the Project Exile *Jones* case, as to intent to discriminate, the court found that fairly strong evidence suggesting discriminatory intent was

119. McCleskey v. Kemp, 481 U.S. 279, 298 (quoting Pers. Admir. of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

120. *Id.* at 292.

121. *Id.* at 292-93.

122. *Id.* at 294–296.

123. *Id.* at 296-97.

124. *McCleskey*, 481 U.S. at 279.

insufficient. In *Jones*, Chad Ramon Jones, an African American, alleged that Project Exile was racially discriminatory because it targeted African Americans for prosecution and also allegedly attempted to avoid more diverse jury pools. The defense and prosecution stipulated that as many as ninety percent of defendants prosecuted under Project Exile were African American.[125]

Jones was initially charged in state court after police officers found a nine-millimeter pistol in his vehicle, along with marijuana and drug paraphernalia. Jones had been driving in the City of Richmond with two passengers in his vehicle when a Richmond deputy sheriff observed Jones driving in the wrong direction on a one-way street. The officer stopped Jones.[126] During the stop, the police officer determined that Jones' driver's license was suspended.

Jones' felon-in-possession case was dismissed in state court and charges were brought in federal court. In addition to arguing selective prosecution, Jones alleged that his case was moved to federal court to avoid a Richmond jury. If Jones' state case had proceeded in the City of Richmond, he would have drawn jurors from a pool made up of approximately seventy-five percent African Americans. A jury pool for the federal district in the Eastern District of Virginia was approximately ten percent African American. Jones alleged that the charges in federal court were based in part on the efforts by prosecutors to avoid an African American jury. As proof, he offered evidence of statements by an Assistant United States Attorney from the Eastern District of Virginia "that one [of the] goal[s] of Project Exile was to avoid 'Richmond juries'."[127]

However, the court concluded that the only evidence suggesting racial animus—the federal prosecutor's statement about "Richmond juries"—could be interpreted in more than one way and "given a less nefarious construction."[128] The court said that the comment could have simply meant that a Richmond jury would be bound by state law, or "endowed . . . with the ability to recommend a term of imprisonment above which a judge may not sentence a defendant."[129] The court went on to say that "[c]onsidering that '[n]o latitude of intention should be indulged in a case like this,' . . . and taking into account the presumption of regularity afforded prosecutorial discretion, the Court is unwilling to ascribe an unconstitutional intent to those responsible for Project Exile absent clear evidence of a racially discriminatory intent."[130] Accordingly, the statement

125. *Jones*, 36 F. Supp. 2d at 307.

126. The facts as outlined in the case do not state why Jones was stopped.

127. *Jones*, 36 F. Supp. 2d at 308 (quoting U.S. v. Scates, No. 3:98CR87, sentencing transcript at 36-37 (E.D.Va. Nov. 24, 1998)).

128. *Id.* at 313.

129. *Id.*

130. *Id.* (quoting *Armstrong*, 517 U.S. at 466 (quoting *Ah Sin* v. *Wittman*, 198 U.S. at 508)).

by the assistant U.S. Attorney was deemed insufficient to prove discriminatory intent. Such has been the fate of subsequent challenges to Project Exile and its progeny, Project Safe Neighborhoods.

Shortly after *Jones* was decided, the Western District of New York issued an opinion addressing a claim that Project Exile as enforced in Rochester, New York, was discriminatory. In *United States v. Grimes*, the court held that Grimes' evidence showing that twenty seven out of thirty three defendants prosecuted under Project Exile were African American failed to state a claim for selective prosecution. The court cited Grimes' lack of evidence that there were White defendants similarly situated who were not prosecuted, and noted that there was no showing of discriminatory intent.[131] Under a separate disparate impact analysis, the court considered Grimes' claim that the geographic focus on the City of Rochester by the Western District of New York, in effect targeted African Americans. Without concluding as to whether Grimes showed a disparate impact, the court rejected Grimes' claim because there was no evidence of racial animus or disparate treatment.[132]

More recently, the several prosecutions under Project Safe Neighborhoods in the Eastern District of Michigan have withstood challenges on equal protection grounds.[133] In March 2006, the Sixth Circuit rejected a challenge to Project Safe Neighborhoods on equal protection grounds in the case *United States v. Henderson*.[134]

Henderson was charged in federal court under Project Safe Neighborhoods. He argued that his prosecution under the program was unconstitutionally race-based because prosecutors target minorities by focusing on a geographic location with a high minority population. Although not specifically referred to by the court in the Henderson decision, as noted, evidence has been presented in numerous cases in the Eastern District of Michigan that eighty-nine percent of the prosecutions in that district were against African Americans.[135] Nevertheless, in dicta, the Sixth Circuit noted that because there was "no record evidence that would tend to show either discriminatory intent or effect on the part of

131. United States v. Grimes, 67 F. Supp. 2d 170 (W.D.N.Y. 1999).

132. *Id.* at 173.

133. *See* United States v. Culbertson, Crim. No. 05-80058 2006 WL 1556203 (E.D. Mich. June 1, 2006); Hubbard v. United States, *supra* note 86; United States v. Beard, No. 05-50026 2005 WL 3262545, at *4 (E.D. Mich. Nov. 30, 2005); and United States v. Wallace, *supra* note 64. There has been at least one case filed in the Western District of Michigan, as well. *See* Carroll v. United States, No. 1:04-CR-244, 2006 WL 1459838, at *1 (W.D. Mich. May 24, 2006).

134. *See* United States v. Henderson, No. 05-1546 2006, WL 890688, at *1-2 (6th Cir. Mar. 30, 2006).

135. *Id.* at 3.

the government's prosecution of Henderson,"[136] Henderson had failed to state a claim for selective prosecution.

According to the Court, a selective prosecution claim cannot be supported by proof short of evidence that prosecutors intended to discriminate. Yet, this is difficult to prove; it is impossible to get into the heads of prosecutors and show bad intent.

What may be shown, however, is that prosecutors knowingly act with an uneven hand. In *Yick Wo* the Court noted that the administrators acting against Yick Wo acted with "an evil eye and an uneven hand."[137] Subsequent courts have assumed that the "evil eye" is as necessary as the "uneven hand" in proving discrimination. Should equal protection require such? To consider this question, it is necessary to examine the possible goals of equal protection laws.

## III. APPLYING TRADITIONAL EQUAL PROTECTION STANDARDS TO PROJECT SAFE NEIGHBORHOODS PROSECUTIONS

There is a longstanding and rich debate about what equal protection should be. There are those, such as Kenneth L. Karst and Ronald Dworkin, who argue that equal protection guarantees to each individual the same rights as other members of the community—rights to be treated as respected, responsible and participating members of society,[138] and with the same concern and respect from their government as the more powerful members have secured for themselves.[139] There are those such as Cass R. Sunstein, who read the equal protection clause "to prohibit unprincipled distributions of resources and opportunities."[140]

And there are those who argue process theory, most fully articulated in the writings of Paul Brest and John Hart Ely.[141] Under this view, the purpose of equal protection law is to correct for the danger that the majority, because it cares less about a minority's welfare than about its own, will award members of the minority fewer benefits, or impose on them disproportionate burdens.[142]

This latter view has shaped much of the equal protection debate over the past two decades, and reflects, at a minimum, a kind of "lowest

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136. *Id.*

137. *Yick Wo*, 118 U.S. at 373-74.

138. *See* Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977).

139. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 198–99 (1977).

140. *See* Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 Sup. Ct. Rev. 127, 128.

141. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 135–79 (1980); and Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 2 (1976).

142. See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1299 (1995).

common denominator" of approaches to equal protection: "pretty much everyone agrees that equal protection should guard against prejudiced decisions to disadvantage members of 'discrete and insular minorities' "[143]

Further expounding on this view, David A. Sklansky has applied the "lowest-common-denominator" process theory to suggest that the federal crack sentences "look pretty troubling."[144] The theory suggests that the objectively indefensible harsher sentences for crack cocaine are unfair and impact African Americans disproportionately. Yet, the idea behind process theory is "that majorities generally can and should be trusted to pass fair laws, or laws that are fair enough, [and] . . . the grounds for that trust begin to evaporate in certain circumstances, including when the majority enacts laws that impose a disproportionate share of the burdens on members of a 'discrete and insular minority'. The problem is especially acute when a law imposes virtually all of its burdens on such a minority."[145] Sklansky noted the concern that "[w]hen faced with such a law, courts need to worry that the majority may not have treated members of the minority with equal concern and respect, and that if an appreciable share of the law's burdens fell on members of the majority, the law would never have been enacted or would subsequently have been amended or repealed."[146]

The implementation of Project Safe Neighborhoods in minority communities presents precisely this dilemma. Those in African American communities—African Americans—are treated unfairly and with an uneven hand. While racial animus may be nearly impossible to prove, what may be inferred from objective facts is that prosecutors under Project Safe Neighborhoods exact penalties without regard to the harm that comes from treating members of the African American community more harshly than members of other communities will be treated. The harm is the treatment of African Americans as dispensable—jailing African Americans disproportionately and for disproportionately longer periods of time. This is the quintessential case of the majority enacting laws that impose a disproportionate share of the burdens on members of a "discrete and insular minority."

With a program like Project Safe Neighborhoods that specifically targets minority communities, proof of discriminatory purpose is the same as that for impact—that African American communities are not disproportionately impacted incidentally or because they happen to commit more gun crimes, they are impacted disproportionately because they are singled out for differential treatment.

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143. *Id.*
144. *Id.* at 1301.
145. *Id.*
146. *Id.*

### A. *Equal Protection Laws Should Protect Against Differential Treatment of Minority Communities.*

Project Safe Neighborhoods involves differential patterns of enforcement with foreseeable discriminatory effects. This fact distinguishes Project Safe Neighborhoods cases from cases with statistical evidence of discriminatory impact.

The Supreme Court has generally rejected statistical evidence to show discriminatory intent, but the fundamental problem in those cases was determining whether the evidence proved that the disparity was based on race.

In *McCleskey,* the Court held that the Baldus study focusing on discriminatory application of the death penalty in Georgia was "clearly insufficient to support an inference that any of the decisionmakers [sic] in McCleskey's case acted with discriminatory purpose."[147] The underlying problem was that the Court did not find the statistical study to be persuasive evidence of discriminatory purpose. The Court found that the study established "[a]t most ... a discrepancy that appears to correlate with race,"[148] but the Court declined "to assume that what is unexplained is invidious."[149]

The Court did not explore what else might explain the discrepancy that "apparently" correlated with race. One possible explanation is that the Court considered the possibility that the statistical variance was incidental or explainable on non-racial grounds, much like the Court suggested in *Armstrong.* As noted above, in rejecting the evidence showing that ninety percent of crack cocaine defendants were African American, the Court in *Armstrong* offered the explanation that perhaps that particular criminal activity was more commonly engaged in by African Americans. Questioning "the presumption that people of *all* races commit *all* types of crime," the Court offered its own statistics from the Sentencing Commission to reflect who engaged in particular types of crimes.[150]

In Project Safe Neighborhoods cases, one need not infer from the statistical evidence that African Americans are singled out because of their race. The program narrowly focuses on African American communities. The differential treatment of those in African American communities foreseeably results in differential treatment of African Americans. Given the foreseeable racial impact, geography in this context should be treated

147. *McCleskey,* 481 U.S. at 279.

148. *Id.* at 312.

149. *Id.* at 313.

150. *Armstrong,* 517 U.S. at 469-70. As noted above, the Court reported the number of convictions in federal courts for crack cocaine (ninety percent of whom were Black), LSD (93.4 percent of whom were White), and pornography or prostitution (ninety-one percent of whom were White), interpreting the data to reflect the level of criminal activity by members of those racial groups.

as an unlawful arbitrary classification.[151] The Supreme Court has left open the possibility of prohibiting classifications other than overt racial classifications where such classifications are arbitrarily defined and have racial implications.

### B. *Geography as an Impermissible "Arbitrary" Classification in Prosecutorial Decision-Making*

In considering the bounds for equal protection analysis, the Supreme Court in *Oyler v. Boles*[152] reviewed a case in which the defendant challenged West Virginia's habitual offender laws. In that case, William Oyler and Paul Crabtree each faced mandatory life sentences because they had been previously convicted of at least three crimes punishable by "confinement in a penitentiary." Defendants argued that not all defendants meeting that criteria were subject to the habitual offender law, and thus they were denied equal protection in that they were punished more harshly than others.

In rejecting defendants' claims, the Court noted that some selectivity in enforcement is not in itself a federal constitutional violation. The Court rejected defendants' claims because there was no "deliberate policy of proceeding only in a certain class of cases."[153] It specifically noted that there was nothing showing "that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[154] One would assume, then, that if a case were deliberately based on such standards the Court would have found it to be violative of equal protection. But short of an explicit racial classification, are courts forced to examine the case for "disparate impact," or is it justifiable to examine classifications other than race where the grouping has the effect of a racial classification?

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151. In a recent opinion, the Sixth Circuit implicitly rejected this argument. It was argued in that case that Project Safe Neighborhoods' enforcement operation constitutes racial discrimination if it is foreseeable that because of the ethnic composition of the community one race will necessarily provide most of the government's targets. Citing the Ninth Circuit's opinion in *United States v. Turner*, 104 F.3d. 1180 (9th Cir. 1997), the Sixth Circuit noted the hypothetical has a "superficial attraction" but is flawed because it is possible that a particular kind of crime may come into vogue and be a feature of a neighborhood or of an occupation marked by one or another ethnic or racial characteristic. *See* United States v. Thorpe, 471 F.3d. 652, 663-64 (6th Cir. 2006). This argument presupposes that a particular crime is characteristic of a particular community without any evidence whatsoever that such is the case. It prohibits consideration of the justifications for differential treatment by summarily dismissing the discrimination claim on the basis that there *might* be reasons for the differential treatment.

152. 368 U.S. 448 (1962).

153. *Id.* at 456.

154. *Id.*

In both *Yick Wo* and *Ah Sin*, the underlying question was whether there was proof that Chinese were singled out for selective enforcement. Subsequent cases applying the "similarly-situated" test have done so without regard to whether there was proof that a particular class of citizens was singled out for disparate treatment. With proof short of an overt racial classification, defendants have had to meet the standards of a selective prosecution claim, which requires proof of disparate impact and discriminatory intent. But given the demographics in this country it is conceivable that a geographic classification is tantamount to a racial classification.

The Supreme Court long ago recognized that geographic line-drawing can be tantamount to racial-line drawing so as to violate equal protection. In the 1879 case, *Missouri v. Lewis*,[155] the Supreme Court considered Lewis' claim that he was denied equal protection as a citizen in one of only a few counties in Missouri that did not allow its citizens the right to appeal cases in which the amount in dispute was less than $2,500. Although citizens of other counties had the right to appeal, the Court denied Lewis relief because equal protection "does not secure to all persons in the United States the benefit of the same laws and the same remedies."[156] However, the Court noted:

> It is not impossible that a distinct territorial establishment and jurisdiction might be intended as, or might have the effect of, a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district. Should such a case ever arise, it will be time enough then to consider it.[157]

Such cases have since arisen, specifically those involving allegations of unlawful gerrymandering,[158] and the Supreme Court continues to recognize the impact that geographic line drawing can have on racial minorities in gerrymandering cases.[159] In the recent case *League of United Latin American Citizens v. Perry*,[160] the Court reiterated and applied the tests in gerrymandering cases, which acknowledge that geographic line-drawing can knowingly affect a racial minority. The Supreme Court identified three threshold conditions for establishing a Voting Rights Act violation, the first of which is that: "(1) the racial group is sufficiently large and geographically compact to constitute a majority in a

155. 101 U.S. 22 (1879).
156. *Id.* at 31.
157. *Id.* at 32.
158. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960).
159. *See, e.g.*, League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006).
160. *Id.*

single-member district."[161] That there are large and geographically compact minority communities is a reality that should be considered in selective prosecution cases as well.

In the Project Exile case *United v. Jones*, the district court in a selective prosecution challenge did recognize the reality that distinct geographical boundaries might have the effect of "a discrimination against a particular race." The court noted:

> Prosecutors have implemented Project Exile in Richmond and Norfolk. Both areas are urban and the population of each is substantially African American. In these areas, federal firearms statutes are aggressively enforced. The same statutes, however, are rarely enforced in more rural areas of the Eastern District of Virginia. This geographic variance means that defendants charged with firearms offenses in outlying areas of the Eastern District of Virginia, who are more likely to be Caucasian, evade federal prosecution under identical and equally applicable statutes for identical conduct.[162]

Coupled with evidence that approximately 90 percent of the Project Exile defendants were African American, the court held that "there is little doubt that Project Exile has a disparate impact on African American defendants."[163]

Project Safe Neighborhoods was implemented across the nation using, in most cases, the same geographic focus on urban communities to the exclusion of suburban and rural communities. As noted above, many of those communities had demographics similar to those in Richmond, with a disproportionate concentration of African Americans in the targeted communities.[164]

If one acknowledges, as the Supreme Court has in the gerrymandering context, that in America there remain "sufficiently large and geographically compact" communities such that a racial minority group constitutes a majority within those communities, then one must also acknowledge that a "distinct territorial establishment and jurisdiction might be intended as, or might have the effect of, a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district."[165] One can say not only that Project Safe Neighborhoods in some districts targets particular communities, but that it targets African American communities in particular.

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161. *Id.* at 2614 (quoting Johnson v. De Grandy, 512 U.S. 997, 1006–1007 (1994)).

162. *Jones*, 36 F. Supp. 2d at 312.

163. *Id.*

164. *See* discussion, *supra* Part I.

165. *Missouri v. Lewis*, 101 U.S. at 32.

Prosecutors in Project Safe Neighborhoods cases know the make-up of their communities and that they are effectively targeting African Americans in targeting certain communities. These cases do not suffer for lack of proof that the disparities are more than fortuitous or based on behavior patterns. Whether there might remain disparities with non-targeted enforcement, some disparity necessarily exists because prosecutors target African American communities and do not target other communities. This fact alone distinguishes Project Safe Neighborhoods cases from those in which the Court questioned whether one could deduce from the statistical evidence that differential treatment was race-based.

Courts examining Project Safe Neighborhoods and its predecessor projects have applied the two-part test under selective prosecution case law. In doing so, the courts have failed to consider that the program operates with blatant discriminatory treatment—selective enforcement of the law based on geographic parameters that are tantamount to racial line-drawing.

To conclude that geographic classifications are tantamount to racial classifications, findings would have to be made by a court, of course, in any given district that there are "geographically compact" communities that have a racial identity, and that prosecutors are in fact targeting certain communities. This Article will proceed on the ambitious premise that geographic line-drawing can, under certain circumstances, be considered tantamount to racial line-drawing, and constitute a constitutionally-impermissible classification.

### C. *The Project Safe Neighborhoods Program Should Be Subject to a Strict Scrutiny Analysis.*

The Supreme Court has made clear: "Whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."[166] Persons need not offer proof of strict intent where the claim is based on the denial of equal protection by the government's unequal treatment. According to the Supreme Court in *Personnel Adm'r v. Feeney*,[167] "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."[168] If prosecutions are

166. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229-30 (1995).

167. 442 U.S. 256, 272 (1979).

168. *Id.* (citing Brown v. Board of Education, 347 U.S. 483 (1954); McLaughlin v. Florida, 379 U.S. 184, 85 (1964)). Executive classifications based upon race are subject to the same constitutional constraints as those promulgated by legislatures. *Cf.* Korematsu v. United States, 323 U.S. 214 (1944) (military order excluding all persons of Japanese ancestry from designated West Coast areas); and Hirabayashi v. United States, 320 U.S. 81 (1943) (West Coast curfew on persons of Japanese ancestry).

based on a racial classification, then they must withstand a strict scrutiny analysis; the program must be narrowly tailored and serve a compelling state interest.[169]

To determine whether the government has a compelling interest justifying racial classifications, the Court requires inquiry into the justifications for the program. The Court said in *Grutter v. Bollinger* that: "[a]bsent searching judicial inquiry into the justification for . . . race-based measures," we have no way to determine what 'classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'"[170] The Court also made clear that it "appl[ies] strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [the government] is pursuing a goal important enough to warrant use of a highly suspect tool."[171] Whatever the purpose for the program, it must be narrowly tailored to accomplish that purpose.[172]

A strict scrutiny analysis of the Project Safe Neighborhoods program requires conjecture about why Project Safe Neighborhoods operates by enforcing select laws in select communities. The federal government should be compelled under an equal protection challenge to provide information through discovery about the program to enable a fuller analysis. Notwithstanding that, I will attempt an analysis based on the assumption that the major justification for the Project Safe Neighborhood's limited operation is that the targeted communities are those with high levels of crime.

There may be some governmental interest in galvanizing resources and striking hard against criminals in communities suffering from high crime. But whether such goals are compelling is a more difficult question. The use of geographic criteria does little more than make identification of cases fairly easy. The Project Safe Neighborhoods prosecution policy is largely reactive and little investigation is needed. As street-level gun-toters are picked up, the cases are examined for federal or state prosecution. It is therefore an easily satisfied, high-numbers operation. The justification boils down to one of efficiency.

While broad sweeps may be efficient, efficiency in exchange for equal protection is, to say the very least, hardly compelling. Geographic and race-neutral criteria should enable the federal government to identify individuals who pose a danger to society. Even-enforcement using objective criteria may require more than reactive efforts—finding and prosecuting offenders besides those referred by participating local law en-

169. *See* Grutter v. Bollinger, 539 U.S. 306, 327 (2003)("[A]ll racial classifications imposed by [the] government 'must be analyzed by a reviewing court under strict scrutiny.'" (quoting Adarand Constructors, Inc., 515 U.S. at 228).

170. *Id.* (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

171. *Id.* at 326.

172. *Id.*

forcement agencies—but it is the obligation of the federal government to ensure that its limited partnerships do not effectively eliminate consideration of criminal activity that rightfully should be prosecuted federally.

Assuming, arguendo, that the Project Safe Neighborhoods' policy is permissible as serving a compelling interest, the government "is still constrained in how it may pursue that end."[173] Given the racial implications of the targeted enforcement, whether a community-wide focus is narrowly tailored is doubtful. Again, broad sweeps may be efficient, but undoubtedly come at the cost of individual consideration. Whether any particular individual should be subject to the harshest penalties possible should be determined based on individual characteristics, not based on where one lives. Moreover, as discussed more fully in the next section, there can and should be neutral criteria for federal enforcement that also make enforcement fairer and more efficient.

## IV. WHY PROJECT SAFE NEIGHBORHOODS AS IMPLEMENTED MAKES BAD POLICY

The question of the constitutionality of Project Safe Neighborhoods' prosecution policy aside, a question that we also should ask is—is it right? The practice of prosecutors' forum shopping for the harshest sentences against a minority class of citizens contravenes a number of policies in our criminal justice system. To begin, federal prosecutors have far-reaching and broad authority. To ignore its obligations to evenly enforce the laws has negative implications in the communities that are targeted, as well as in the communities where crime is ignored.

"Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."[174] Prosecutors should seek justice in the broadest sense. It is antithetical to prosecutors' duties as agents for the people to knowingly discriminate in prosecutions.

A prosecutor has substantial power.[175] In the Supreme Court case of *Morrison v. Olsen*,[176] in which the Court reviewed the discretion of Independent Counsel Kenneth Starr, Justice Scalia noted the words of Justice Robert Jackson when he was Attorney General under President Franklin Roosevelt:

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173. *Id.* at 333 (quoting Shaw v. Hunt, 517 U.S. 899,908 (1996)).

174. McCleskey, 481 U.S. at 346 (Brennan, J. dissenting) (quoting Rose v. Mitchell, 433 U.S. 545, 555 (1979)).

175. In addition to the broad discretion given prosecutors by law, prosecutors also have vast discretion by virtue of their not having to answer to a "client." Such freedom creates the inherent risk that prejudice or self-interest will govern their decision-making. See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 58–59 (1991).

176. Morrison v. Olson, 487 U.S. 654, 660 (1988).

> There is a most important reason why the prosecutor should have, as nearly as possible a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the decision of prosecutor is that he must pick his cases, because no prosecutor can investigate all of the cases in which he receives complaints.... *What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.*
>
> If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted.[177]

The prosecutor is not an ordinary advocate whose sole aim is to win. Rather, the prosecutor serves the dual role of advocate for the government and administrator of justice.[178] As such, the prosecutor's duties include the oversight function of insuring the fairness and efficiency of the criminal justice system.[179] "The United States Attorney is the representative not of an ordinary party in a controversy, but of a sovereignty whose obligation to govern *impartially* is as compelling as its obligation to govern at all."[180]

Forum-shopping by prosecutors for the harshest penalties by law is not per se unlawful,[181] but to do so singularly against minority communities is an egregious violation of prosecutors' duty to seek justice. Additionally, forum shopping is an effort to circumvent federal sentencing

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177. *Id.* at 727-28 (Scalia, J., dissenting)(citing R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940)(emphasis added).

178. *See, e.g.*, Model Code of Professional Responsibility EC 7-13 ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); Model Rules of Professional Conduct R. 3.8 cmt. (1991); Standards for Criminal Justice Standard 3-1.1(b) (Am. Bar Ass'n. 2d ed. 1980).

179. Davis, *supra* at 51 (citing Fred c. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 57 (1991)(citing Carol a. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537, 538-39 (1986)).

180. Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

181. *But see* Robert Heller, *Selective Prosecution and the Federalization of the Criminal Law: The Need for Meaningful Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1313 (1997) (discussing forum shopping concerns raised by state-U.S. sentencing disparity in particular).

policies that seek to eradicate considerations such as geography and race.[182]

One of the major principles underlying enactment of the Sentencing Reform Act ("SRA") is that similarly-situated defendants should be sentenced uniformly. Congress commissioned the Sentencing Commission to provide "certainty" and "fairness" in sentencing, two of the hallmarks of due process.[183] The Sentencing Commission was specifically charged with "avoid[ing] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. . . ."[184] Congress was concerned with a history in sentencing that meted out unwarranted disparities for similarly-situated defendants based on such "illegitimate considerations as *geography*, race, gender, socio-economic status, and judicial philosophy."[185]

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182. There are particular concerns when prosecutors forum shop between federal and state systems. See *Id.* at 1326.

183. *See* Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in Booker and Fanfan*, 33 PEPP. L. REV. 615, 617 (2006).

184. *Id.* at 622 (citing 28 U.S.C. § 991(b)(1)(b) (2000)).

185. *Id.* (emphasis added). The eradication of discrimination in sentencing was a major policy underlying the new guidelines following a history that fluctuated from determinative sentencing under English colonial practice to indeterminate sentencing, and back with passage of the Sentencing Reform Act of 1984 to determinate sentencing. The history leading to the SRA is instructive.

During the period in United States history of indeterminate sentencing, state and federal judges were empowered with the authority to impose any sentence they chose within a wide penalty range established by the legislature. Indeterminate sentencing came in response to criticism that fixed sentences did not allow for individuation of punishment, and the belief that death and corporal punishment were disproportionate penalties with little deterrent effect. By the late nineteenth century the rehabilitation model of criminal sentencing came to the fore based upon the belief that experts in criminology and psychiatry could treat and correct offenders.

But the pendulum swung again in the early 1970s, in response to criticism that the rehabilitation model was a failure, and that indeterminate sentencing resulted in unwarranted disparities.

In the post-Civil War era, Congress began to expand into areas traditionally within the ambit of the states' police powers. But there has been a substantial surge in the number of federal crimes since 1970. According to an American Bar Association report, more than forty percent of the federal criminal provisions enacted since the Civil War have been enacted since 1970. The Federalist Society issued a report that the number of federal crimes increased by thirty percent from 1980 and 2004. Between 1980 and 2003, the number of cases and defendants in the federal system had more than doubled, with the number of criminal cases increasing 240 percent and the number of criminal defendants increasing 230 percent. The increase in drug and firearms cases has been especially steep. Drug cases have grown from 3,130 in 1980 to 11,520 in 2003, and firearms cases have increased from 931 prosecutions in 1980 to 3,620 in 2003. See Susan R. Klein, *Shifting Powers in the Federal Courts–The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U.L. REV. 693 (2005). Thus, although determinate sentencing sought to eradicate disparities, federalization of crimes created new possibilities for disparate treatment.

It is also problematic that the focus of Project Safe Neighborhoods on street-level crimes for which there is concurrent state jurisdiction means that uniquely federal crimes are not pursued. States generally have the resources to pursue Project Safe Neighborhoods' cases.[186] Many of Project Safe Neighborhoods cases originate through state and local law enforcement efforts. The cases often go through state courts, and only upon a defendant refusing a state plea offer is the case referred for federal prosecution. Thus, federal prosecutors are pursuing cases for which there are laws and resources to prosecute in state courts, while virtually ignoring the majority of federal gun laws.

It should be noted that the issue as raised here is not whether tough enforcement of existing gun laws is effective and/or good policy. The point is that where state gun laws can be vigorously enforced and at the same time ensure some level of uniformity and fairness, why focus federal enforcement efforts exclusively on these crimes? Substantial opportunity costs are incurred when federal resources that could be used to combat uniquely federal crimes—like interstate gun trafficking—are used instead on cases that could be handled effectively by state and local authorities.

Nor do I intend to suggest that federal prosecutors should *not* enforce federal crimes because states have concurrent jurisdiction.[187] As noted above, the criticism is that the myopic enforcement of only street-level gun crimes in select communities is not justifiable. Federal prosecutors have always operated under guidelines suggesting that serious, complex, and/or high-level criminal activity is their appropriate focus. As noted above: "[w]hat every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain."[188] Prosecutors may not cede this imperative for the sake of ease and efficiency. Criteria for exercising their broad discretion can and should be geography and race-neutral.

Finally, the integrity of the Government is at stake when policies persist despite evidence that African American communities are singled out for disparate treatment. The difficulty in proving violations of equal

186. The district court noted in the Project Exile case United States v. Jones that: "[w]hile vigorous prosecution of firearms offenses has undoubtedly contributed to some unascertainable decline in the city's murder rate, there is no compelling reason to suspect that a comparable effort by local prosecutors would not achieve a comparable effect." See Jones, 36 F. Supp. 2d at 313. The City of Richmond attorney acknowledged that he possessed every institutional tool necessary to effectively prosecute cases that were diverted to federal court under Project Exile. *Id.* at 316.

187. It can and has been argued, of course, that federal prosecutions of traditionally state crimes such as those involved with Project Safe Neighborhoods is a problem of over-federalization. *See* Healy, *supra* note 12, and *Jones*, 36 F. Supp. 2d at 313-16.

188. *Morrison*, 487 U.S. at 728.

protection does not ameliorate the recognition that differential treatment occurs and is wrong.[189]

Unfortunately, the policies of disparate treatment of African Americans date back to this country's origins.[190] But worse, they persist in several law enforcement and prosecution policies today.[191]

As noted in *Armstrong* and other cases, by the American Bar Association, the United States Sentencing Commission, and in numerous scholarly publications, enforcement of the federal crack cocaine laws have had a disparate impact on African Americans, both in terms of the penalties under the statute and by selective enforcement that targets African American communities.[192] The disproportion remains despite overwhelming evidence that African Americans are not the majority users of crack cocaine and that the penalty variance is not justified by objective standards.[193]

African Americans are more likely to face the death penalty in the United States, and not just in the State of Georgia.[194] Several cases have

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189. The inability of equal protection laws to deal with overtly discriminatory practices such as those apparent in Project Safe Neighborhoods prosecutions raises serious questions about the legal framework within which we evaluate claims of discrimination. Critical race theorists have fully addressed the shortcomings of these laws and offer a panoply of alternatives that seek to eradicate the realities of discrimination. *See* KIMBERLE CRENSHAW, NEIL GOTANDA & GARRY PELLER CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1995).

190. *See* RANDALL KENNEDY, RACE, CRIME AND THE LAW (1997) (exploring the history of race discrimination in the criminal justice system).

191. *See* KATHERYN K. RUSSELL, THE COLOR OF CRIME (1998) (analyzing how racism continues to undermine society's criminal justice system).

192. *See* Nkechi Taifa, *Cracked Justice: A Critical Examination of Cocaine Sentencing,* 27 UWLA L. REV. 107 (1996). *See also* U.S. Sentencing Comm'n Special Report to Congress: Cocaine and Federal Sentencing Policy xi (1995). The United States Sentencing Commission pronounced that "federal sentencing data leads to the inescapable conclusion that blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine." *Id.* at xii. The Commission found that the high percentage of Blacks convicted of crack cocaine offenses is "a matter of grave concern." *Id.*

193. Statistics from the National Institute on Drug Abuse reveal that the greatest number of documented crack users is White. *Id.* at 38, *citing* National Institute on Drug Abuse, Overview of the 1991 National Household Survey on Drug Abuse (1991). *See also* Sam Meddis, *Is the Drug War Racist? Disparities Suggest the Answer is Yes,* USA TODAY, July 23, 1993, at 1A ("Although law enforcement officials say blacks and whites use drugs at nearly the same rate, a USA TODAY computer analysis of 1991 drug arrests found that the war on drugs has, in many places, been fought mainly against blacks.... USA TODAY first studied the issue four years ago and found blacks, about 12 percent of the population, made up almost 40 percent of those arrested on drug charges in 1988, up from 30 percent in 1984. The new analysis, which uses city-by-city racial breakdowns from the 1990 census and arrest data from police agencies that report to the FBI, found that by 1991 the proportion of blacks arrested for drugs increased to 42 percent.")

194. *See* David C. Baldus and George Woodward, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research,* 41 No. 2 Crim. Law Bulletin 6 (2005).

attacked this "policy" as well, in that the disproportionate numbers do not correlate to any objective factors, strongly evidencing racial discrimination in seeking the death penalty.

And racial profiling has confirmed the long-held suspicion in most African American communities that members of this minority are singled out by law enforcement.[195] After substantial statistical studies reflecting that African Americans are disproportionately singled out for traffic stops, there has been some effort by law enforcement agencies and courts to eradicate this practice.[196]

Project Safe Neighborhoods comes on the heels of these questionable policies and exacerbates a well-documented problem—African Americans being treated differently than members of other communities, in disproportionate numbers for disproportionately harsh treatment. And Project Safe Neighborhoods goes further than many of these practices, even acknowledging its singular focus on African American communities.

Existing firearms laws should be enforced, but not selectively against minority communities. Criminal defendants should be punished, but punished fairly. Justice cannot at once be blind and look through a narrow lens at minority communities. The presumed justifications for targeting African American communities are almost certainly outweighed by general principles of fairness and justice. Separate treatment in every context might not be inherently unequal, but where separate treatment is intended to exact unequal punishment, the effect and the purpose is to discriminate.

## CONCLUSION

Project Safe Neighborhoods is a program that goes a step further than several other policies in this country's criminal justice system that have had a disparate impact on African Americans. It specifically targets African American communities with the goal of providing harsher treatment against those within those communities.

Courts considering the issue have applied the two-part test for proving violations of equal protection through selective prosecution: by requiring proof of disparate impact, as well as proof of purposeful discrimination. These tests have predictably made challenges to Project Safe

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195. *See* Samuel R. Gross and Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002).

196. *See* Paul Gottbrath, *Racial Lawsuits Prompt Change*, THE CINCINNATI POST, Feb. 26, 2001 (Cincinnati, which has since entered into a Consent Decree to redress complaints of racial profiling by police officers, considered consent decrees entered into in the following locales in response to complaints and evidence of racial profiling: Highland Park, Illinois, Los Angeles, California, Montgomery County, Maryland, the State of Maryland (state police), the State of New Jersey (state police), Pittsburgh, Pennsylvania and Steubenville, Ohio).

Neighborhoods' unsuccessful. But the stringent requirements of proof of similarly-situated non-prosecuted individuals and racial animus are not required because Project Safe Neighborhoods' target in minority communities is tantamount to race-based targeting. The challenge to courts is to consider whether targeting a program geographically can have such predictable racial implications that the targeting is effectively race-based.

Racial discrimination today is rarely overt, and much has been written about unconscious racial discrimination.[197] Whether the underlying cause of discriminatory policies is conscious or unconscious racism, the criminal justice system today has consistently reflected the federal and state governments' failure to treat the interests of African Americans in a way that assures them equality in treatment.

Where the government intentionally and singularly targets only the minority population for prosecution, this itself is discriminatory. If this is not what equal protection is about, then there is little hope that the law can ever redress the discrimination that continues to be documented in this Nation.

197. *See* Charles Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); *see also* Davis, *supra* note 71.

## APPENDIX A
## THIRTY METROPOLITAN AREAS IN WHICH 60 PERCENT OF AFRICAN AMERICANS DWELL IN U.S.

| City | PSN Focus- | Page References[198] |
|---|---|---|
| Boston, Massachusetts | D. Mass. | 15-16 |
| Buffalo, New York | W.D. N.Y. | 23 |
| Chicago, Illinois | N.D. Ill. | 10 |
| Cincinnati, Ohio | S.D. Ohio | 25-26 |
| Cleveland, Ohio | N.D. Ohio | 25 |
| Columbus, Ohio | S.D. Ohio | 25-26 |
| Detroit, Michigan | E.D. Mich. | 16 |
| Gary-Hammond-East Chicago, Indiana | N.D. Ind. | 11[199] |
| Indianapolis, Indiana | S.D. Ind. | 12 |
| Kansas City, Missouri | W.D. Mo. | 18-19 |
| Los Angeles-Long Beach, California | C.D. Cal. | 4 |
| Milwaukee, Wisconsin | E.D. Wisc. | 36 |
| New York, New York | E.D. N.Y. | 21-22 |
| Newark, New Jersey | D. N.J.[200] | |
| Philadelphia, Pennsylvania | E.D. Pa. | 27 |
| Pittsburgh, Pennsylvania | W.D. Pa. | 28 |
| St. Louis, Missouri | E.D. Mo. | 18 |
| San Francisco-Oakland, California | N.D. Cal. | 4 |
| Atlanta, Georgia | N.D. Ga. | 8-9 |
| Baltimore, Maryland | D. Md. | 15 |
| Birmingham, Alabama | N.D. Ala. | 1-2 |
| Dallas-Ft. Worth, Texas | N.D. Tex.[201] | |
| Greensboro-Winston Salem, North Carolina | M.D. N.C.[202] | |
| Houston, Texas | S.D. Tex.[203] | |
| Memphis, Tennessee | W.D. Tenn.[204] | |
| Miami, Florida | S.D. Fla. | 8 |

198. PSN (Project Safe Neighborhoods); The resource for data herein and to which all pages references are made in Appendices A & B is United States Department of Justice Archive—Summary of District Gun Violence Reduction Strategies, *available at* http://www.usdoj.gov/archive/opd/AppendixA.htm, unless otherwise noted.

199. The N.D. Indiana does not reference the cities, but the counties in which they are situated, Lake and Porter Counties.

200. *See* PSN in Practice II, 66–68, *available at* http://www.psn.gov/pubs/pdf/PSN_InPracticeII.pdf#search= percent22psn percent20in percent20practice percent20II percent22.

201. *Id.* at 98–100.

202. *Id.* at 76–78.

203. *Id.* at 100–01.

204. *Id.* at 96–97.

| | | |
|---|---|---|
| New Orleans, Louisiana | E.D. La. | 14 |
| Norfolk-Virginia Beach, Virginia | E.D. Va.[205] | |
| Tampa-St. Petersburg, Florida | M.D. Fla.[206] | |
| Washington, D.C. | Dist. Columbia | 6 |

205. *Id.* at 106–09.
206. *Id.* at 22–23.

## APPENDIX B
## LIST OF U.S. CITIES WITH 100,000+ POPULATIONS WITH OVER 30 PERCENT AFRICAN AMERICAN[207]

| City | Percentage Black | PSN Focus | |
|---|---|---|---|
| Gary, Indiana | 84.03 | N.D. Ind. | 11 |
| Detroit, Michigan | 81.55 | E.D. Mich. | 16 |
| Miami Gardens, Florida | 80.07 | S.D. Fla. | 8[208] |
| Birmingham, Alabama | 73.46 | N.D. Ala. | 1-2 |
| Jackson, Mississippi | 70.64 | S.D. Miss. | 18 |
| New Orleans, Louisiana | 67.25 | E.D. La. | 14 |
| Baltimore, Maryland | 64.34 | D. Md. | 15 |
| Memphis, Tennessee | 61.41 | W.D. Tenn.[209] | |
| Atlanta, Georgia | 61.39 | N.D. Ga. | 8-9 |
| Washington, D.C. | 60.01 | Dist. Columbia | 6 |
| Richmond, Virginia | 57.19 | E.D. Va. | 34 |
| Savannah, Georgia | 57.08 | S.D. Ga.[210] | |
| Newark, New Jersey | 53.46 | D. N.J.[211] | |
| Flint, Michigan | 53.27 | - | |
| St. Louis, Missouri | 51.20 | E.D. Mo. | 18 |
| Cleveland, Ohio | 50.99 | N.D. Ohio | 25 |
| Shreveport, Louisiana | 50,80 | W.D. La.[212] | |
| Portsmouth, Virginia | 50.61 | - | |
| Baton Rouge, Louisiana | 50.02 | M.D. La. | 14 |
| Augusta, Georgia | 49.75 | - | |
| Montgomery, Alabama | 49.63 | M.D. Ala. | 2 |
| Inglewood, California | 47.13 | - | |
| Mobile, Alabama | 46.29 | S.D. Ala.[213] | |
| Columbia, South Carolina | 46.00 | D. S.C.[214] | |
| Beaumont, Texas | 45.85 | E.D. Tex. | 31 |
| Hampton, Virginia | 44.68 | - | |
| Norfolk, Virginia | 44.11 | E.D. Va.[215] | |
| Durham, North Carolina | 43.81 | M.D. N.C.[216] | |

207. Wikipedia Encyclopedia (based on 2000 census data), *available at* http://en.wikipedia.org/wiki/List_of_U.S._cities_with_large_African American_populations.

208. Miami Gardens was not incorporated as a city until 2003. See Wikipedia Encyclopedia, *supra*. The PSN targeted city to which reference is made herein is Miami.

209. PSN in Practice, *supra* at 96–97.

210. *Id.* at 30–31.

211. *Id.* at 66–68.

212. *Id.* at 47–49.

213. *Id.* at 3–4.

214. *Id.* at 90–91. Columbia is not specifically referenced, but the county in which the city is located, Richland County, is targeted.

215. *Id.* at 106–09.

| City | Percentage Black | PSN Focus | |
|---|---|---|---|
| Columbus, Georgia | 43.74 | - | |
| Philadelphia, Pennsylvania | 43.22 | E.D. Pa. | 27 |
| Dayton, Ohio | 43.13 | S.D. Ohio | 25-26 |
| Cincinnati, Ohio | 42.92 | S.D. Ohio | 25-26 |
| Fayetteville, North Carolina | 42.42 | - | |
| Little Rock, Arkansas | 40.41 | E.D. Ark.[217] | |
| Newport News, Virginia | 39.07 | E.D. Va.[218] | |
| Rochester, New York | 38.55 | W.D. N.Y. | 23 |
| Hartford, Connecticut | 38.05 | D. Conn. | 6-7 |
| Greensboro, North Carolina | 37.40 | M.D. N.C.[219] | |
| New Haven, Connecticut | 37.36 | D. Conn. | 6-7 |
| Milwaukee, Wisconsin | 37.34 | E.D. Wisc. | 36 |
| Buffalo, New York | 37.23 | W.D. N.Y. | 23 |
| Winston-Salem, North Carolina | 37.10 | M.D. N.C.[220] | |
| Chicago, Illinois | 36.77 | N.D. Ill. | 10 |
| Chattanooga, Tennessee | 36.06 | E.D. Tenn. | 30 |
| Richmond, California | 36.06 | - | |
| Oakland, California | 35.66 | N.D. Cal. | 4 |
| Tallahassee, Florida | 34.24 | N.D. Fla.[221] | |
| Louisville, Kentucky | 33.01 | W.D. Ky. | 13 |
| Paterson, New Jersey | 32.90 | - | |
| Charlotte, North Carolina | 32.72 | W.D. N.C. | 24 |
| Kansas City, Missouri | 31.23 | W.D. Mo | 18-19 |
| Bridgeport, Connecticut | 30.76 | D. Conn.[222] | |
| Huntsville, Alabama | 30.21 | - | |
| Kansas City, Kansas | 30.12 | D. Kan. | 13 |

216. *Id.* at 76–78.

217. *Id.* at 8–9.

218. *Id.* at 106–09.

219. *Id.* at 76–78.

220. *Id.* at 76–78.

221. *See* U.S. Attorney's Office, Northern District of Florida Press Release, United States Attorney Launches Project Safe Neighborhoods to Attack Gun Offenses (May 5, 2003), *available at* http://www.usdoj.gov/usao/fln/Press percent20Releases/2003 percent20Press percent20Releases/PSN050503.

222. PSN in Practice, *supra* at 16–18.