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I. INTRODUCTION: LAW AND EQUITY[1]

After a three month operation involving confidential informants and resulting in two of the defendants being caught red-handed, five black men were charged with conspiracy to distribute cocaine under 21 U.S.C. § 846.[2] One of the defendants filed a motion for discovery or dismissal, alleging that his race played an unconstitutional role in the decision to prosecute him on federal rather than state charges.[3] In support, his attorney from the public defender office submitted an affidavit stating that in all twenty-four cases involving a similar charge closed by the office in the previous year, the defendant was black.[4]

The defendant's situation is not unique to criminal trials. Compare it to a case in which a shareholder asked corporate officials for information as to why a merger between his corporation and another had been called off under suspicious circumstances. When the request was denied and the shareholder sued, the court agreed that he had a right to an explanation, granted his request and ordered the information be turned over.[5] Or consider a board of directors that advanced the date of a shareholder meeting–a legal and legitimate decision under the corporate bylaws and Delaware Corporate Law. When the shareholders protested that the true motive of the move was to give shareholders less time to solicit votes, the Delaware Supreme Court agreed it was an abuse of power and nullified the date shift.[6]

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[1] I would like to thank Professor Lyman Johnson and Professor Darryl Brown for their help and guidance in corporate and constitutional law issues in this paper. Also I would like to thank my friends Nick Bonarrigo and Melanie Coleman for reading and re-reading the paper for grammatical errors.

[2] United States v. Armstrong, 517 U.S. 456, 458 (1996) (holding that in order to succeed in a defense of selective prosecution, the defendant must prove that similarly situated individuals of a different race were not prosecuted).

[3] *Id.* at 459. The federal charges carried a minimum sentence of ten years and the equivalent state charges carried a minimum of three years and a maximum of five. *See* United States v. Armstrong, 43 F.3d 1508, 1511 (9th Cir. 1995).

[4] *Id.*

[5] Security First Corp. v. U.S. Die Casting & Dev., 687 A.2d 563 (Del. 1997) (holding that a stockholder must show by a preponderance of the evidence that there is a credible basis of probable corporate wrong doing in order to succeed in a demand for corporate books and records). In this case, a shareholder was unconvinced by the explanations of the board of directors as to why a merger fell through. The court granted the shareholder's request for access to certain corporate books and records.

[6] Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971) (deciding that inequitable action is not permissible simply because it is legally possible). In *Schnell*, the court did not allow a board of directors to advance the date of the annual stockholder meeting. The court agreed with the lower court's decision that the date shift was an attempt to utilize corporate law for the illegitimate purpose of staying in office.

In spite of certain similarities in their general fact patterns, the method of analysis by the American judicial system to these citizens' complaints illustrates a disturbing trend. The burden required for proving abuse of power and granting access to information differs between the corporate law setting and the criminal law setting, but not as one would expect. In one set of cases, a principle that demands fairness over technicality is applied; in the other set, it is not. The reasons for this vary from historical to political, nevertheless, this unequal application leads to the disappointing conclusion that the constitutional law of equal protection does much less to ensure equitable outcomes in public settings than equity principles do in private ones.

The basis for allowing consideration of equity to affect legal decisions is largely philosophical. No matter how detailed, no rule or law can completely and adequately cover every situation that may potentially arise. Recognition of this problem dates back to Aristotle, who observed that "every law is necessarily universal, while there are some things which it is not possible to speak of rightly in any universal or general statement."[7] In modern times, lawyers have made a profession of exploiting this problem, finding exceptions and ways to work within a statute and accomplish a goal meant to be prevented or simply not previously considered, yet clearly against the spirit of the law.

Our judicial system has been well aware of this problem.[8] Hence the sound underpinnings of equity in corporate law provide a failsafe to ensure fairness for minority shareholders. Yet the same judicial body has given equity relatively no place in the equal protection or due process doctrines that provide protection for minority citizens. Their cases are tried with the same ultimate goal of corporate law cases or any other case that goes to court–justice. So one may wonder why the judicial system permits consideration of equity in business cases but not race-related criminal cases. To understand how this inconsistency came about, we must review the origins and basis of equity's existence, specifically in the American judicial system. I hope that through this paper it will become clear that the historic reasons for demanding equity only in business cases are outdated. The same principles of equity in business should be required to be applied to race-related criminal cases under the Equal Protection Clause, and similar results should follow.

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[7] ARISTOTLE, ETHICS 1137b.

[8] *See* GARY MCDOWELL, EQUITY AND THE CONSTITUTION 5-7 (1982). The American judicial system has considered equity since its birth. Consolidation of law and equity into one Supreme Court by our Constitution was contested at the time of its inception.

II. THE HISTORY OF EQUITY

A. The Origins of Equity in the American Judicial System

To bring a suit in thirteenth century England, the claimant needed to allege an injury that fell within the scope of a writ.[9] When no writ was available or for some reason the claimant could not get relief from the common law courts, he could petition the king.[10] The king's chancellor heard these petitions. As these petitions grew more frequent, a body of law apart from the common law courts began to emerge. By the fifteenth century the chancellor no longer received deferred petitions from the king, but heard cases in a complete and separate Court of Chancery.[11]

In feudal England, the Court of Chancery primarily dealt with cases involving land[12] because ownership, use, and inheritance of land where commonly disputed subjects. Two legal instruments were developed to address these problems–the use, and the trust. Although use and trusts could be established intentionally and independently, eventually they were used constructively to provide equitable remedies. This can best be seen through a hypothetical.[13]

A father wanted to give land to a brother to be used for the father's son while the father was away. After the father departed, the uncle ignored the father's wishes and used the land for his own benefit. The uncle therefore owned the title to the land and the son could not sue the uncle for specific performance of the father's intended use because there was no such writ. If the son petitioned the chancellor for relief, the chancellor might find it unconscionable for the uncle to use the land for his own benefit. This is because the uncle was said to be the owner at law and the son the owner in equity. In other words, the uncle held the land for the use of the son.[14] If the son held the land for the use of third party, such as a younger sister, the son was said to hold it in trust for the younger sister. When a use or trust was established, the chancellor could issue an injunction to the owner at law, ordering him to properly execute his duties to the equity owner. If the owner at law did not obey, he could be thrown in jail.

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[9] JILL MARTIN, MODERN EQUITY 5 (2001).
[10] *Id.* at 6.
[11] *See* MCDOWELL, *supra* note 8, at 25.
[12] *See* MARTIN, *supra* note 9, at 8.
[13] *Id.*
[14] *Id.* at 9.

The use and the trust were equitable responses to a general problem that arose in that day and age. Without land disputes, there would have been no need for the development of a legal tool such as the trust. Over time, the trust became firmly established in chancellor courts. These early beginnings give the trust a time-honored precedent basis. Various legal minds capitalized on these deep historic roots to use the trusts as one of the primary means of equity's expansion into other areas of law rather than simply relying on the original principles of equity. For example, by the eighteenth century the chancellor was construing "implied" and "constructive" trusts.[15] The idea of a "public trust" grew from these notions and was used to apply equitable doctrines to governmental action. Henry Parker described the application of the trust to public office this way: "[T]his and that Prince is more or lesse absolute, as he is more or lesse trusted . . . . [A]ll trusts differ not in nature or intent, but in degree only and extent."[16]

The concept of a government official holding office in a public trust for the beneficiary, the people, is a plausible and logical analogy. As previously stated, the trust was a firmly established form of equity. By using an established tool with a developed legal history, lawyers must have known that there would be less chance of equity proponents being seen as arbitrarily relying on "equity" whenever they did not agree with a political decision. Thus, the trust functioned as a check on equity.

When England established colonies in the New World, the chancery courts and the public trust idea were transported to North America. As the colonial legal system developed, these two legal concepts diverged from the developmental course of their predecessors in England. The distinction between the chancery court and colonial common law courts faded; colonial common law courts began to rely on equity as well as the common law.[17] The idea of a public trust expanded considerably as the times required and eventually was even put forth as one of the legal justifications for rebellion against England.[18]

Following the Revolutionary War, the legal scene in the newly formed United States was in disarray. In the 1820s, legal minds began to express the view that the inherited common law was too vague, and a political movement to codify the common law began.[19] This movement opposed the broad judicial discretion the common law–equity in particular–granted judges. Some members of the legal and political community

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[15] PETER HOFFER, THE LAW'S CONSCIENCE 30 (1990).
[16] *Id.* at 36-37.
[17] *See* MCDOWELL, *supra* note 8, at 34.
[18] *See* HOFFER, *supra* note 15, at 78-79.
[19] *See* MCDOWELL, *supra* note 8, at 72.

disagreed with the codification movement and argued that the common law did not need codification or further limitations on equity.

Justice Story, one of the more prominent supporters of equity, attempted to clarify equity's role in American jurisprudence through.[20] He agreed that the bounds of equity needed to be clearly defined in order to prevent abuse, but argued that courts of equity should be bound by precedent as courts of law are, the principle of equity decisions being legitimized by precedent. The goal of the codification movement was to reduce the uncertainty of the common law through precise statutes. Justice Story's response was a return to the basic principle of equity–the uncertainty complained of was not due to excessive judicial discretion in common law judgment, he argued, but due to the "endless complexity and variety of human actions."[21] The difficulty of attempting to cover the vast and expanding array of debates would soon become more apparent.

While the codification movement was in full swing, judges began applying equity to relatively new types of cases for which there were no precedents. For instance, testators left freedom for their slaves in their wills.[22] Administration of such clauses turned out to be a difficult task for the courts. Could "freedom" be left in a will? If slaves were considered "property," could anything be devised to them in a will? These were complicated questions which the law had not yet answered, due in part to its general nature. A judge could have looked at a will and made an equitable decision to enforce the intent of the testator despite the lack of relevant law. However, be it due to well-considered decision, political and social pressures of that day,[23] or their own prejudices and biases, judges did not rely on equity directly. Some judges and lawyers made equity arguments using the trust. Francis Scott Key, for example, argued that when a master promised freedom to the slave "[e]quity will not regard the want of an intervening trustee between the master and slave . . . equity will consider the master himself as a trustee for the benefit of the slave."[24] Such arguments rarely enjoyed success.[25]

Following the Civil War, the nation saw the rise of industrialization, new problems from hostility of many whites toward the recently freed black

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[20] *Id.*
[21] *Id.* at 83.
[22] *See* HOFFER, *supra* note 15, at 112.
[23] *See id.* at 116. Consider the decree of George Washington Dargin of South Carolina: "A free African population is a curse to any country, slaveholding or non-slaveholding; and the evil is exactly proportionate to the number of such population." *Id.*
[24] *Id.* at 118
[25] *Id.* at 114

population, and the growth of the new chief economic actor–the corporation. Initially, the courts were pro-white and pro-industrialization, not according blacks much protection and extremely reluctant to grant injunctions against industrial nuisance and pollution.[26] But scientific discoveries on the effects of pollution and an awakening of social conscience gradually had an effect on judicial decisions. Led by famous judges and justices such as Cardozo, Hand, and Brandeis, courts gradually issued equitable injunctions against industrial plants.[27] This set the stage for a decisive test of the courts' willingness to employ equity for purposes of racial equality.

In 1953, President Eisenhower appointed Earl Warren to succeed former Chief Justice Fred M. Vinson. The very next year Justice Warren wrote the decision that set the tone for what became known as the Warren Court. It was perhaps the most famous case decided during Warren's tenure: *Brown v. Board of Education*.[28] The Court overruled the "separate but equal" doctrine of *Plessy v. Ferguson*[29] and held that segregated schools were unconstitutional.

Chief Justice Warren later explained the role that equity played in the Court's decision: "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."[30] Critics have disputed the equitable reasoning in *Brown v. Board*, arguing that, despite Chief Justice Warren's use of the word "traditionally," this particular use of equity seemingly had no precedent.[31] The decision granted relief to a social class of people rather than an individual, the traditional beneficiary of equity decisions. Additionally, the two cases that Chief Justice Warren cited as precedent involved property and business disputes, the typical subject matter of equity cases.[32]

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[26] *Id.* at 156-57.

[27] *Id.* at 162-69.

[28] Brown v. Board of Education, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson* and holding that public school segregation violates the Fourteenth Amendment).

[29] Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that the Equal Protection Clause was satisfied if blacks were provided "equal" facilities).

[30] Brown v. Board of Education, 349 U.S. 294, 300 (1955) (declaring that the defendants must make a "prompt and reasonable start toward full compliance" with the earlier *Brown v. Board* decision).

[31] *See* MCDOWELL, *supra* note 8, at 99-100.

[32] *See* Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944) ("The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancelor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity had distinguished it."); Alexander v. Hillman, 296 U.S. 222, 239 (1935) ("Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge, and promptly to enforce substantial rights of all the parties before them.").

Such criticism allows the tail to wag the dog. The equity doctrine existed independent of and prior to property and business cases. Even those that criticize the application of equity in the decision trace equity back to Aristotle, who made no mention of limited application of equity to land and corporate law cases. Chief Justice Warren recognized the fundamental principle of equity described by Aristotle, that strict application of the law cannot adequately protect all that its writer intends for it to protect–justice can be avoided too easily on a technicality or an oversight. The cited cases show that the Supreme Court had been willing to rely on equity, not that equity can only be used in certain contexts.[33]

Chief Justice Warren had seen the results of the "law" and was not impressed. To him, the United States had failed to enforce the Fourteenth Amendment in good faith. He later pointed out that by 1968, when blacks were given the same rights as whites to live where they chose, over one hundred years had passed since the passage of the civil rights statute upon which the Court relied.[34] In his opinion, so much injustice caused by laws such as the "black codes" had transpired in the United States that "by the 1940s the South was almost as much an area of apartheid as the Republic of South Africa. The doctrine of separation of the races was honored to the nth degree, but the 'equal' part of the equation was totally disregarded."[35] His reasoning required looking at the effect of the law and understanding that equity called for a real solution rather than technical adherence to a doctrine that was clearly failing in a practical sense.

B. The Development of Equity in Corporate Law

Corporate form and identity matured a great deal over the period preceding Chief Justice Warren's term in the Supreme Court. In 1932, in a book that helped shape corporate thought for the next fifty years, Adolf Berle and Gardiner Means pointed out how the form of ownership of wealth has changed.[36] In the past, wealthy individuals generally had been associated with owning land. However, through the course of the growth of corporations, productive assets were held more and more by corporations and wealth was becoming more associated with owning stock. Control and ownership were separated due to this shift; owning stock may have given

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[33] MCDOWELL, *supra* note 8, at 101.
[34] EARL WARREN, THE MEMOIRS OF EARL WARREN 292 (1977).
[35] *Id.* at 293.
[36] *See* Robert W. Hamilton, *Corporate Governance in America 1950-2000: Major Changes But Uncertain Benefits*, 25 IOWA J. CORP. L. 349, 350 (2000).

wealth, but it did not give complete control over the productive "property."[37] Those assets were controlled by those who managed the corporation–the officers and board of directors.

The independence of the directors from the control of the shareholders existed primarily because of the difficulty for a single shareholder to make a change in management in large publicly held corporations. The costs and efforts it would take to reach and organize the possibly thousands of other shareholders in order to attain enough votes to change the board are enormous, and few shareholders are up to the task.[38] This collective action problem created "rationally apathetic"[39] shareholders–if a shareholder did not like what the board was doing, he or she could easily "exit" the corporation by selling the stock in the capital market and investing elsewhere. In sum, shareholders had *de jure* power of the corporation through their election of the board of directors, but the board had the *de facto* power.

Although shareholders are shareholders purely by choice, rather than simply abiding by *caveat emptor*, American law has granted shareholders additional protection above and beyond what the various markets would provide independently.[40] Consider the following hypothetical. Shareholders invest in Company X, purchasing stock in an initial public offering for $10 per share. Their investment and good management by the directors and officers pays off. The business prospers and Company X stock rises to $12. At a board meeting, the directors consider a merger with competitor Company Y. Analysis shows that as a result of the merger several duplicate expenses can be cut, new markets will be accessible, profits will rise, and the value of Company X stock will likely increase from the current $12 per share to a possible high of $20 per share. Several directors of Company X realize that they can personally capitalize on this by buying out the common stock shareholders stock before the merger. They offer certain shareholders $15 per share and buy back large amounts of stock without making any disclosure of the contemplated merger. Company X and Company Y proceed with the merger. The directors gain for themselves the resulting merger value.

This type of behavior is forbidden in American corporate law.[41] Equity provides part of the reason behind the prohibition. The relationship between the directors and the shareholders resembles the trusts of medieval

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[37] *See id* at 350-51.
[38] Professor Lyman Johnson, Lecture at Washington and Lee University Law School (2002).
[39] *Id.*
[40] The duties of care and loyalty placed upon directors and officers are described *infra* Part II(B).
[41] *See* 15 U.S.C. § 78j(b) (2003).

England. Directors have control of the corporation and therefore the shareholder's invested capital, under the assumption that they will operate the business for the benefit of the shareholders. The *de jure / de facto* separation applies here; the shareholder holds property in equity and the corporation holds a trust, with the directors as trustees. In this situation, courts will not allow directors to squander or use corporate assets for their own personal benefit at the expense of the shareholders. Such an action would be considered inequitable, and the court would grant judgment for the shareholder to prevent misappropriation or to recover damages. In this way, through the resolution of disputes between shareholders, officers, and directors, a significant body of equity law developed.

Courts rely on deeper policy considerations as well. For example, laws are drafted to protect shareholders because it is a benefit to society at large if people are willing to invest in new businesses. Investment allows new companies to grow, to provide more services, to provide more jobs, and so forth. Protection encourages investment by giving investors a sense of security.

III. THE PROTECTIONS OF MODERN BUSINESS LAW

A. Minority Shareholders and Minority Citizens

If Berle and Means had focused their attention on a particular community instead of the public corporation, would their analysis have been any different? The preamble to the Constitution designates "the people of the United States" as the creators of the Constitution and therefore the government. Democracy prides giving the people "power," but it is probably more accurate to say that the majority of citizens have gone the way of the shareholders and become rationally apathetic. The effort it takes for a single citizen to gather and convince enough voters to support a cause is difficult enough to deter nearly all but the wealthy and influential upper echelon of the population from running for office. Normally, this group contains few minorities. Therefore, the rhetoric "solve it at the polls" means little to the average minority citizen.

There are several police practices and policies in place that have been ruled permissible by the courts, but would not be employed if minorities had any say in the matter.[42] Few would deny that there are power

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[42] See KENNEDY, RACE, CRIME AND THE LAW 364 (1998) (describing the disparate sentencing guidelines in crack and cocaine cases). *See also* Whren v. United States, 517 U.S. 806 (1996) (holding that racially motivated traffic stops are constitutional if the office observes some traffic violation); City of Los Angeles

holders–police and prosecutors–that decide to employ these policies regardless of the minority dissension and based in part on personal motivations. When this occurred in the corporate law setting, it seemed right and proper to apply equitable principles to prevent the directors from taking advantage of their position to the detriment of the shareholders. The courts readily embraced the Aristotelian "general law, complex life" problem in corporate law cases. The same cannot be said for criminal law cases. Intuitively, and in the spirit of our country's values, the citizen who is born a minority without choice should be granted at least as much protection as the shareholder who purchased stock out of his or her own free will. Unfortunately this is not the case.

B. Protection of Shareholder Interest: Duty and Equitable Purpose

Numerous statutory measures and common law doctrines provide protection for shareholders by laying out the shareholders' rights and providing standards to ensure that the directors and officers are working earnestly for the benefit of the shareholders.[43] The fundamental principle behind these measures and behind the corporation itself is that the directors are working for the corporation, and therefore for the shareholders. Corporate law holds directors to certain fiduciary duties, such as the duty of care and the duty of loyalty, in an effort to prevent negligent performance or exploitation of the corporation. In short, the duty of care is aimed at ensuring that directors are not negligent in their work, that they are well-informed before making corporate decisions, and that they act in good faith to make what they believe are good business judgments.[44] The duty of loyalty prevents the directors from competing with the corporation or advancing self-interest to the detriment of shareholders.[45]

In addition to the efforts by states legislators and various legal scholars to codify these duties, a fair amount of discretion remains with the court to make decisions in line with equitable principles. For example, in

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v. Lyons, 461 U.S. 95 (1983) (in which police administer a chokehold with little provocation as part of a police policy).

[43] *See* Northeast Harbor Golf Club, Inc. v. Harris, 661 A.2d 1146 (Maine 1995) (prohibiting retiring president from usurping corporate opportunity by personally purchasing land adjacent to corporation golf club); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (holding that directors must be well informed in making business judgment decisions); DEL. CODE ANN. tit. 8, § 102(b)(7) (2003) (prohibiting any provision in the articles of incorporation from eliminating or limiting a director's liability for breach of duty of loyalty to the corporation or liability for transactions from which the director derives improper personal benefits).

[44] *See Van Gorkom*, 488 A.2d at 872-73.

[45] *See Northeast Harbor Golf Club*, 661 A.2d at 1149.

Schnell v. Chris-Craft Industries, Inc.,[46] the court found that the defendant corporation had not done anything illegal in advancing the date of the shareholder meeting.[47] In fact, the applicable corporate statutes were followed. However, a brief examination of the facts revealed that there was no legitimate business reason for the shift. The directors were using Delaware corporate law and the corporate structure to their advantage to prevent the stockholders from waging a successful proxy war which would remove them from the board. The Delaware Supreme Court found this to be an inequitable purpose and reversed the lower court's decision, nullifying the shift.[48]

C. Protection of Shareholder Interest: Access to Information

The rules concerning when a shareholder may obtain information about board of directors' actions are also of particular relevance. In *Security First Corp. v. United States Die Casting & Development*,[49] the Delaware Supreme Court held that for a stockholder to succeed in a demand for corporate books and records, the plaintiff must "show a credible basis to find wrongdoing" and "justify each category of the requested production."[50] After merger talks between Security First and Mid Am broke off, Security First paid Mid Am $275,000 pursuant to a termination agreement, with an additional $2,000,000 due contingent on certain specified events. This was done on terms more favorable to Mid Am than originally agreed and Security First common stock value subsequently dropped significantly. Security First's explanation for the failed transaction was that a fundamental difference in management philosophy and direction had been identified, but this was insufficient for David Sly, CEO and sole stockholder of U.S. Die, the record holder of approximately five percent of Security First's common stock as suspicious.[51] The Chancery Court agreed that Sly was due further explanation, accepting Sly's written proffer that the payment alone represented "a specific transaction raising the plausibility of more than

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[46] Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971) (holding that although the management complied with state Corporate Law when it advanced the date of a shareholder meeting, it was an inequitable use of state corporate law to attempt to keep the current directors in office).

[47] *Id.* at 439.

[48] *Id.*

[49] Security First Corp. v. U.S. Die Casting & Dev., 687 A.2d 563 (holding that shareholder had the right to certain corporate documents when the corporation's merger with another corporation failed, causing a loss to the corporation and detriment to the shareholders).

[50] *Id.* at 565.

[51] *See id.* at 567.

speculative, general mismanagement."[52] Affirming the Chancery Court, the Delaware Supreme Court agreed that Sly had satisfied the burden of proof necessary to grant him inspection of certain corporate records.[53]

IV. CRIMINAL AND CORPORATE CASE COMPARISONS

A. Considering the Effects: Schnell and the Results of the Criminal Legal Process

In selective action defenses, there is inherent tension between the good of upholding the law and the evil of undermining the equality for which that very law stands by applying differing punishments based on the race of the defendant.[54] This tension reached its extreme in the case of the Martinsville Seven.[55] Although it can be extremely difficult for a defendant to prove that his or her race played a vital role in the jury's decision of the appropriate punishment, this case exemplified a selective action phenomenon in an undeniable manner. Over a forty-one year period, Virginia executed black men exclusively in forty-five rape cases, but executed no white men convicted of the same crime during that same time frame.

The statistic brings to mind Chief Justice Warren's assessment of the jury selection in *Hernandez v. State of Texas*[56]:

> Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period. But it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner.[57]

Similarly, exclusively putting blacks to death for a particular crime committed by both blacks and whites over a forty-one year period "bespeaks discrimination" in the horrible form of selective execution.[58] The Virginia

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[52] *Id.* at 568.
[53] *Id.* at 571.
[54] A "selective action defense" is a defense that alleges that some part of the judicial system, such as the prosecutor, the judge, the jury, or the system as a whole, acted improperly based on race.
[55] Hampton v. Commonwealth, 58 S.E. 2d 288 (Va. 1950).
[56] Hernandez v. State of Texas, 347 U.S. 475 (1954) (overturning a defendant's conviction although there was no single act within the judiciary system that violated the law).
[57] *Id.* at 482.
[58] I believe that, considering the time frame of the case and the active segregation that existed in the United States at that time, it is safe to characterize this statistic as selective execution.

Supreme Court disagreed, however, and instead focused on the facts of the case itself, refusing to allow the statistical evidence of other case results to play any role.[59] The court looked at the statute which allowed the jury to sentence death, the legitimacy of the jury selection process, and the appropriateness of the jury's sentence in light of the crime.[60] In other words, the court relied upon procedural correctness to legitimize the action. The Supreme Court denied review and the Martinsville Seven were executed by electrocution.[61]

The directors in *Schnell*, like the Virginia judicial system, also took the correct procedural steps. But the Delaware Supreme Court evaluated a wider view of the situation, considering not just the legality, but the motives and effects of the director's actions as well. The court was willing to apply an equitable analysis, thereby preventing the directors from abusing the power of their position. According to the court, it was not a sufficient defense that the defendants had not explicitly broken the law.[62] It would be inequitable–and therefore an injustice–to ignore the results of their actions and pretend that literal compliance with the law automatically provides justification. This principle matched the Supreme Court's approach in *Hernandez* and should have been followed in equal protection cases such as the Martinsville Seven.[63]

There are at least two potential social policy problems with applying an equitable analysis to selective action defense cases under equal protection. First, the remedy of overturning the conviction is most likely a widely unacceptable proposition, especially in a case like the Martinsville Seven in which the defendants were found guilty of gang rape. However, it should be equally unacceptable to allow selective execution to continue unchecked. There can be no justification for upholding a law claiming justice if the law is not administered in a just manner.[64] A compromise would require at least lessening the sentence from death to incarceration.

The second problem is that there is often no one particular person or group to check. An entire legal system was at work in Virginia to produce

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[59] See *Hampton*, 58 S.E.2d at 298 (stating that there was "not a scintilla of evidence" to support defendant's claim of selective execution).

[60] *Id.* at 299.

[61] *See* KENNEDY, *supra* note 42, at 316

[62] *See* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971).

[63] Unfortunately for the Martinsville Seven, *Hernandez* was decided the year after their execution.

[64] *See* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.")

the result of selective execution, from the police, to the prosecutor, to the judge, to the jury. Regardless of the existence of these problems, this heinous process should not have been accepted simply as an unfortunate fact of life. It may be a combination of conscious and unconscious decisions with no particular group at fault, but the system should not be permitted to prevail in the purpose of selective execution. How can our society remedy injustices to shareholders, but not do similarly to combat unequal protection of the law that results in something resembling genocide?

Admittedly, the difficulties of reaching a specific remedy for selective execution are far more weighty and complex than the problem faced by the Delaware Supreme Court in *Schnell*, but that should not be a reason not to face the challenge. Although there are many unique issues involved in attacking the Martinsville Seven problem, they are issues we shall never need to face–the Supreme Court decided that execution for raping a woman is cruel and unusual punishment in *Coker v. Georgia*.[65]

B. To Search or Not to Search: Security First *and* Armstrong

United States v. Armstrong is the authority for the equal protection doctrine's regulation of selective prosecution in the United States. In *Armstrong*, the defendants were indicted for conspiracy to possess with intent to distribute cocaine. They filed a motion for discovery or dismissal alleging that they were federally prosecuted because they were black. Their attorneys, the public defender office, also filed an affidavit alleging that in all twenty-four cases closed by the office in the preceding year, the defendant had been black. The district court found this to be noteworthy and ordered the government to produce a list of similar cases from the last three years in which it identified the race of the defendants, the levels of law enforcement involved, and the criteria for deciding to prosecute.[66] The government refused, and the case eventually went to the Supreme Court.

The Supreme Court stated that the equal protection rule for proving selective prosecution has two parts: First, the defendant must show that the federal prosecutorial policy had a discriminatory effect, and second, the defendant must show a discriminatory purpose.[67] In order to show a discriminatory effect, the defendant must show that similarly situated individuals of a different race were not prosecuted.[68] The Court held that the

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[65] Coker v. Georgia, 433 U.S. 584 (1977).
[66] United States v. Armstrong, 517 U.S. 456, 459 (1996).
[67] *Id.* at 465.
[68] *Id.*

defendant did not even satisfy the first requirement, let alone the problem of showing a "discriminatory purpose."[69] To the Court, the statistical evidence was virtually meaningless.

Armstrong differs from the Martinsville Seven case in that the two social problems with applying equitable analysis to selective action identified in Part A are lessened and narrowed. First, overturning a federal conviction for possession of crack probably does not have the same shock value as overturning convictions for gang rape, especially since the defendants can still be punished under state laws. Second, in *Armstrong* there is a link in the judicial system chain to focus on–the prosecutor. Additionally, the Supreme Court decided *Armstrong* almost fifty years after the segregation and open racial hostility toward blacks, prevalent at the time of the Martinsville Seven, had ended. One might think that these mitigating factors would lead to an easier resolution of the problem, but it is questionable whether the Court even identified a problem. After all, in *Armstrong*, the Court turned immediately to the Federal Rules of Evidence as authority,[70] even though the true issue of the case was the validity of the federal prosecution that would make those rules relevant.

The *Armstrong* court completely ignored the defendant's complaint that the decision to prosecute him federally was racially motivated. The federal charges carried a minimum sentence of ten years and the equivalent state charges carried a minimum of three years and a maximum of five. Thus, a minimum of five to seven years of an American citizen's freedom were at stake, but at a maximum, the risk of allowing unconstitutional behavior to take place in the American judicial system was at stake. With such high risks, the Court should not have been focused solely on the technicality of discovery rules.

V. CONCLUSION

If problems such as that in *Armstrong* are not addressed, they will continue checked. Yet even though corporate law and criminal law deal with similar problems, the American judicial system has applied equitable analysis in corporate law and has not done so with the equal protection doctrine in criminal law. While the white corporate plaintiff in *Security First* needed only to allege suspicious circumstances, the black defendant in *Armstrong* was denied his opportunity for discovery in spite of evidence that suggested that selective prosecution was taking place. Thus, despite our

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[69] *Id.* at 469-70.
[70] *See id.* at 461.

society's lofty goals of liberty and the elimination of racism, our judicial system has recognized realistic equitable doctrines in a manner that provides minority shareholders greater protection than minority citizens.

Equity was originally recognized as the answer to the difficulty of resolving legal problems that are too complex for written laws to fully cover. Although equity has, at times, been fully employed in race-related cases and served its purpose, in modern times it has been forgotten except in the context of business law. Modern business cases provide examples of the way an equitable approach could apply to criminal cases in which evidence has been presented to show selective prosecution. The reasons for taking an equitable approach are greater than the years of freedom of an American citizen's life that are at stake. They are greater than the reliability provided by technically followed bright line rules. As Justice Powell stated, "Because of the risk that the factor of race may enter the criminal justice process," courts must engage in "'unceasing efforts' to eradicate racial prejudice from our criminal justice system."[71] Courts must ensure that "prosecutorial discretion cannot be exercised on the basis of race."[72] If courts expect to uphold these mandates, they must realize that the equal protection doctrine should follow the example set by courts that make equitable decisions when harm is caused by the actors to whom the courts grant much discretion. We cannot continue to provide stockholders greater protection than minority citizens and still expect to "eradicate racial prejudice from our criminal justice system."

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[71] McCleskey v. Kemp, 481 U.S. 279, 309 (1987).
[72] *Id.* at 310 n.30.