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Prosecutorial Discretion and Discrimination in the Decision to Charge

Amy G. Applegate
Indiana University Maurer School of Law, aga@indiana.edu

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*Amy Grossman Applegate**

I. PROSECUTORIAL DISCRETION: THE PROBLEM

It is universally recognized that prosecutors exercise tremendous amounts of discretion in deciding whether or not to initiate proceedings against a person for the commission of a crime.[1] The courts have traditionally been extremely solicitous toward this prosecutorial discretion.[2] The case law is replete with instances of judicial affirmation

* J.D., *cum laude,* Harvard Law School, 1981; Staff Attorney in the Enforcement Division of the Securities and Exchange Commission. The author wishes to express deep gratitude for the guidance and assistance of Dean James Vorenberg of the Harvard Law School.

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1. "Discretion" is a term often used but difficult to define. A comprehensible definition may be found in Vorenberg, *Narrowing the Discretion of Criminal Justice Officials,* 1976 DUKE L.J. 651:

> For our purposes discretion can best be seen as a residual concept—the room left for subjective judgment by the statutes, administrative rules, judicial decisions, social patterns and institutional pressures which bear on an official's decision. Our system gives no official unlimited discretion and every decision or action involves some exercise of judgment. A precise definition is not crucial since discretion is a relative concept—more or less free rein for decisions by public officials. As long as this is understood, Judge Breitel's simple definition may suffice: "[P]ower to consider all circumstances and then determine what legal action is to be taken."

Id. at 653-54 (footnotes omitted) (quoting Breitel, *Controls in Criminal Law Enforcement,* 27 U. CHI. L. REV. 427 (1960)).

2. The number of cases in which courts have upheld prosecutors' exercises of discretion are too numerous to completely document. Examples include: United States v. Lovasco, 431 U.S. 783, 784-88 (1977) (18 month delay by federal prosecutors in bringing charges against respondent not a due process violation and lower courts therefore had erred in dismissing indictment); United States v. Thompson, 251 U.S. 407, 411-13 (1920) (Court may not exercise its discretion to limit district attorney's decision to make resubmission to grand jury). Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868) (Attorney General has discretion to dismiss an appeal brought by government); United States v. Wallace, 578 F.2d 735, 740 (8th Cir.), *cert. denied,* 439 U.S. 898 (1978) (*Petite* policy, under which Justice Department declines to bring a federal prosecution after a state proceeding unless compelling reasons exist, involves an exercise of prosecutorial discretion not subject to judicial evaluation); United States v. Smith, 523 F.2d 771, 782 (5th Cir. 1975), *cert. denied,* 429 U.S. 817 (1976) (prosecutor's exercise of discretion in prosecuting appellant's filing of false Medicare statements while not prosecuting others' Medicare form mistakes upheld); United States v. Raven, 500 F.2d 728, 733 (5th Cir. 1974) (defendant's evidence failed to establish bad faith enforcement despite his contention that he was first subject of criminal prosecution under statutes in question and despite alleged existence of other violators of statutes); United States v. Strutton, 494 F.2d 686, 688 (2d Cir. 1974) (court declined to reverse prosecutor's exercise of discretion in the face of defendant's allegation that his prosecution was a callous indictment of a pathetic and harmless individual); United States v. Ream, 491 F.2d 1243, 1246 (5th Cir. 1974) (defendant's failure to present facts which would raise doubt about prosecutor's motive precluded court

of prosecutorial discretion in the decision to charge,[3] not to charge,[4] and what to charge.[5] A prosecutor may not be compelled to bring a prosecution,[6] nor, for the most part, compelled to terminate one.[7]

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from granting motion for discovery and motion to dismiss on ground that defendant was being discriminatorily prosecuted because of his antiwar activities); United States v. Hunter, 459 F.2d 205, 220-21 (4th Cir.), *cert. denied,* 409 U.S. 934 (1972) (Attorney General has discretion to limit prosecution to one of several newspapers allegedly in violation of Civil Rights Act); Spillman v. United States, 413 F.2d 527, 530 (9th Cir.), *cert. denied,* 396 U.S. 930 (1969) (court refused to inquire into motives of United States Attorney for prosecuting appellant, despite fact that prosecution violated policy of Department of Justice); Washington v. United States, 401 F.2d 915, 925 (D.C. Cir. 1968) (evidence that enforcement of law is lax or that other offenders may go free held insufficient to show abuse of prosecutorial discretion in particular prosecution under the law); Newman v. United States, 382 F.2d 479, 481-82 (D.C. Cir. 1967) (United States Attorney's consent to guilty plea tendered by codefendant for lesser included offense under indictment and refusal to grant same plea for defendant did not constitute denial of defendant's constitutional rights); Smith v. United States, 375 F.2d 243, 247 (5th Cir.), *cert. denied,* 389 U.S. 841 (1967) (Attorney General's discretion in prosecuting or abandoning a prosecution held absolute); United States v. Cox, 342 F.2d 167, 171-72 (5th Cir.), *cert. denied,* 381 U.S. 935 (1965) (United States Attorney held to have discretionary power to refuse to sign an indictment); Goldberg v. Hoffman, 225 F.2d 463, 466 (7th Cir. 1955) (United States Attorney's insistence on prosecuting individual for tax evasion when such proceedings might endanger individual's life held within United States Attorney's discretion); United States v. One 1940 Oldsmobile Sedan Auto., 167 F.2d 404, 406 (7th Cir. 1948) (District Attorney's broad discretion to resubmit presentment to Grand Jury or to subsequent grand juries not subject to court's control); United States v. Perkins, 383 F. Supp. 922, 928 (N.D. Ohio 1974) (defendant's motion to dismiss charges of illegal wiretapping on ground of selective prosecution denied despite existence of various similar malfeasances by government); United States v. Manno, 118 F. Supp. 511, 515 (N.D. Ill. 1954) (singling out of "racketeers" for prosecution for income tax evasion not unconstitutionally discriminatory); Howell v. Brown, 85 F. Supp. 537, 539-40 (D. Neb. 1949) (court denied motion to compel United States Attorney to bring a prosecution, finding decision to be solely discretionary); United States v. Brokaw, 60 F. Supp. 100, 102 (S.D. Ill. 1945) (entering of order of nolle prosequi held to be within sole discretion of prosecutor).

3. For cases affirming a prosecutorial decision whether to charge *see, e.g.,* United States v. Lovasco, 431 U.S. 783, 784-85, 792-95 (1977); United States v. Smith, 523 F.2d 771, 782 (5th Cir.), *cert. denied,* 429 U.S. 817 (1976); United States v. Raven, 500 F.2d 728, 733 (5th Cir. 1974); United States v. Strutton, 494 F.2d 686, 688 (2d Cir. 1974); United States v. Hunter, 495 F.2d 205, 220-21 (4th Cir.), *cert. denied,* 409 U.S. 934 (1972); United States v. One 1940 Oldsmobile Sedan Auto., 167 F.2d 404, 406 (7th Cir. 1948); United States v. Perkins, 383 F. Supp. 922, 928 (N.D. Ohio 1974); discussed at note 2 *supra.*

4. For cases affirming a prosecutorial decision not to charge *see, e.g.,* United States v. Thompson, 251 U.S. 407, 412-13 (1920); Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868); Smith v. United States, 375 F.2d 243, 247 (5th Cir.), *cert. denied,* 381 U.S. 841 (1967); discussed at note 2 *supra.*

5. For cases affirming what a prosecutor charged, *see, e.g.,* United States v. Ruggiero, 472 F.2d 599, 606 (2d Cir. 1973) (where criminal statutes overlap, government's discretion to choose among them is limited only by requirement that choice be nondiscriminatory); Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967), discussed at note 2 *supra.*

6. United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied sub nom.* Cox v. Hauberg, 381 U.S. 935 (1965). *See also* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 381 (2d Cir. 1973); Peek v. Mitchell, 419 F.2d 575, 578 (6th Cir. 1970); Powell v. Katzenbach, 359 F.2d 234, 234 (D.C. Cir. 1965), *cert. denied,* 384 U.S. 906 (1966); Moses v. Kennedy, 219 F. Supp. 762, 764 (D.D.C. 1963), *aff'd sub nom.* Moses v. Katzenbach, 342 F.2d 931 (D.C. Cir. 1965); Howell v. Brown, 85 F. Supp. 537, 538 (D. Neb. 1949); United States v. Brokaw, 60 F. Supp. 100, 101 (S.D. Ill. 1945).

7. *See* note 2 *supra* for cases refusing to compel a prosecutor to terminate a prosecution.

The judiciary has always been reluctant to circumscribe prosecutorial discretion.[8] The reasons commonly cited in support of this deference include the doctrine of separation of powers;[9] the impossibility of total enforcement of the laws;[10] the need for leniency in particular cases;[11] and the prosecutor's, as opposed to the judge's, expertise.[12] Chief Justice (then Circuit Judge) Burger once stated: "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought." [13]

Moreover, courts fear that in allowing challenges to the prosecutor's decisions, they will open up the "floodgates"—inviting a deluge of spurious claims.[14] Courts also point out that the prosecutor's motive

8. Numerous commentators note the judicial tradition of reluctance to substitute judicial for prosecutorial judgment. *See, e.g.*, 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 9:1, at 218 (2d ed. 1979).

9. The doctrine of separation of powers is perhaps the most widely given reason for lack of judicial interference with the prosecutor's exercise of discretion. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), has been cited for the proposition that the courts may compel an executive officer to perform an express duty imposed by the Constitution or statute, but they have no power to control his conduct in matters involving his discretion. For a case following *Marbury, see* Goldberg v. Hoffman, 225 F.2d 463, 465 (7th Cir. 1955). For cases applying separation of powers reasoning to prosecutorial discretion, *see* United States v. Torquato, 602 F.2d 564, 569 (3rd Cir.), *cert. denied*, 444 U.S. 941 (1979); United States v. Johnson, 577 F.2d 1304, 1307 (5th Cir. 1978); United States v. Ream, 491 F.2d 1243, 1246 n.2 (5th Cir. 1974); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 379-80 (2d Cir. 1973); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

A related argument in this context is that of executive privilege. This was claimed by the prosecutors in United States v. Cammisano, 546 F.2d 238, 240-41 (8th Cir. 1976); United States v. Berrios, 501 F.2d 1207, 1210 (2d Cir. 1974). These cases are discussed in Part IV, *infra*. *See also* Comment, *Defense Access to Evidence of Discriminatory Prosecution*, 1974 U. ILL. L.F. 648, 660-61 (1974) (courts must show direct evidence of discriminatory prosecution to override claim of executive privilege).

10. For references to the impossibility of total enforcement of the laws, *see, e.g.*, Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. ILL. L.F. 88, 100-01; Case Comment, *Curbing the Prosecutor's Discretion: United States v. Falk*, 9 HARV. C.R.-C.L. L. REV. 372, 373 (1974).

Of course, it can be argued that if total enforcement of the laws is impossible, perhaps the laws should be revised in a more enforceable manner, (*i.e.*, fewer laws, with more resources allocated to enforcement of those laws).

11. For a reference to the need for leniency in particular cases, *see, e.g.*, Givelber, *supra* note 10, at 101-02. However, a persuasive argument can be made against this rationale. One scholar argues that the result of discretionary leniency in enforcement is, in fact, injustice or discrimination towards those who are not treated leniently. K. DAVIS, DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY, 670-72 (1970).

12. For a reference to a discussion of the prosecutor's expertise, *see, e.g.*, Givelber, *supra* note 10, at 192.

13. Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967).

14. The "opening of the floodgates of litigation" argument has been reiterated often. The court in United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974), expressed that fear, despite its order that the prosecutor turn over his files to the district judge for in camera inspection and subsequent disclosure of relevant ma-

is irrelevant to the ultimate issue of whether the defendant committed the crime with which he or she is charged.[15] In addition, judges often allude to lack of judicial standards with which to measure or limit prosecutorial discretion.[16]

These beliefs have resulted in a tradition of judicial deference to prosecutorial discretion, as well as in an overriding presumption of prosecutorial good faith in the decision to charge.[17] Selectivity in prosecution has traditionally been upheld as a means of allowing the prosecutor, who is unable to prosecute every violation of every law, to best promote general compliance with the laws.[18] Objective considerations taken into account by the prosecutor include sufficiency of the evidence to prove the government's case and the availability of witnesses.[19] Subjective considerations are also factors in the decision, including the seriousness of the crime, injury to the victim, the background of the defendant, the need for leniency in a particular case, the

terials to defense counsel. *See also* Moss v. Hornig, 314 F.2d 89, 93 (2d Cir. 1963); (proof that others have violated the law and have not been prosecuted could be offered with respect to almost every lesser offense); Buxbom v. City of Riverside, 29 F. Supp. 3, 8 (S.D. Cal. 1939) (federal question not involved in decision not to enjoin prosecution, even though others guilty of same offense not prosecuted, or else every such case would be turned into a federal constitutional question); Givelber, *supra* note 10, at 104 (due to flood of litigation argument judiciary not responsive to unequal enforcement claims); Note, *Discriminatory Enforcement of Federal Penal Laws—United States v. Falk*, 479 F.2d 616 (7th Cir. 1973), 34 OHIO ST. L.J. 942, 947-48 (1973) (allowing a diminished showing to establish an equal protection claim of unlawful selective prosecution could subject courts to delays in processing frivolous claims).

15. *See* Cardinale & Feldman, *The Federal Courts and the Right to Nondiscriminatory Administration of the Criminal Law: A Critical View*, 29 SYRACUSE L. REV. 659, 685-87 (1978). The authors are particularly critical of striking down prosecutions because of improper prosecutorial motives, arguing that such action immunizes conduct otherwise prohibited by statute and in effect punishes society. They suggest that instead of striking down convictions of defendants who have been discriminated against, courts instead consider other alternatives, such as leniency in sentencing or sanctions for the prosecutors engaging in such conduct. *Id.* at 691-94. *See also* Givelber, *supra* note 10, at 104; Case Comment, *supra* note 10, at 374-76.

16. The lack of judicial standards to circumscribe prosecutorial discretion, even if such intervention were warranted, is mentioned in many cases. *See* the cases listed in notes 2-7, *supra*. *See also* Givelber, *supra* note 10, at 191; Case Comment, *supra* note 10, at 379-81.

17. *All* of the cases which have considered the issue of prosecutorial discrimination have at the very least paid lip service to the presumption of prosecutorial good faith in the decision to charge. *See, e.g.*, United States v. Falk, 479 F.2d 616, 620 (7th Cir. 1973).

Usually, the presumption of prosecutorial good faith is not overcome. *See* United States v. Torquato, 602 F.2d 564, 569 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979); United States v. Ojala, 544 F.2d 940, 943-45 (8th Cir. 1976); United States v. Bennett, 539 F.2d 45, 54 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976); United States v. Crow Dog, 532 F.2d 1182, 1196 (8th Cir.), application for *stay of execution and enforcement of judgment denied*, 426 U.S. 917 (1976); United States v. Scherer, 523 F.2d 371, 377 (7th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976).

18. *See* Pugach v. Klein, 193 F. Supp. 630, 634 (S.D.N.Y. 1961) (decision to prosecute requires determination that prosecution will promote the ends of justice, instill respect for the law, and advance the cause of ordered liberty).

19. *Id.* at 635; Comment, *Prosecutorial Discretion—A Re-Evaluation of the Prosecutor's Unbridled Discretion and Its Potential for Abuse*, 21 DEPAUL L. REV. 485, 493 (1971).

need for immunization in a particular case, the deterrent value of prosecuting a particular case, alternative remedies to a criminal prosecution, and testing the validity or bounds of a law.[20]

Although, under our present system, the prosecutor must be allowed to exercise some discretion, objections have been made to the extent of this discretion. Some commentators have objected to the

20. *Pugach,* 193 F. Supp. at 634-35; Comment *supra* note 19, at 493. A good summary of considerations the prosecutor should take into account in his or her decision to charge may be found in *American Bar Association Standards for Criminal Justice,* §§ 3-3.8, -3.9 (2d ed. 1980) [hereinafter cited as *A.B.A. Project*], which provides for the following:

3-3.8 Discretion as to non-criminal disposition

(a) The prosecutor should explore the availability of noncriminal disposition, including programs of rehabilitation, formal or informal, in deciding whether to press criminal charges. Especially in the case of a first offender, the nature of the offense may warrant noncriminal disposition.

(b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

. . . .

3-3.9 Discretion in the charging decision

(a) It is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence exists which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;

(ii) the extent of the harm caused by the offense;

(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

(iv) possible improper motives of a complainant;

(v) reluctance of the victim to testify;

(vi) cooperation of the accused in the apprehension or conviction of others;

(vii) availability and likelihood of prosecution by another jurisdiction.

(c) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his record of conviction.

(d) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(e) The prosecutor should not bring or seek charges greater in number or degree than he can reasonably support with evidence at trial.

A.B.A. Project at 3.52-54.

See also United States Department of Justice: Principles of Federal Prosecution 5-15 (1980) [hereinafter cited as *Principles*] for another exposition of considerations the prosecutor should take into account in deciding whether or not to charge. It should be noted, however, that the focus in *Principles* is on considerations in declining to prosecute.

courts' rubber stamping of all prosecutorial decisions.[21] The virtually unbridled discretion exercised by the prosecutor has been the cause for some concern.[22] Critics have pointed to the potential for, and the reality of, abuse,[23] charging that discretionary enforcement detracts from the legitimacy of the criminal justice system,[24] violates the principle of fair notice,[25] and frustrates the will of the people.[26] Professor Davis, a particularly articulate critic of uncontrolled prosecutorial power, has pointed out an inconsistency—other administrative discretion is reviewable, while the prosecutor's decision is left relatively unhampered.[27]

Although the concerns about the prosecutor's broad discretion have largely gone unanswered,[28] the prosecutor is not entirely free in

21. *See* K. DAVIS, DISCRETIONARY JUSTICE 209-10 (1969).

22. Jackson, *The Federal Prosecutor,* 24 J. AM. JUD. SOC'Y 18, 19 (1940) noted the prosecutor's extreme power, and its possibility for abuse. *See also* DAVIS, *supra* note 21 at 209-10; Comment, *supra* note 19, at 497-98; Case Comment, *supra* note 10, at 379; Vorenberg, *Narrowing the Discretion of Criminal Justice Officials,* 1976 DUKE L.J. 651, 652-53; Givelber, *supra* note 10, at 106 Comment, *supra* note 9, at 661.

23. For references to abuse caused by unbridled discretion, *see* the sources listed in note 22 *supra.*

24. Givelber, *supra* note 10, at 100.

25. *Id.* at 98.

26. *Id.* at 96. The people's will is frustrated by the fact that laws are enacted to be enforced across the board, and when laws cease to be enforced, they probably should not be perpetuated.

27. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 9.2, 223 (2d ed. 1979).

28. There are a few alternatives to judicially supervising the discretion exercised by the prosecutor. One alternative would call for a restructuring of our present criminal justice system, and would therefore be unlikely to be seriously considered. Nevertheless, an exhaustive review and amendment or repeal of many existing laws would help serve to limit the enforcement problem we currently face. Many laws, *e.g.,* consensual sex crimes, are rarely, if ever, enforced. These laws could be amended or repealed. Of course, the legislature would have to take extreme action here, *i.e.,* repeal *many* laws, and, given our currently expanding Criminal Code, it appears improbable that legislators would be willing to repeal rather than enact laws.

Another alternative for narrowing prosecutorial discretion would be to require total enforcement of all the laws. This alternative is likewise untenable, because it would require an extremely high increase in governmental resources allocated to law enforcement. Total enforcement would undoubtedly result in higher taxes and, given the present state of the economy and taxpayers' reluctance and hostility towards any increase in taxes, this alternative is not feasible. Of course, it seems irrational to enact so many laws and then be unwilling to pay for their enforcement.

The most reasonable alternative for controlling prosecutorial discretion is to require that prosecutor's offices promulgate and follow guidelines for exercising their discretion. Even with guidelines, the prosecutor is still exercising discretion; however, the discretion so exercised has the virtue of being reasoned and clear. The American Bar Association and the United States Justice Department, among other authorities, support internal prosecutorial guidelines.

The A.B.A. has stated that "the prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted." § 3-3.4(c), at 3.44.

The A.B.A. has further stated that

(a) Each prosecutor's office should develop a statement of

(i) general policies to guide the exercise of prosecutorial discretion, and

(ii) procedures of the office.

exercising discretion. For example, a prosecutor may not prosecute cases in a discriminatory manner, or for vindictive or retaliatory purposes. Nor may a prosecutor bring criminal charges for civil objectives.[29] Although there is no right to violate a governmental statute, there is a right to equal treatment in the enforcement of the statute.[30]

This article will explore the issue of when an exercise of prosecutorial discretion will be deemed by the courts to be "discriminatory" or "selective", in violation of the constitutional guarantee of equal protection. After discussing the historical development of the doctrine, this article will attempt to define what constitutes discriminatory enforcement in light of all relevant federal case law. The final sections will outline the presentation of a defendant's claim of discriminatory enforcement and offer some observations, conclusions, and suggestions.

II. Historical Development

The foundation of the doctrine of discriminatory enforcement can be traced back to an early equal protection clause case, *Yick Wo v. Hopkins*.[31] The petitioner in *Yick Wo* was convicted of violating an 1880 San Francisco municipal ordinance which made it a misdemeanor to maintain a laundry without first obtaining the consent of a municipal board of supervisors, unless the laundry was in a building constructed of either brick or stone.[32] The petitioner, a Chinese citizen, introduced undisputed evidence showing that more than 150 Chinese citizens operating laundries in wooden buildings had been arrested on the

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The objectives of these policies as to discretion and procedures should be to achieve a fair, efficient, and effective enforcement of criminal law.

(b) In the interest of continuity and clarity, such statement of policies and procedures should be maintained in an office handbook. This handbook should be available to the public, except for subject matters declared "confidential," when it is reasonably believed that public access to their contents would adversely affect the prosecution function.

A.B.A. Project, supra note 20, § 3-2.5, at 3.24-25. *See also Principles, supra* note 20 at 1-4 (principles of federal prosecution set forth to promote the reasoned exercise of prosecutorial discretion; internal office procedures should be established).

It should be noted that the major concern in this paper is the discretion in the prosecutorial decision whether to charge. For a discussion of controlling the prosecutor's discretion in determining what to charge, *see* Vorenberg, *supra* note 22, at 678-83. A further discussion of prosecutorial guidelines, and how they relate to the issue of prosecutorial discrimination, may be found in Part IV, *infra*.

29. J. Vorenberg, *Prosecutorial Discretion* (1980) (unpublished materials for course on Government Lawyer, Harvard Law School).

30. Note, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Colum. L. Rev. 1103, 1111 (1961). *Cf.* East Coast Lumber Terminal, Inc. v. Town of Babylon, 174 F.2d 106, 112 (2d Cir. 1949) (the fourteenth amendment deals with both the enforcement of invalid laws and the unequal enforcement of valid laws); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (the fifth amendment guarantees the same equal protection by federal officials as the fourteenth amendment guarantees by state officials).

31. 118 U.S. 356 (1886).

32. *Id.* at 358.

charge of carrying on business without the special consent of the board of supervisors, while the non-Chinese operators of more than 80 other laundries operated in wood buildings had not been arrested.[33] In addition, it was admitted that the petitioner and 200 of his countrymen similarly situated had sought permission to continue their businesses in the various houses which they had been occupying and using for laundries for more than 20 years. All of these petitions were denied, and all of the petitions of those who were not Chinese, except for one, were granted.[34]

The Court condemned the ordinance because it granted a "naked and arbitrary power to give or withhold consent, not only as to places, but as to persons." [35] Although the Court did not find the ordinance void on its face, it held that the administration of the ordinance violated the equal protection guaranteed to petitioners by the fourteenth amendment because the board was arbitrarily and unjustly discriminating on the basis of race and nationality. The Court concluded:

> 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.[36]

Although *Yick Wo* involved the discriminatory administration of a law on the part of a licensing board,[37] its holding was read and expanded in the 1944 case of *Snowden v. Hughes* [38] to generally cover

33. *Id.* at 359.

34. *Id.*

35. *Id.* at 366.

36. *Id.* at 373-74.

37. In Cox v. Louisiana, 379 U.S. 536, 557-58 (1965), the Court stated

> it is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by the use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.

Also, in Niemotko v. Md., 340 U.S. 268, 273 (1951), the Court held: "It thus becomes apparent that the lack of standards in the license-issuing 'practice' a prior restraint in contravention of the fourteenth amendment, and that the completely arbitrary and discriminatory refusal to grant the permits was a denial of equal protection." And in Fowler v. R.I., 345 U.S. 67 (1953), the concurring opinion would have found an equal protection violation in a municipal ordinance applied to penalize a minister of one religious group for preaching at a peaceful religious meeting in a public park, while other religious groups were being allowed to conduct religious services there with impunity. *Id.* at 70 (Frankfurter, J., concurring).

38. 321 U.S. 1, 8 (1944). In *Snowden*, the Court held that a state statute neutral on its face, is open to attack if invidious and purposefully discriminatory application is shown. *See also* East Coast Lumber Terminal, Inc. v. Town of

the discriminatory administration of laws. *Yick Wo* also involved discriminatory action on the part of local officials. It is now settled that federal officials are also subject to the same duty of nondiscrimination in the administration of laws.[39]

After *Yick Wo,* judicial relief was not granted to enjoin a city and its officials from discriminatorily enforcing its laws until *City of Evansville v. Gaseteria.*[40] In that case, Gaseteria, the appellee, successfully brought an equity action to enjoin the city and its officers, the appellants, from interfering with appellee's installation of a gasoline filling station. Among other administrative actions, appellants revoked appellee's permit for its gasoline station, allegedly for the reason that its underground storage tanks exceeded ordinance limits. There was evidence, however, that "under substantially like circumstances . . . various others ha[d] been permitted to make and maintain large installations, far in excess of alleged ordinance limits, both before and after these occurrences, and they ha[d] been in no manner disturbed by the city or its officials." [41] In addition, there was undisputed evidence that appellants' actions were taken for the purpose of preventing appellee, as they had prevented a number of others, from cutting the price of gasoline within the city. The Seventh Circuit agreed with the lower court that appellants evidenced a definite purpose and plan of discriminating unlawfully against appellee's installation. The court found appellant's actions violative of the fourteenth amendment and affirmed the lower court's decree granting the injunction.[42]

At first blush it may appear somewhat odd that the *Gaseteria* court would find an equal protection violation based on the city officials' attempt to prevent the price cutting of gasoline. The Supreme Court in *Yick Wo* based its finding of an equal protection violation on a licensing classification that distinguished between race and nationality. In *Gaseteria* no such "invidious" discrimination had been alleged. A few

Babylon, 174 F.2d 106, 112 (2d Cir. 1949) (unequal enforcement of valid laws within scope of fourteenth amendment). *Cf.* Ex parte Virginia, 100 U.S. 339, 347 (1880) (no agency or officers of the state shall deny equal protection of the laws to persons within the state's jurisdiction).

The expansion of *Yick Wo* has been criticized by Cardinale and Feldman, *The Federal Courts and the Right to Nondiscriminatory Administration of the Criminal Law: A Critical View,* 29 SYRACUSE L. REV. 659, 661-62 (1978). The authors are particularly critical of judicial interference with prosecutorial discretion as opposed to a licensing board's discretion. They argue that the doctrine of separation of powers requires much greater prosecutorial freedom from judicial interference.

39. Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (the fifth amendment guarantees the same equal protection by federal officials as the fourteenth amendment guarantees by state officials); Washington v. United States, 401 F.2d 915, 922-23 (D.C. Cir. 1968) (the fifth amendment due process clause contains the same "protection of equal laws" pledge as does the fourteenth amendment).

40. 51 F.2d 232 (7th Cir. 1931).

41. *Id.* at 237.

42. *Id.*

explanations account for the outcome of this case. In the first place, the undisputed facts of *Gaseteria* showed that rather extraordinary and dishonest measures had been taken by the city officials to prevent the appellee from installing its station.[43] Secondly, the court was enjoining administrative licensing rather than prosecutorial action. Although the holding of *Yick Wo* was eventually found applicable to discriminatory prosecutions,[44] there was nevertheless extreme judicial reluctance to examine the motives of prosecutorial decisions. As a result, it was not until the late 1960's that any prosecutions were successfully enjoined, indictments dismissed, or convictions overturned as a result of claims of prosecutorial discrimination.[45] The third most important factor that probably influenced the court's decision in *Gaseteria* was the judicial doctrine in the so-called "Lochner Era."[46] It has been observed that judicial opinions were informed by conservative economic theory and hostility toward labor regulation.[47] The court in *Gaseteria* found the city's purpose of preventing price cutting of gasoline within the city to be improper and its actions in that regard violative of the fourteenth amendment's guarantee of equal protection.[48] It seems unlikely that a court would reach the same conclusion today.[49]

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43. *Id.* at 233-35. The court concluded:

> It thus appears that the prior pretexts upon which the carrying on of this work was resisted and stopped, after the permit had been granted, viz., misrepresentation to the fire marshal as to location outside of the fire limits, the contention of excavation of alley, which culminated in stopping the work and the arrest of Williams and others of appellee's employees and the claim that appellee had unlawfully crossed the alley with pipes, were all abandoned by the city, and the revocation was predicated wholly upon appellee's alleged transgression of the [storage of petroleum] ordinance.

44. For a discussion of the expansion of the *Yick Wo* holding to discriminatory prosecutions, *see* notes 52-56 *infra* and accompanying text.

45. For cases of successful claims of discriminatory prosecution, *see* the cases discussed in Part III, *infra*. Cases which demonstrate judicial reluctance and/or refusal to question prosecutorial decisions include: United States v. Thompson, 251 U.S. 407 (1920); Confiscation Cases, 74 U.S. (7 Wall.) 454 (1868); Goldberg v. Hoffman, 225 F.2d 463 (7th Cir. 1955); United States v. One 1940 Oldsmobile Sedan Auto., 167 F.2d 404 (7th Cir. 1948); Howell v. Brown, 85 F. Supp. 537 (D. Neb. 1949); United States v. Brokaw, 60 F. Supp. 100 (S.D. Ill. 1945). For a more detailed discussion of the judiciary's reluctance to examine prosecutorial decisions, *see* notes 2-20 *supra* and accompanying text.

46. The "Lochner Era" may be defined as the period beginning around the turn of the century with Allgeyer v. Louisiana, 165 U.S. 578 (1897), and ending in the mid-1930's with West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 434-35 (1978).

47. *Id.* at 435. A conservative economic perspective would be hostile to governmental interference with "free market" competition. In *Gaseteria,* 51 F.2d at 233, the city feared that appellee would engage in price cutting and it attempted to prevent appellee from engaging in such action.

48. *Id.* at 237. It should be noted that in addition to *Yick Wo,* the court cited as support for its holding Dobbins v. Los Angeles, 195 U.S. 223 (1904) (municipal ordinance fixing time limits within which gas works could be erected struck down as unlawful exercise of police power). 51 F.2d at 237.

49. Although a return to the "Lochner Era" appears unlikely, the growing conservative trend in the country may cast doubt upon the validity of this assertion.

The *Gaseteria* decision is not representative of the type of case which followed *Yick Wo v. Hopkins*. Although both decisions concerned licensing, *Yick Wo*'s continued vitality has been far more general, applying to other forms of discriminatory state action.[50] This section will focus on the development of the discriminatory enforcement holding in *Yick Wo* and its application to the area of prosecutorial discretion in charging.

Before the 1960's, there were not many cases in which defendants alleged that their prosecutions were violative of equal protection.[51] The courts were initially divided on the applicability of the *Yick Wo* rule to prosecutorial discrimination. While many courts failed to reach or even address the issue,[52] other courts indicated that the rule was not applicable to prosecutorial decisions.[53] Even though no court reversed a conviction for discriminatory prosecution until 1969,[54] one court in 1932 [55] found the *Yick Wo* holding applicable to prosecutorial discrimination.[56] After the Supreme Court in *Snowden v. Hughes* [57] acknowledged the general applicability of the *Yick Wo* holding to the unequal or discriminatory application of state statutes, there were some challenges to prosecutions on equal protection grounds. The challenges were consistently unsuccessful; typically the courts would assert that it was no defense that others were violating with impunity the law under which the defendant had been indicted or convicted.[58]

50. For a discussion of the expansion of *Yick Wo, see* text accompanying note 38 *supra*.

51. This paper concerns equal protection challenges to prosecutions in federal courts. No attempt has been made to document such challenges in state courts.

52. Edelman v. California, 344 U.S. 357 (1953); Gundling v. Chicago, 177 U.S. 183 (1900); Crowley v. Christensen, 137 U.S. 86 (1890); United States *ex rel.* Plue v. Cummings, 224 F.2d 276 (2d Cir. 1955); Sanders v. Waters, 199 F.2d 317 (10th Cir. 1952); Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 96 (6th Cir. 1947); City of Evansville v. Gaseteria, 51 F.2d 232 (7th Cir. 1931); United States v. Palermo, 152 F. Supp. 825 (E.D. Pa. 1957); Broad-Grace Arcade Corp. v. Bright, 48 F.2d 348 (E.D. Va. 1931).

53. Grell v. United States, 112 F.2d 861, 875-76 (8th Cir. 1940); Saunders v. Lowry, 58 F.2d 158, 159 (5th Cir. 1932); United States v. Manno, 118 F. Supp. 511, 515 (N.D. Ill. 1945); Buxbom v. City of Riverside, 29 F. Supp. 3, 18 (S.D. Cal. 1939).

54. United States v. Robinson, 311 F. Supp. 1063, 1065-66 (W.D. Mo. 1969) (systematic violation by government of wiretapping statutes and application of statutes to private detective represents unjust discrimination in statutes' enforcement).

55. Boynton v. Fox West Coast Theatres Corp., 60 F.2d 851, 853-54 (10th Cir. 1932). The plaintiffs in *Boynton* were theatre owners in one county who challenged the enforcement of the Sunday closing law against them because county attorneys in other counties were not enforcing the law.

56. *Id.* The court in *Boynton* nevertheless rejected the theatre owners' claim, finding that they had failed to prove discrimination in violation of equal protection of the law. *Id.* at 854.

57. 321 U.S. 1, 11 (1944). *See* note 38 *supra* and accompanying text for a discussion of *Snowden*.

58. For typical unsuccessful challenges, *see, e.g.*, Grell v. United States, 112 F.2d 861, 875 (8th Cir. 1940) (fraudulent schemes to obtain contracts); Saunders v. Lowry, 58 F.2d 158, 159 (5th Cir. 1932) (accepting bribes); United States v.

It was not until 1962 that the Supreme Court actually addressed the issue of "discriminatory prosecution." [59] In *Oyler v. Boles*,[60] the Court considered a challenge to the administration of West Virginia's habitual criminal statute. The statute "provide[d] for mandatory life sentence upon the third conviction 'of a crime punishable by confinement in a penitentiary.'" [61] The petitioners, both sentenced to life imprisonment under the statute,[62] claimed a denial of equal protection because the prosecuting authorities sought to enforce the statute only in a minority of cases where the statutory standards were satisfied.[63] Thus, the petitioners argued that they had been denied equal protection with respect to other three-time offenders who had not been prosecuted under the statute.[64]

The Supreme Court noted that the petitioners had not alleged "whether the failure to proceed against other three-time offenders was due to lack of knowledge of the prior offenses on the part of the prosecutors or was the result of a deliberate policy of proceeding only in a certain class of cases or against specific persons." [65] Acknowledging that the statistics showed that a high percentage of those subject to the law had not been proceeded against, the Court concluded:

> [T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged.[66]

Palermo, 152 F. Supp. 825, 828 (E.D. Pa. 1957) (tax avoidance). *See also* Thompson v. Spear, 91 F.2d 430, 433-34 (5th Cir. 1937), *cert. denied*, 302 U.S. 762 (1938) (no denial for equal protection where commission made diligent effort to enforce laws fairly and impartially but unable to do so).

59. In Edelman v. California, 344 U.S. 357, 359 (1953), the Supreme Court indicated that a showing of systematic or intentional discrimination would have been a defense to the defendant's criminal prosecution, had it been shown. The Court, however, did not reach the issue, since the case had already been disposed of on state procedural grounds. *See also* Two Guys v. McGinley, Inc., 366 U.S. 582, 588-89 (1961), in which the Court noted the possibility of a defense of discriminatory prosecution.

60. 386 U.S. 448 (1962).

61. *Id.* at 449 (citing W. VA. CODE § 6130 (1961)).

62. 368 U.S. at 449-51.

63. *Id.* at 455.

64. *Id.* at 455-56.

65. *Id.* at 456.

66. *Id.*

Put in a modern context, the challenge in *Oyler* failed for want of a showing of intentional discrimination.[67]

Since the Supreme Court's decision in *Oyler v. Boles,* there has been a dramatic increase in the number of cases in which defendants or prospective defendants have alleged that their prosecutions were, or that threatened prosecutions would be, violative of equal protection. The following section attempts to discern from this mass of cases exactly what constitutes unconstitutional prosecutorial discrimination.

III. The Elements of the Discriminatory Prosecution Defense

The elements of a defense of discriminatory prosecution are that others, similarly situated, have not been prosecuted and that the government's selection of the particular defendant for prosecution has been invidious or in bad faith, that is, based upon such impermissible considerations as race, religion or the desire to prevent the exercise of constitutional rights.[68] The classic statement of the discriminatory defense is found in *United States v. Berrios,*[69] and has been widely, if not universally, adopted.[70] The following subsections will examine in detail the substantive requirements of the defense.[71]

A. Element 1: Nonprosecution of Others Similarly Situated

This element may be thought of as a threshold requirement for establishing the defense. The requirement of showing unequal treatment between persons similarly situated has its historic base in *Yick*

67. *See generally* Washington v. Davis, 426 U.S. 229, 240 (1976) (equal protection challenge requires a showing of intentional or purposeful discrimination).

68. In United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974), the court stated:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie,* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as "intentional and purposeful discrimination."

69. *Id.*

70. For cases adopting the *Berrios* restatement, *see, e.g.,* United States v. Stout, 601 F.2d 325, 328 (7th Cir.), *cert. denied,* 444 U.S. 979 (1979); United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978); United States v. Bourque, 541 F.2d 290, 293 (1st Cir. 1976); United States v. Leggett & Platt, Inc., 542 F.2d 655, 658 (6th Cir. 1976), *cert. denied,* 430 U.S. 945 (1977); United States v. Oaks, 527 F.2d 937, 940 (9th Cir. 1975), *cert. denied,* 426 U.S. 952 (1976); United States v. Swanson, 509 F.2d 1205, 1208-09 (8th Cir. 1975); United States v. Ortega-Alvarez, 506 F.2d 455, 458 (2d Cir. 1974), *cert. denied,* 421 U.S. 910 (1975).

71. *See* Cardinale & Feldman, *supra* note 15, at 668-76 for an interesting examination of and commentary on the substantive requirements of the defense.

Wo v. Hopkins,[72] in which the petitioner showed that with respect to all of those similarly situated, the law prohibiting the operation of laundries in wooden structures was being enforced only against Chinese persons. In all cases where the discriminatory prosecution defense has prevailed, the defendant has successfully proved that the government is not proceeding against others, and that these others are "similarly situated" by virtue of having committed the same offense.[73]

The nebulous concept of persons "similarly situated" was developed in a line of cases involving the Sunday closing laws. The Supreme Court had upheld the constitutionality of the Sunday closing laws, also indicating that states could create reasonable exceptions to the laws without running afoul of the equal protection clause.[74] Several years later, in *Zayre of Georgia, Inc. v. City of Atlanta,*[75] suit was brought seeking an injunction to require the city to enforce its Sunday closing law [76] in a nondiscriminatory manner. The petitioner's chief complaint was that "drug stores" carrying many of the same items sold by the petitioners were allowed to remain open on Sundays, while the petitioners were not.[77] The district court noted the competitive advantage an establishment could gain by labeling itself a "drug" store rather than a "department" store.[78]

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72. For a discussion of *Yick Wo, see* notes 31-36 *supra* and accompanying text.

73. For a discussion of several cases in which the first element of the discriminatory prosecution defense was met, *see* text accompanying notes 106-25 *infra.*

74. McGowan v. State of Maryland, 366 U.S. 420, 426 (1961) (exempted commodities necessary either for health of populace or enhancement of recreational atmosphere of day); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 585 (1961) (works of charity and necessity, delivery of milk, wholesome recreation and work in connection with rendering service by a public utility exempted).

75. 276 F. Supp. 892 (N.D. Ga. 1967).

76. The statute provided: "'Any person who shall pursue his business or the work of his ordinary calling on the Lord's day, works of necessity or charity only excepted, shall be guilty of a misdemeanor.'" 276 F. Supp. at 893 (quoting GA. CODE § 26-6905 (1958)).

77. 276 F. Supp. at 893-94. The court explained that while the statute itself excepted works of necessity or charity, various activities, including the operation of dance halls and movie theaters and the promotion of athletic events such as baseball, football and automobile racing, had also been exempted by subsequent legislation. Other activities, including the sale of gasoline, drugs and food for consumption, had been exempted by judicial decision. 276 F. Supp. at 893. It was also stipulated

> that drug stores carrying consumer goods from A to Z are allowed to stay open on Sundays and to sell all their wares, not just drugs; that drive-in groceries which carry almost every article of food which the consumer may have forgotten to purchase during the other six days of the week remain open on Sunday; that the [city] operates recreational facilities which sell tennis and golf equipment; that the [city] licenses and operation of shops which sell lighters, clothes and other consumer durables in the [city's] municipal airport; and that television repairmen are left free to follow their ordinary course of business on Sunday.

Id. at 893-94.

78. 276 F. Supp. at 893.

The court concluded that while a municipality can create reasonable exceptions to its Sunday closing law, it may not carve out exceptions through selective enforcement of the state statute. The court, in issuing the injunction requested by the petitioners, held that under *Yick Wo v. Hopkins,* the city's enforcement policy must be applied in a fair and nondiscriminatory manner.[79] However, the court's opinion is rather unclear with respect to what exactly constitutes nondiscriminatory enforcement in this context.

Several years after the first *Zayre* case, the Court of Appeals for the Fifth Circuit clarified what constituted unconstitutional selective enforcement in the context of the Sunday closing laws. In *Zayre of Georgia, Inc. v. City of Marietta,*[80] the department stores appealed a denial of their motion to broaden a preliminary injunction issued against the discriminatory enforcement of a Sunday closing law.[81] The original injunction had been issued as a result of the plaintiffs' allegations that they were being denied equal protection of the laws. Plaintiffs claimed to have been threatened with prosecution and revocation of their business licenses for remaining open in violation of the statute, while other business establishments selling many of the same items *"in direct competition"* with the department store had been allowed to conduct business on Sunday without threat of prosecution or revocation of licenses.[82]

After their initial victory, the plaintiffs in *Zayre* sought to broaden the preliminary injunction so as to include the alleged discriminatory enforcement of the statute with respect to other businesses or occupations *not* directly in competition with the appellants. The lower court refused to do so,[83] finding "a great difference between discriminatory enforcement of a statute and non-discriminatory non-enforcement." [84]

The Fifth Circuit agreed that the appellants did not have standing to assert a denial of equal protection with respect to the nonenforcement of the statute toward noncompetitive businesses.[85] The court noted that *Yick Wo,* unlike the instant case, involved discrimination based on race between two classes in direct economic competition with each other.[86] However, after the granting of the preliminary injunction, there was no longer any inequality of treatment among those in direct economic competition. Consequently, the court found *Yick Wo*

79. *Id.* at 894.
80. 416 F.2d 251 (5th Cir. 1969), *cert. denied,* 397 U.S. 918 (1970).
81. 416 F.2d at 252.
82. *Id.* (emphasis added).
83. *Id.* at 253.
84. *Id.*
85. *Id.*
86. *Id.* at 253-54.

inapplicable because those allegedly receiving preferential treatment were not in similar circumstances to the appellants.[87] Since discrimination had not been shown to exist in enforcement between parties "similarly situated," the court agreed that no relief could be afforded to the appellants.[88]

Judge Boyle, writing in dissent,[89] argued that all businesses or occupations which were violating the statute were "similarly situated" with respect to the appellants.[90] He would have enlarged the injunction to prevent what he perceived to be discriminatory enforcement.

The conclusion to be drawn from the *Zayre* cases is that for the purposes of the Sunday closing laws, "similarly situated" means businesses engaged in direct economic competition—the same type of business or businesses that sell the same items or conduct the same activities. Different businesses, although both theoretically subject to enforcement of the closing laws, are not "similarly situated." [91] In addition, the "same" businesses in different geographic areas are not similarly situated.[92] Thus, the standards to be met in showing that others are "similarly situated" are stringent.

The Sunday closing law cases were decided before *Berrios* and a majority of other discriminatory prosecution cases.[93] The rule discernible from *Berrios* and the various other discriminatory prosecution cases is consistent with the Sunday closing law cases. The defendant must allege and offer evidence tending to show that the government, aware of others committing the same or similar offenses as the de-

87. *Id.* at 254.

88. *Id.*

89. 416 F.2d 252, 254 (Boule, J., dissenting).

90. Judge Boyle concluded:

> Thus, those "similarly situated" in this case are all persons pursuing their regular business or calling, other than in the spheres of charity or necessity. The statute applies to "any person" and, therefore, those "similarly situated," for purposes of this statute, are "all persons" and are those entitled to be treated alike. The fact that a retail merchant is more "similarly situated" with other retail merchants, for example, than he is with a florist or pet shop operator, does not compel the conclusion that the retail merchant and the florist and the pet shop operator are not "similarly situated" so far as this statute is concerned. To hold otherwise is to read Yick Wo v. Hopkins . . . too narrowly.

416 F.2d at 255.

91. Zayre v. Marietta, 416 F. Supp. at 254. *See also* Broad-Grace Arcade Corp. v. Bright, 48 F.2d 348, 351 (E.D. Va.), *aff'd*, 284 U.S. 588 (1931) (court rejected contention that enforcement of Sunday law against miniature golf course operator was arbitrary discrimination denying equal protection because government failed to enforce it against persons engaged in other activities in same locality).

92. *See* Boynton v. Fox West Coast Theatres Corp., 60 F.2d 851, 854 (10th Cir. 1932) (enforcement of Sunday law against theatres held not to involve denial of equal protection of law, even though county attorneys in other counties were not enforcing law).

93. Most of the discriminatory prosecution cases were decided in the 1970's. United States v. Robinson, 311 F. Supp. 1063 (W.D. Mo. 1969), was the first case in which a conviction was reversed on the grounds of discriminatory prosecution.

fendant, has not prosecuted those others, but has "singled out" the defendant or a class of defendants for prosecution. Governmental or prosecutorial knowledge of the other violators appears to be crucial to the defense.[94]

Failure to make the allegation that others similarly situated are not being prosecuted will result in a rejection of the defense.[95] The mere allegation that others are committing the same offense is insufficient.[96] Similarly, evidence that another person previously committed the same crime and was not prosecuted will not support the claim.[97] In addition to showing that others have committed the same crime or have engaged in similar conduct, evidence must be presented that they are not being and have not been prosecuted. There must be more than the mere possibility that others will not be prosecuted.[98] Therefore, evidence of other prosecutions will generally obviate the claim.[99] A showing of few or no prior prosecutions of a particular crime, without more, is likewise insufficient.[100]

The "others not being prosecuted" must be engaged in basically the same act as the defendant,[101] thereby committing the same crime or violating the same statute.[102] Even if persons are violating the

94. For cases which show that the government's knowledge of other violators is crucial, *see* text accompanying notes 106-25 *infra.*

95. United States v. Bourque, 541 F.2d 290, 293 (1st Cir. 1976); United States v. Dawson, 400 F.2d 194, 204 (2d Cir. 1968), *cert. denied,* 393 U.S. 1023 (1969); United States v. Hubbard, 474 F. Supp. 64, 77 (D.D.C. 1979).

96. *See* United States v. Kelly, 556 F.2d 257, 265 (5th Cir. 1977), *cert. denied,* 434 U.S. 1017 (1978) (defendant claimed DEA officials committed some offenses as he, a Customs Service employee, and Justice Department decided to prosecute Customs Service and not DEA). *See also* United States v. Shober, 489 F. Supp. 393, 405 (E.D. Pa. 1979) (allegation that everyone was engaging in similar conduct was held insufficient).

97. United States Labor Party v. Oremus, 619 F.2d 683, 690-91 (7th Cir. 1980).

98. United States v. Malinowski, 472 F.2d 850, 860 (3d Cir.), *cert. denied,* 41 U.S. 970 (1973) (mere possibility that similar cases will be treated more leniently did not support claim of discriminatory prosecution).

99. The following cases show that even as few as 2-3 other prosecutions will preclude a successful discriminatory prosecution defense: United States v. Kahl, 583 F.2d 1351, 1353-54 (5th Cir. 1978); United States v. Oaks, 527 F.2d 937, 939-40 (9th Cir. 1975); Rhinehart v. Rhay, 440 F.2d 718, 727 (9th Cir.), *cert. denied,* 404 U.S. 825 (1971); United States v. Carson, 434 F. Supp. 806, 809 (D. Conn. 1977).

100. United States v. Union Nacional de Trabajadores, 576 F.2d 388, 395 (1st Cir. 1978).

101. United States v. Cooper, 577 F.2d 1079, 1086 (6th Cir.), *cert. denied,* 439 U.S. 868 (1978) (defendants convicted for misapplying bank funds while those who made nominee loans escaped prosecution); United States v. Cantu, 557 F.2d 1173, 1177-78 (5th Cir. 1977), *cert. denied,* 434 U.S. 1063 (1978) (defendant convicted of "shielding" illegal aliens while others who employed illegal aliens not prosecuted); United States v. Smith, 523 F.2d 771, 782 (5th Cir. 1975), *cert. denied,* 429 U.S. 817 (1976) (prosecutor could prosecute filing of false Medicare statements while not prosecuting Medicare form mistakes); Georgia v. Mitchell, 450 F.2d 1317, 1321 (D.C. Cir. 1971) (Attorney General could prosecute de jure segregation and fail to prosecute de facto segregation).

102. In United States v. Torquato, 602 F.2d 564, 571 (3d Cir.), *cert. denied,* 444 U.S. 941 (1979), the defendant charged that only Democrats were being in-

same statute or ordinance, a difference in the magnitude of the violation may, nevertheless, mean that the persons are not similarly situated.[103]

Although different courts have varied in their definition of "similarly situated," [104] the common thread in all of the cases is a showing that the government or prosecutor, with the knowledge [105] that other people are engaging in substantially the same conduct as the defendant or class of defendants and thus violating the same statute, does not prosecute the others, but instead singles out the defendant or class of defendants for prosecution. An examination of several cases in which the defense was successfully raised will serve to illustrate the point.

In *United States v. Robinson,*[106] a private detective challenged his conviction for violating wiretapping statutes. The defendant presented a substantial amount of documentary evidence which showed that although government officials were engaging in systematic violations of the same statutes that the defendant had violated, no government official had ever been prosecuted. The defendant included in his evidence [107] references to such cases as *Katz v. United States,*[108] *Alderman v. United States,*[109] *Desist v. United States,*[110] and *Olmstead v. United States,*[111]

dicted for extortion. However, the court found that the defendant had not made a sufficient prima facie showing inasmuch as there was no evidence that Republicans were engaging in the *same* conduct as the defendant, that is, extortion of a particular group of persons, equipment lessors to the Pennsylvania Department of Transportation. 602 F.2d at 571. *See also* Wheaton v. Hagan, 435 F. Supp. 1134, 1148-49 (M.D.N.C. 1977) (policy of arresting possessors of marijuana while not arresting possessors of alcoholic beverages in public place was not nonprosecution of others similarly situated).

103. Cook v. City of Price, 566 F.2d 699, 701-02 (10th Cir. 1977).

104. Cardinale & Feldman, *supra* note 15, at 669. The authors cite for support, at 669 n.72, United States v. Kelly, 556 F.2d 257, 264 (5th Cir. 1977) (similar offenses); United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975), *cert. denied,* 424 U.S. 955 (1976) (others generally have not been prosecuted for conduct similar to conduct for which defendant was prosecuted); United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974) (other persons who have not been proceeded against because of conduct of the type forming basis of charge); United States v. Stagman, 446 F.2d 489, 494 (6th Cir. 1971) (persons committing similar offenses committed in approximately same time and area); United States v. Dawson, 400 F.2d 194, 204 (2d Cir. 1968) (except for being prosecuted, defendant must be identically situated with other violators); United States v. Robinson, 311 F. Supp. 1063, 1065 (W.D. Mo. 1969) (similarity of circumstances).

105. *See, e.g.,* United States v. Baechler, 509 F.2d 13, 15 (4th Cir. 1974), *cert. denied,* 421 U.S. 993 (1975) (failure of government to prosecute all evaders of Selective Service Act could have been due to lack of knowledge).

106. 311 F. Supp. 1063 (W.D. Mo. 1969).

107. *Id.* at 1064-66.

108. 389 U.S. 347 (1967) (warrant requirement for electronic surveillance by government).

109. 394 U.S. 165 (1969) (suppression of evidence obtained through illegal electronic surveillance by government).

110. 394 U.S. 244 (1969) (prospective application of *Katz v. United States* to electronic surveillance by government).

111. 277 U.S. 438 (1928) (former law with respect to evidence obtained through electronic surveillance by government).

and various authorities [112] and Senate hearings [113] from which there could be drawn only one conclusion—the government was, with impunity, knowingly and systematically violating the wiretap statutes.[114] Surprisingly, the fact that the unprosecuted violators were government officials did not negate the fact that they were similarly situated to the defendant.[115]

In *United States v. Steele*,[116] the defendant, convicted for failure to complete the 1970 census form, showed that in Hawaii there had been only four prosecutions for failure to complete the census.[117] Additionally, the defendant alleged that other people who had not completed the form had not been prosecuted.[118] The government's recording procedure showed who had and who had not complied with the law.[119] The defendant was able to locate six other persons who had refused to complete the form, but who had not been prosecuted.[120] While those six had not taken a public stand on the issue, the only four individuals prosecuted had actively participated, as did the defendant, in a census resistance movement.[121] The defendant in *Steele* was therefore successful in showing that others similarly situated had not been prosecuted.[122]

Finally, in *United States v. Falk*,[123] the first element of the defense was met by evidence that the government, aware of over 25,000 violations of the Selective Service laws, had a written policy of nonenforcement,[124] and that the government had nevertheless prosecuted the defendant, an active member of a draft counseling organization, for violating those laws.[125]

The information necessary to show that others similarly situated have not been prosecuted is usually in the hands of the prosecutor or the government, if it exists at all.[126] Thus, the defendant, who bears

112. *See* United States v. Robinson, 311 F. Supp. at 1065 n.1 for a list of sources which tend to prove the systematic and widespread violation by the government of the wiretapping statute.

113. *Id.*

114. *Id.* at 1064-65.

115. *Id.* at 1066.

116. 461 F.2d 1148 (9th Cir. 1972). For a further discussion of *Steele*, *see* notes 178-87 *infra* and accompanying text.

117. *Id.* at 1150.

118. *Id.* at 1151.

119. *Id.* at 1152.

120. *Id.* at 1151.

121. *Id.*

122. *Id.* at 1152.

123. 479 F.2d 616 (7th Cir. 1973).

124. *Id.* at 621.

125. *Id.* at 619-20.

126. For further discussion of the defendant's problems in obtaining evidence from the government, *see* notes 272-76 *infra* and accompanying text.

the burden of establishing a prima facie case,[127] often does not have available the evidence crucial to his or her defense. Therefore, few defendants are successful in overcoming the hurdle imposed by the first element.[128]

B. Element 2: "Invidious" or "Bad Faith" Prosecution

Under the *Berrios* test for discriminatory prosecution, once the first element has been shown—that others, similarly situated, have been prosecuted—there still remains the second element. A defendant must prove that in addition to being singled out, he or she was singled out for prosecution invidiously or in bad faith. In other words, the defendant must show that the prosecution was based on either an impermissible consideration such as race, religion, nationality, or other arbitrary classification,[129] or the desire to prevent the exercise of constitutional rights. The cases that have been decided under this second element are voluminous. These cases and the principles that emerge from them will be examined in the following section.

1. Arbitrary Classification

The only case in which the Supreme Court actually struck down a prosecution as discriminatory was *Yick Wo v. Hopkins*.[130] The grounds for that decision were unexceptional by modern standards—nationality or race could not determine against whom an ordinance would be enforced. Surprisingly, there have been few subsequent federal cases in which a prosecution has been so challenged. Although numerous defendants have alleged that their prosecutions were discriminatory, they have not contended that such prosecutions have been

127. For a further discussion of the defendant's prima facie case, *see* text accompanying notes 251-61 *infra*.

128. For a further discussion of why defendants are usually unsuccessful in proving the first element of the defense, *see* text accompanying notes 272-76 *infra*.

129. The arbitrary classification standard appears roughly analogous to the strict scrutiny standard of review traditionally employed by the courts in equal protection challenges. Arbitrary classifications are inherently suspect and to be permissible must be justified by a compelling state interest. Korematsu v. United States, 323 U.S. 214, 216 (1944). It is virtually impossible to find any interest that will justify the state's imposition of an inherently suspect, arbitrary classification. *But see* Korematsu v. United States, 323 U.S. at 217-18 (upholding constitutionality of incarceration and dispossession of all persons of Japanese ancestry on West Coast following bombing of Pearl Harbor); Hirabayashi v. United States, 320 U.S. 81, 92 (1943) (upholding West Coast curfew against persons of Japanese origin).

Inherently suspect classifications include race, color, religion, national origin, nationality, and ancestry. J. NOWAK, R. ROTUNDA, and J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 527 (1978). Not included are wealth, San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 25 (1973), and sex, Craig v. Boren, 429 U.S. 190, 197-99 (1976).

130. For a discussion on *Yick Wo, see* notes 30-36 *supra* and accompanying text.

based upon classifications, such as race or nationality, which are suspect under the traditional equal protection analysis. It may be intuitively obvious to some, and there is certainly supporting documentation for the belief, that the laws in the United States are applied unequally, especially with respect to minority citizens.[131] One would expect that, given the revitalization of the *Yick Wo* decision in the late 1960's and 1970's, there would be more cases involving prosecutorial discrimination based on race or nationality. Federal jurisdiction would exist in such cases, including those involving local prosecutors, because the defendant would be asserting a claim under the Federal Constitution, the denial of equal protection guaranteed by the fifth and fourteenth amendments. Of course, federal review would be discretionary.

A possible explanation for the dearth of this kind of case may be that these disputes are typically dealt with in state courts.[132] Those discriminated against on the basis of race or nationality are often people who simply cannot afford to bring their causes to the federal system. Usually, their cases will already be in state courts.[133] In addition, unless the evidence is overwhelmingly clear, a defense of alleged discriminatory prosecution is unlikely to prevail. As pointed out earlier, defendants will rarely have the necessary evidence, even when it does exist, to prove their claims.[134]

Although the Supreme Court has reaffirmed the holding of *Yick Wo*, the Court has not reversed any convictions on these grounds.[135]

131. For documentation of the unequal application of laws in this country, *see generally* D. BELL, RACE, RACISM & AMERICAN LAW (1980).

132. *See, e.g.*, People v. Harris, 182 Cal. App. 2d 837, 5 Cal. Rptr. 852 (1960), in which a defendant's conviction for gambling was reversed and a new trial ordered so that the defendant could attempt to prove the deliberate and intentional racially discriminatory enforcement of a law in violation of the equal protection guarantees of the federal and state constitutions. *Id.* at 842, 5 Cal. Rptr. at 855-56. At trial the defendant had unsuccessfully offered to prove that in Pasadena during a three-year period far more blacks than whites were arrested for gambling; that the police chief routinely ordered his officers to patrol the black section of town for gambling while no such action was taken in the white section; and that there were, all through the period involved, gambling clubs for white men in which no arrests were made. There was evidence that the police chief knew of the white clubs and was even a member of one of them. 182 Cal. App. 2d at 839, 5 Cal. Rptr. at 854.

For a discussion of state court cases dealing with the issue of discriminatory prosecution, *see generally* Annot., 4 A.L.R. 3d 404-21 (1965).

133. It seems fairly safe to generalize by saying that the state and local prosecutors handle most "street crime." On the other hand, federal prosecutors, especially in recent years, have been focusing on certain types of crime, particularly white collar crime and political corruption. Thus, one could conclude that minorities are prosecuted much more frequently by local, rather than by federal, prosecutors. Their cases would then be heard in state courts.

134. For a discussion of the difficulty for a defendant to obtain evidence of his or her discriminatory prosecution, *see* Part IV, *infra*.

135. In Ah Sin v. Wittman, 198 U.S. 500 (1905), although the Court reaffirmed the *Yick Wo* ruling, it held that the defendant in that case had not sufficiently proved discriminatory enforcement. The defendant showed that the ordinance under which he was convicted had only been enforced against Chinese persons. The Court denied habeas corpus relief to the defendant because there had been no proof that

In other federal cases defendants have claimed that they have been discriminated against because of their religious beliefs,[136] but such cases have usually involved the active exercise of first amendment freedoms.

In *United States v. Cammisano,*[137] the defendants, who had been prosecuted for violating the Meat Inspection Act,[138] alleged selective prosecution on the basis of their Italian ancestry.[139] The case was ultimately dismissed because of the government's refusal to turn prosecutorial information over to defense counsel,[140] which may be viewed as a small victory in and of itself. The district court, in finding that the defendants had raised a reasonable doubt about the prosecutor's purpose sufficient to require production of government documents for in camera inspection, noted the distinction between a prosecutorial classification based on one's nationality or ancestry and one based on "alleged association with 'organized crime.'" [141] The court in *Cammisano* noted that while a classification based on the former would be impermissible unless it furthered some compelling state interest, a classification on the basis of an alleged association with organized crime would most likely be permissible as rationally related to valid law enforcement needs.[142] Other cases have held that it is not unreasonable for a prosecutor to single out for investigation or prosecution persons suspected of being involved in organized crime [143] or

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others, besides the Chinese citizens convicted, had violated the ordinance. 198 U.S. at 759. The *Ah Sin* decision apparently rested on the defendant's failure to sufficiently prove the first element of the discriminatory prosecution defense.

136. *See, e.g.,* United States v. Murdock, 548 F.2d 599, 600 (5th Cir. 1977), where the defendant claimed that he had been singled out for failure to file federal income tax returns because he had "assert[ed] his First Amendment Religion/ Political Freedoms to be a Protestant or Protestor."

137. 413 F. Supp. 886 (W.D. Mo.), *aff'd,* 546 F.2d 238 (8th Cir. 1976).

138. 21 U.S.C. § 601ff (1972). The Meat Inspection Act is generally concerned with preventing the flow of unwholesome, adulterated or misbranded meat or meat food products into the stream of interstate commerce.

139. 413 F. Supp. at 890.

140. United States v. Cammisano, 433 F. Supp. 964, 967 (W.D. Mo. 1977).

141. 413 F. Supp. at 891 n.5.

142. *Id.* For an excellent discussion of the "reasonable classification" doctrine in selective enforcement, *see* Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws,* 61 COLUM. L. REV. 1103, 1115-22 (1961). For a discussion of prosecutorial classifications under an equal protection analysis, *see* Givelber, *supra* note 10, at 90-96. For a further discussion of prosecutorial classifications, *see* note 167 *infra.*

143. In United States v. Sacco, 428 F.2d 264 (9th Cir.), *cert. denied,* 400 U.S. 903 (1970), the court stated:

> Here, selection of this defendant for intensive investigation was based on his suspected role in organized crime . . . . It cannot be said that that standard for selection is not rationally related to the purposes of the various criminal laws for violation of which [the defendant] was being investigated, including the alien registration laws.

428 F.2d at 271. *See also* United States v. Scherer, 523 F.2d 371, 377 (7th Cir. 1975), *cert. denied,* 424 U.S. 911 (1976) (defendant must offer evidence that he was singled out for investigation, or that government's surveillance had impermissible

racketeering.[144]

Prosecution for violation of the tax laws is a fertile area for claims of selective enforcement. Although many of these challenges concern the exercise of protected rights,[145] some challenges have centered on allegedly discriminatory classifications. The Eighth Circuit has unequivocally held that it is not unreasonable prosecutorial discretion to focus on the prosecution of attorneys, accountants and other enrolled practitioners,[146] given the "special obligations and responsibilities [of these professionals] to the tax laws." [147] Similarly, the prosecution of politically prominent or newsworthy persons is generally not an impermissible basis for selection.[148] Although there may be countervailing first amendment considerations,[149] the publicity surrounding the prosecution of public figures may enhance law enforcement needs such as deterrence and equality.[150]

Although it is not impermissible for a prosecutor to single out suspected criminals, public figures, or tax professionals, a prosecutorial classification according to whether a person is an employee of the government may be impermissible. In *United States v. Robinson,*[151] a private detective was convicted for a clearly illegal wiretap.[152] The defendant asserted a defense of discriminatory prosecution, alleging that government officials had been extensively violating the wiretapping statutes, but had never been prosecuted.[153] Finding that government officials engaging in illegal wiretapping were similarly situated to the

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prosecutorial purpose). The legendary case in this context is former Attorney General Robert Kennedy's allegedly relentless prosecution of suspected mobster Jimmy Hoffa. S. ZAGRI, FREE PRESS, FAIR TRIAL 3-4 (1966).

144. United States v. Manno, 118 F. Supp. 511, 515 (D.C. Ill. 1954) (fact that "racketeers" were singled out for prosecution for tax violations held not to constitute unconstitutional discrimination).

145. For an analysis of the tax protestor cases, *see* notes 212-17 *infra* and accompanying text.

146. United States v. Swanson, 509 F.2d 1205, 1208 (8th Cir. 1975); United States v. Wiley, 503 F.2d 106, 107 (8th Cir. 1974).

147. United States v. Swanson, 509 F.2d 1208.

148. United States v. Ojala, 544 F.2d 940, 943-45 (8th Cir. 1976) (prosecution of politically prominent person held not impermissible); United Statse v. Peskin, 527 F.2d 71, 86 (7th Cir. 1975), *cert. denied,* 429 U.S. 818 (1976) (same).

149. For a discussion of cases involving an impermissible interference with the exercise of first amendment rights, *see* text accompanying notes 169-214 *infra.*

150. The deterrent value of prosecuting prominent people is clear. The consideration of equality before the law generally concerns prosecutions of public officials and non-controversial public figures.

151. 311 F. Supp. 1063 (W.D. Mo. 1969). For a further discussion of the *Robinson* case, *see* text accompanying notes 106-14 *supra.*

152. 311 F. Supp. at 1063. The defendant had wiretapped the telephone of a client's unfaithful wife.

153. *Id.* at 1064. The court explained that defense counsel had attempted, but had not been permitted, to submit the defense of unconstitutional systematic discrimination against private persons in the enforcement of the wiretap statutes. The question had been reserved as a ground for a motion for judgment of acquittal. *Id.*

private defendant who engaged in illegal wiretapping,[154] the court could discern "no reasonable basis for systematic discriminatory enforcement." [155] The court concluded that the application of the wiretap statutes to the defendant "represented a systematic, fixed, and continuous policy of unjust discrimination in their enforcement in violation of the Fifth Amendment." [156]

The result in *Robinson* is somewhat surprising. Even though the discrimination was found to be systematic, one would not expect that the classification—governmental versus nongovernmental employee —would be deemed unreasonable. Under a traditional equal protection analysis, it seems unlikely that this classification would be struck down.[157] That is not to say that the classification in *Robinson* should have been upheld. The point is merely that it is surprising that the court did not find the classification reasonable for law enforcement purposes.

A few years later, the court in *United States v. Perkins* [158] rejected a claim of discriminatory prosecution based upon the same governmental/nongovernmental distinction. In *Perkins,* the court distinguished *Robinson* on the basis of the enactment of the Omnibus Crime Control Act of 1968, which amended the wiretap law applicable in *Robinson.*[159] However, the court indicated that apart from the statu-

154. 311 F. Supp. at 1065. The court stated at 1064-65:

> Much documentary evidence has been adduced by defendant on his motion for acquittal or for new trial to show that, during this time, and before and after, the Government itself, while it was not explicitly exempt from the operation of the statute, engaged in its systematic violation. . . . [T]hrough the time in question here, the agencies of the federal government did in fact engage in extensive wiretapping activities in violation of . . . the statutes under which the defendant in the case at bar has been charged. These activities have continued right up to the time of the alleged offense in the case at bar. . . . The abundance of . . . materials which tend to prove the systematic violation of the wiretapping statute is great. The necessary conclusion from this evidence is that there has been systematic discrimination in the enforcement of the act against the defendant in this case, which renders the prosecution invalid.

155. *Id.* at 1065-66.

156. *Id.* at 1066.

157. *Id.*

158. It should be noted that the emphasis in cases of illegal governmental surveillance of wiretapping has been on the exclusionary rule. The interests of innocent persons wiretapped or placed under surveillance have not received much attention. However, it appears that a distinction for law enforcement purposes between governmental and nongovernmental offenders would probably be considered reasonable. For a discussion of a case which considered this distinction reasonable, *see* notes 159-60 *infra* and accompanying text.

159. The court noted that *Robinson* involved a prosecution arising *before* the Omnibus Crime Control Act of 1968, 18 U.S.C. § 2511 (1976 and Supp. III 1979), which gave the government limited eavesdropping powers, 383 F. Supp. at 928. In *Perkins,* the defendant's allusions to the spectre of Watergate and other governmental malfeasances was insufficient to invalidate his prosecution. It should be noted that in *Robinson* the applicable wiretapping law was 18 U.S.C. § 2 (1964) and the Communications Act of 1934, 47 U.S.C. §§ 501, 605 (1976).

tory distinctions, the type of prosecutorial discretion alleged was not unlawful.[160] The *Perkins* court apparently would allow a prosecutorial policy that made a distinction based on one's employment with the government. Given the general judicial reluctance to examine prosecutorial discretion or to strike down prosecutions,[161] *Perkins* would appear to be the prevailing approach.

A showing of general laxity in enforcement or a showing that few, if any, have been prosecuted for violating a particular statute or committing a particular crime, without more, will not support a discriminatory prosecution defense.[162] This principle stems from the Supreme Court's pronouncement in *Oyler v. Boles* that mere selectivity in enforcement is not unlawful.[163] Unless the defendant makes *some* allegation that he or she has been prosecuted under an arbitrary prosecutorial classification, the claim of discriminatory prosecution will be summarily rejected.[164] Additionally, creating a new or unusual classification and claiming to have been prosecuted on that basis will most likely not meet with success.[165]

The general rule discernible from the cases appears to be that in order for a defendant to prevail on a challenge to a prosecution, he or

160. 383 F. Supp. at 928.

161. *See* notes 1-17 *supra* and accompanying text for a discussion of the general deference given to prosecutorial discretion.

162. The following cases stand for the proposition that *any* degree of nonenforcement of a law, without more, will not invalidate a prosecution; United States v. Douglass, 579 F.2d 545, 550 (9th Cir. 1978); United States v. Mann, 517 F.2d 259, 271 (5th Cir. 1975), *cert. denied,* 423 U.S. 1087 (1976); United States v. Brookshire, 514 F.2d 786, 788-89 (10th Cir. 1975); United States v. Ortega-Alvarez, 506 F.2d 455, 458 (2d Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); United States v. Raven, 500 F.2d 728, 733 (5th Cir. 1974), *cert. denied,* 419 U.S. 1124 (1975); United States v. Hunter, 459 F.2d 205, 220 (4th Cir.), *cert. denied,* 409 U.S. 934 (1972); United States v. Stagman, 446 F.2d 489, 494 (6th Cir. 1971); United States v. Gebhart, 441 F.2d 1261, 1265 (6th Cir.), *cert. denied,* 404 U.S. 855 (1971); Washington v. United States, 401 F.2d 915, 924 (D.C. Cir. 1968); Moss v. Hornig, 314 F.2d 89, 92 (2d Cir. 1963); United States v. Rickenbacker, 309 F.2d 462, 464 (2d Cir. 1962), *cert. denied,* 371 U.S. 962 (1963); Grell v. United States, 112 F.2d 861, 875 (8th Cir. 1940); Saunders v. Lowry, 58 F.2d 158, 159 (5th Cir. 1932); United States v. Maplewood Poultry, 320 F. Supp. 1395, 1396 (D. Me. 1970); Strasser v. Doorley, 309 F. Supp. 716, 727-28 (D.R.I. 1970); United States v. Palermo, 152 F. Supp. 825, 828 (E.D. Pa. 1957); Buxbom v. City of Riverside, 29 F. Supp. 3, 8-9 (S.D. Cal. 1939).

163. For discussion of *Oyler v. Boles, see* text accompanying notes 59-66 *supra.*

164. United States v. Wallace, 578 F.2d 735, 741 (8th Cir.), *cert. denied,* 439 U.S. 898 (1978); Shock v. Tester, 405 F.2d 852, 856-57 (8th Cir.), *cert. denied,* 394 U.S. 1020 (1969); United States v. Yingling, 368 F. Supp. 379, 382-84 (W.D. Pa. 1973).

165. *See* United States v. Arias, 575 F.2d 253 (9th Cir.), *cert. denied,* 439 U.S. 868 (1978) (defendants who choose to testify being submitted to charges of perjury); United States v. Strutton, 494 F.2d 686 (2d Cir. 1974) (prosecution of pathetic individuals). *See also* United States v. Alarik, 439 F.2d 1349 (8th Cir. 1971), in which a defendant convicted of refusing to register for the draft challenged his prosecution because adult counselors and abettors of draft evasion had not been prosecuted. The court rejected the defendant's charge of discriminatory treatment between those under 26 and amenable to the draft and those over 26 and not amenable to the draft. *Id.* at 1350.

she must show not only that others similarly situated have not been prosecuted, but also that the classification of those prosecuted and those not prosecuted is an impermissible one. Impermissible classifications are those enumerated in the traditional equal protection analysis, including race, religion and nationality.[166] Any other classification must be shown to be unreasonable;[167] and, given the judicial reluctance to examine or question the decision to prosecute, such a requirement will be virtually impossible to meet. *Robinson* is the only case to date in which a court struck down a prosecution on the basis of a classification which, although not inherently suspect, was unreasonable. A more successful approach to showing an invidious or bad faith prosecution has been with prosecutorial attempts to stifle the exercise of constitutional rights.

2. Preventing the Exercise of Constitutional Rights

Although *Yick Wo v. Hopkins* struck down as discriminatory a prosecution on the basis of enforcement directed only against Chinese citizens, the *Yick Wo* holding has been significantly expanded and applied in the context of prosecutions aimed at preventing the exercise of constitutional rights. As early as 1968, Chief Judge Bazelon of the District of Columbia Circuit stated:

166. For a further analysis of prosecutorial classifications, *see* note 129 *supra*. Compare the impermissible considerations determined judicially with those suggested by the United States Department of Justice:

> In determining whether to commence or recommend prosecution or take other action, the attorney for the government should not be influenced by:
> (a) the person's race; religion; sex; national origin; or political association, activities, or beliefs;
> (b) his own personal feelings concerning the person, the person's associates, or the victim; or
> (c) the possible effect of his decision on his professional personal circumstances.

Principles, supra note 20, at 14. While subsection (a) above appears to generally reflect the present state of the law, subsection (b) goes well beyond the law. *See* United States v. Bourque, 541 F.2d 290 (1st Cir. 1976) (defendant failed to show that others similarly situated were not normally prosecuted for offenses with which he was charged; therefore court rejected defendant's claim that prosecution was invalid because charges brought by prosecutor were based on personal vindictiveness).

167. A few commentators have noted the distinction between suspect and non-suspect criteria in law enforcement administration. Amsterdam, *The One-Sided Sword: Selective Prosecution in Federal Courts*, 6 RUT.-CAM. L. REV. 1, 22 (1974), noted the traditional compelling interest/rational basis distinction. In Note, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1115-18 (1973), the idea of the "reasonable classification" doctrine in selective enforcement was developed. The question would be whether the legislature could have reasonably made the classification made by the prosecutor. Finally, in Comment, *Defense Access to Evidence of Discriminatory Prosecution*, 1974 U. ILL. L.F. 648, 651, the author argued that an "arbitrary criterion" is defined as "a basis for selection that is not rationally related to the purposes of the criminal law under which the defendant is charged." (footnote omitted). The author maintained that *any* arbitrary criterion constitutes an unjustifiable standard. *Id.* He found two especially suspect standards to be race or religion, and a standard based on the defendant's exercise of a constitutional right. *Id.* at 652.

> The Government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances. Moreover, a prosecution under such circumstances would be barred by the equal protection clause, since the Government employs an impermissible classification when it punishes those who complain against police misconduct and excuses those who do not.[168]

In 1972 and 1973 three circuit court cases reached the issue of bad faith prosecutions in the context of preventing the exercise of constitutional rights. These cases specifically held a prosecutorial desire to stifle the exercise of constitutional rights to be an invidious or bad faith prosecution, and warrant a more detailed examination.

In *United States v. Crowthers*,[169] the defendants appealed convictions for violations of government regulations occurring during several "Masses for peace" in the Pentagon public concourse in November, 1969 and June, 1970.[170] The Fourth Circuit reversed the convictions because the evidence showed that prior to these particular masses, the authorities had authorized numerous other meetings, band recitals, and masses, some of which probably exceeded the level of noise and obstruction attributed to the defendants.[171] There was also uncontroverted evidence that the authorities had approved of the prior meetings on the concourse,[172] but had disapproved of the defendants' masses for peace.[173]

The court found that the government could not, on the one hand, permit an Episcopal prayer service for the health of the President and

168. Dixon v. District of Columbia, 394 F.2d 966, 968 (D.C. Cir. 1968). The actual holding in *Dixon* was that the judgments of the lower court be vacated and traffic violation charges dismissed with prejudice in a case involving an alleged retaliatory prosecution, where the government expressed no objection to such a dismissal. Although Chief Judge Bazelon addressed the equal protection issue, the two other judges concurred in the result only. *Id.* at 971.

169. 456 F.2d 1074 (4th Cir. 1972).

170. *Id.* at 1076-77. The General Services Administration regulations under which the defendants were arrested were 41 C.F.R. § 101-19.304 Disturbances, which prohibited disorderly conduct on public property, and 41 C.F.R. § 101-19.307a Distribution of handbills, which prohibited the distribution of handbills on public property without the prior approval of an authorized official.

171. 456 F.2d at 1078-79.

172. For example, there had been previously approved an Episcopal prayer service for the health of then-President Nixon at which service there had been 450 persons, far more than there had been at any of the meetings in question. *Id.* at 1078-79.

173. The government alleged that prior meetings had all been religious in nature, while the meetings in which the defendants had been involved were, in reality, "political activity". Even accepting the government's characterization, the court held that the government could not permit those meetings of which it disapproved. *Id.* at 1079. For an elaboration of the court's point, *see* notes 174-77 *infra* and accompanying text.

in support of the Armed Forces, and, on the other hand, prosecute a Quaker or Episcopal prayer service to end all war or the Vietnam War.[174] The court also noted that the government could not bring a prosecution so as to deny the right of the people to peacefully assemble and petition the government for redress of grievances—even those relating to foreign policy.[175] Based on these principles, the court concluded that "[the government] may not permit public meetings in support of government policy and at the same time forbid public meetings that are opposed to that policy." [176] Citing *Yick Wo v. Hopkins* and *Bolling v. Sharpe,* the court concluded:

> "For officials of the United States government to selectively and discriminatorily enforce [a regulation] so as to turn it into a scheme whereby activities protected by the First Amendment are allowed or prohibited in the uncontrolled discretion of these officials violates the defendants' right to equal protection of the laws . . . ." [177]

Not long after the *Crowthers* decision, the Ninth Circuit decided *United States v. Steele.*[178] *Steele* focused upon the appeal of a defendant convicted of violating a statute which punished the refusal to answer questions on a census form.[179] The defendant introduced evidence that the only four people in Hawaii chosen for prosecution for violation of the statute had participated in a census resistance movement, publicizing a dissident view that the census is an unconstitutional invasion of privacy and urging the public to avoid compliance with census requirements.[180] The defendant also alleged that there were other

174. 456 F.2d at 1079.

175. *Id.*

176. *Id.*

177. *Id.* at 1080. The extension of the reasoning of Cox v. Louisiana, 379 U.S. 536 (1965), to *Crowthers* is apparent. In *Cox,* the Court noted the severe danger of the guarantee of equal protection in a discretionary licensing scheme under which parades or meetings were allowed only with the prior permission of an official. *Id.* at 557. The Court stated:

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.

Id. at 557-58.

178. 461 F.2d 1148 (9th Cir. 1972). For a further discussion of *Steele, see* text accompanying notes 116-21, *supra. Id.* at 557-58. *See also Niemotko v. Maryland* and *Fowler v. R.I.,* discussed *supra* at note 37.

179. 461 F.2d 1148 (9th Cir. 1972). For further discussion of *Steele, see* text accompanying notes 116-21 *supra.*

180. 461 F.2d at 1150-51. Specifically, the court noted that there was evidence that:

> Steele held a press conference, led a protest march, and distributed pamphlets entitled "Big Brother is Snooping." David Watamull was the

people who had not completed the census forms but who had escaped prosecution. The government refused the defendant's request for information concerning how many others had not completed the forms. However, Steele was able to bring to the court's attention six other people who had completely refused on principle to complete the census forms; these six had not taken a *public* stand against the census and none of them were prosecuted.[181]

At trial, the Regional Technician for the census in Hawaii described the four persons prosecuted as "hard core resisters." [182] He testified that he had ordered his staff to compile special background dossiers on the four, a discretionary procedure not followed with any other offenders. He also testified that his organization had been very concerned about the census resistance movement.

The Ninth Circuit indicated that in cases of alleged discriminatory prosecution, the defendant "must prove that the selection was deliberately based on an unjustifiable standard, such as race, religion, or other arbitrary classification." [183] The court stated that Steele would be entitled to an acquittal if he could prove "that the authorities purposefully discriminated against those who chose to exercise their First Amendment rights." [184] Noting that the government's operating procedures would have identified all persons who did not comply, and further noting that at least six other non-vocal persons in violation of the statute had been identified by Steele, the court concluded that the enforcement procedure clearly focused on the "vocal offender." [185] Such a procedure was "inherently suspect, since it [was] vulnerable to the charge that those chosen for prosecution [were] being punished for their expression of ideas, a constitutionally protected right." [186] Steele's evidence created a strong inference of discriminatory prosecution which the government was required to explain or justify. Since the government offered no explanation for its selection of defendants other than prosecutorial discretion, the court concluded that Steele had demonstrated purposeful discrimination by census authorities against

owner of radio station KTRG, which broadcast editorials on the census. Census authorities had complained to the Federal Communications Commission about them because they "were calculated to incite people to subvert the law." Donald Dickinson spoke against the census as an announcer on station KTRG. William Danks headed the state chapter of a group called Census Resistance '70; he distributed pamphlets and publicly criticized the census.

Id. at 1151.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 1152.

186. *Id.*

those who had publicly expressed their opinions about the census. Steele's conviction was therefore reversed.[187]

The last case in the trilogy is *United States v. Falk,*[188] in which a defendant appealed his conviction for failing to possess a selective service registration card and a draft classification card. Although his conviction was at first affirmed,[189] in a rehearing *en banc,* the court of appeals vacated the judgment and remanded the cause so that the defendant could have a hearing on his charge of discriminatory prosecution. The court's discussion of the case is noteworthy, particularly in light of its thorough analysis of the problem of discriminatory prosecution.

The court first discussed the holding of *Yick Wo* and its "undeniable application . . . to discriminatory prosecutions." [190] It then identified two questions that appeared to be troubling the courts which had dealt with the problem. The first source of disagreement was the effect of the Supreme Court's decision in *Oyler v. Boles;* [191] specifically the *Oyler* court's statement that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." [192] The *Falk* court distinguished *Oyler* as a case where no intentional or purposeful discrimination had been alleged. It pointed out that *Oyler* did not preclude the granting of relief for intentional or purposeful discrimination against an individual.[193] In *Falk,* intentional discrimination had been alleged. Falk claimed that he had been singled out for selective and discriminatory treatment not because he had violated the statute, but because the government wished to punish him for and stifle his participation in the anti-draft movement. The court pointed out that Falk's expression of his views on Vietnam was protected by the first amendment.[194] Analogizing to the constitutional prohibition of discrimination on the basis of race or religion, the court

187. *Id. See also* United States v. Danks, 357 F. Supp. 193 (D. Hawaii 1973). Danks was one of the four individuals named in *Steele.* His conviction was accordingly reversed. *Id.* at 195-96.

188. 479 F.2d 616 (7th Cir. 1973) (en banc), *rev'g* 472 F.2d 1101 (7th Cir. 1972). For critiques of the *Falk* decision *see* Case Comment, *Curbing the Prosecutor's Discretion: United States v. Falk,* 9 HARV. C.R.-C.L. L. REV. 372 (1974); Note, *The Ramifications of United States v. Falk on Equal Protection From Prosecutorial Discrimination,* 65 J. CRIM. L. AND CRIMINOLOGY 62 (1974); Note, *United States v. Falk: Developments in the Defense of Discriminatory Prosecution,* 72 MICH. L. REV. 1113 (1974); Note, *Discriminatory Enforcement of Federal Laws-United States v. Falk,* 34 OHIO ST. L.J. 942 (1973).

189. United States v. Falk, 472 F.2d 1101 (7th Cir. 1972).

190. 479 F.2d at 619.

191. 368 U.S. 448 (1962). For a further discussion of Oyler v. Boles, *see* notes 60-67 *supra* and accompanying text.

192. Oyler v. Boles, 368 U.S. at 456.

193. 479 F.2d at 619 (citing Moss v. Horning, 314 F.2d 89, 93 (2d Cir. 1963)).

194. 479 F.2d at 620.

condemned "discrimination on the basis of the exercise of protected First Amendment activities, whether done as an individual or, as in this case, as a member of a group unpopular with the government." [195]

The second source of disagreement concerned the problem of proof. The court, responding to fears that prosecutors would be forever testifying about their motives in seeking an indictment,[196] maintained that the presumption is always that a prosecution is undertaken in good faith and in a nondiscriminatory fashion.[197] "However, when a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose," the burden of proving nondiscriminatory enforcement of the law is shifted to the government.[198] The Seventh Circuit noted the circumstances of the case which raised a reasonable doubt about the purposes of the prosecution. Falk had twice [199] attempted to present evidence that the government was aware of over 25,000 violations of the Selective Service laws, similar to the violations committed by the defendant, and that the government had a written policy of nonenforcement.[200] At the close of the government's case, Falk's attorney attempted to make an offer of proof which included a statement by the Assistant United States Attorney that the defendant's draft-counseling activity was one of the reasons why the prosecution was brought.[201] Although the trial court refused the offer, the Assistant United States Attorney made an unsolicited reply in which he noted that the indictment against Falk was approved not only by him, but also by the Chief of the Criminal Division of the United States' Attorney's Office, the First Assistant United States Attorney, the United States Attorney and the Department of Justice in Washington.[202]

The court of appeals also pointed out that there had been a three-year delay in bringing the indictments against Falk,[203] that Falk faced a seemingly excessive punishment of three years imprisonment and that he had been unjustly denied classification as a conscientious objector. The court further noted that had Falk originally received the classifi-

195. *Id.*

196. *Id.* The court stated that "the prospect of government prosecutors being called to the stand by every criminal defendant for cross-examination as to their motives in seeking an indictment is to be avoided." *Id.*

197. *Id.*

198. *Id.* at 620-21.

199. Falk unsuccessfully had made a pretrial motion to dismiss and offered proof with his motion for acquittal at the close of the government's case.

200. *Id.*

201. *Id.*

202. *Id.* at 622. It should be noted that the court attached great importance to the Assistant United States Attorney's unsolicited reply.

203. *Id.*

cation to which he was entitled, he would not have had to refuse induction in order to assert his valid claim.[204] The combination of all these factors made out at least a prima facie case of improper discrimination in enforcing the law.[205]

The case was remanded for a hearing at which Falk could question the Assistant United States Attorney as to the content of his previous statements to defense counsel and could present additional evidence on the issue of other alleged violators and the government's lack of general enforcement. The court reiterated its holding that the defendant had already presented a prima facie case and that the burden of going forward with proof of nondiscrimination rested on the government.[206]

Following the *Crowthers-Steele-Falk* trilogy, there has been a plethora of cases in which defendants have asserted that their prosecutions were invalid because they were intended to prevent the exercise of constitutional rights. In *United States v. Danks,*[207] the court reversed the conviction of the defendant Danks, one of the four invidiously-prosecuted individuals referred to by the Ninth Circuit in the *Steele* case.[208] In *United States v. Berrios,*[209] the Second Circuit reluctantly affirmed [210] a lower court holding that the prosecutor had to turn his files concerning the defendant's prosecution over to the court for in camera inspection. The defendant contended that he had been singled out for prosecution because he was one of the few Teamsters officials who had outspokenly supported Senator McGovern rather than Richard Nixon in 1972, and because he had spearheaded an effort to

204. *Id.* at 622-23. The court noted the government's policy of not prosecuting those who ultimately submit to its will. *Id.* at 623.

205. *Id.* The court concluded:

> [T]he combination in this case of the published government policy not to prosecute violators of the card possession regulations, Falk's status as an active and vocal dissenter to United States policy with regard to the draft and the Vietnam War, the Assistant United States Attorney's statement that officials ranging from an Assistant Attorney to the Department of Justice in Washington participated in the decision to prosecute Falk, the untimely delay in bringing the indictment and the government's stated policy to prosecute only those who refuse induction while absolving those who submit to the will of the authorities, lead us to conclude that the district court erred in refusing a hearing on the offer of proof. The unrebutted evidence before the court, including the admission of the Assistant United States Attorney and the two published statements by the Selective Service officials which contradict the propriety of the action taken in this case, made out at least a *prima facie* case of improper discrimination in enforcing the law.

206. *Id.* at 623-24.

207. 357 F. Supp. 193 (D. Hawaii 1973).

208. *Id.* at 196. Danks headed the state chapter of a group called Census Resistance '70; he distributed anti-census pamphlets and publicly criticized the census. United States v. Steele, 461 F.2d at 1151.

209. 501 F.2d 1207 (2d Cir. 1974).

210. The court commented on "the apparent weakness of Berrios' claim . . . ." *Id.* at 1212.

unionize the Marriott Restaurant chain, an enterprise apparently closely connected with the Nixon family.[211]

Danks and *Berrios* were decided in 1973 and 1974, respectively. The *Danks* court had no choice under *Steele* but to reverse the defendant's conviction. The *Berrios* court merely affirmed a lower court's ruling for in camera disclosure of the prosecutor's files. However, the defendants in the numerous cases which followed the *Crowthers-Steele-Falk* line were all unsuccessful. An examination of those cases, and why the challenges failed, follows.

After the *Crowthers, Steele* and *Falk* trilogy, the typical case was a challenge to prosecution for violation of the income tax laws. For the most part these challenges were made by vocal or active tax protestors who had been prosecuted for failure to file returns or pay taxes, or for supplying false or fraudulent statements.[212] These defendants alleged that they had been unlawfully prosecuted for exercising their first amendment rights. All of these challenges failed.[213] However, there is a major distinction between these cases and *Steele* or *Falk*. In *Steele* and *Falk* the defendants were being prosecuted solely for their protests or outspokenness against official policy. Although *Steele* and *Falk* stand for the proposition that people cannot be prosecuted by the government simply as a means to prevent the exercise of their

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211. *Id.* at 1209. The court explained:

> In support of his charge of selective prosecution, Berrios submitted the affidavit of his counsel Martin Garbus, Esq., which states that he and his client "believe" that (1) there have been only three prosecutions under § 504 since 1969; (2) Mr. Marriott has been a close friend of the President and a substantial contributor to his political campaign; (3) Donald Nixon, the President's brother is a vice-president of Marriott; (4) Herbert Kalmbach, attorney for Marriott, was also the President's personal attorney; (5) Charles Colson, formerly counsel to the President and later counsel to the Teamsters Union was a "prime mover in the prosecution," and (6) there are hundreds of unions with officers who have prison records.

Id. at 1209-10 (footnotes omitted).

Another case in which the question of political activity was addressed was United States v. Torquato, 602 F.2d 564 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979). Although the defendant, who alleged discriminatory enforcement as between members of the Democratic and Republican party, was unable to make a sufficient prima facie showing, the court noted that "membership in a political party is protected by the first amendment, and the mere exercise of that right cannot be punished by means of selective prosecution." 602 F.2d at 569 n.9. For a discussion of defendant's prima facie showing, *see* note 102 *supra*.

212. The defendants in these cases were typically prosecuted under 26 U.S.C. §§ 7203 and 7205 (1954).

213. United States v. Moss, 604 F.2d 569 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980); United States v. Stout, 601 F.2d 325 (7th Cir.), *cert. denied*, 444 U.S. 979 (1979); United States v. Catlett, 584 F.2d 864 (8th Cir. 1978); United States v. Kahl, 583 F.2d 1351 (5th Cir. 1978); United States v. Johnson, 577 F.2d 1304 (5th Cir. 1978); United States v. Murdock, 548 F.2d 599 (5th Cir. 1977); United States v. Ojala, 544 F.2d 940 (8th Cir. 1976); United States v. Gardiner, 531 F.2d 953 (9th Cir.), *cert. denied*, 429 U.S. 853 (1976). For a discussion of why these tax challenge cases failed, *see* notes 214-19 *infra* and accompanying text.

first amendment rights, these cases do not hold that the exercise of first amendment rights will shield people from punishment for commission of crimes. According to *Steele* and *Falk,* if the government is not enforcing a law, and one speaks out against that law, or against government policy, he or she may not be punished. However, if a law is regularly enforced, then protest of that law will not prevent the government from prosecuting violators.

In the context of the tax cases, the courts responded to defendants' challenges to their prosecutions by reaffirming the principle that the prosecution of the most flagrant violators of the law is permissible in furtherance of the government's legitimate interest in deterrence.[214] Prosecution of the most vocal and publicized protestors, who concomitantly break the law, simply serves to ensure more general compliance with that law.[215] Most importantly, in enforcing the tax laws, the government was able to show that it was not singling out only the protestors—pointing to its policy of regularly prosecuting *all known* violators.[216] Active protestors were simply the more readily visible offenders.[217] The courts all agreed that prosecution of vocal offenders, as well as all other known offenders, was not invidious or bad faith prosecution.

From these cases it becomes clear that the prosecution of a flagrant violator of the law is not, by itself, unlawful. In fact, an earlier opinion in the *Falk* case had, under that principle, upheld the defendant's prosecution.[218] However, although it is a legitimate enforcement technique to prosecute the notorious violator, this is only legitimate as long as all known violators are also prosecuted. As one court recently stated, "Aggressively displaying one's antipathy to the . . . system or daring the government to enforce [a law] does not create immunity from, or a defense to, prosecution." [219]

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214. For a further discussion of prosecution of flagrant violators of the law, *see* notes 218-19 *infra* and accompanying text. *See also* United States v. Gardiner, 531 F.2d 953, 954 (9th Cir.), *cert. denied,* 429 U.S. 853 (1976) (citing United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975), *cert. denied,* 424 U.S. 955 (1976)).

215. United States v. Moss, 604 F.2d 569, 573 (8th Cir. 1979); United States v. Stout, 601 F.2d 325, 328 (7th Cir.), *cert. denied,* 444 U.S. 979 (1979); United States v. Catlett, 584 F.2d 864, 868 (8th Cir. 1978); United States v. Johnson, 577 F.2d 1304, 1309 (5th Cir. 1978); United States v. Ojala, 544 F.2d 940, 944-45 (8th Cir. 1976); United States v. Oakes, 527 F.2d 937, 940 (9th Cir. 1975).

216. *See, e.g.,* United States v. Stout, 601 F.2d at 328; United States v. Kahl, 583 F.2d 1351, 1354 (5th Cir. 1978).

217. *See, e.g.,* United States v. Catlett, 584 F.2d 864, 868.

218. United States v. Falk, 472 F.2d 1101, 1107, *rev'd,* 479 F.2d 616 (7th Cir. 1972).

219. United States v. Heilman, 614 F.2d 1133, 1139 (7th Cir. 1980) (citing United States v. Stout, 601 F.2d at 328).

It is also clear that the exercise of first amendment rights will not shield an individual from prosecution for a serious offense.[220] Some commentators have noted a distinction in judicial treatment of the selective prosecution defense based on *"malum prohibitum"* and *"malum in se."* [221] Although it is somewhat unusual for a defendant to challenge a prosecution for a serious crime on the grounds that he or she was selectively prosecuted,[222] there have been a few such cases. These cases are different from the tax, selective service, and census cases where the defendants allege that they have been prosecuted for their active protest against the law violated. In prosecutions for more serious offenses, defendants appear to allege that they have been prosecuted for the exercise of first amendment freedoms only, and not for alleged commissions of crimes. As can be expected, courts are not receptive to such challenges.[223] When a defendant is charged with a serious crime, the courts are hesitant to allow or be persuaded by evidence that his or her prosecution stems from an impermissible purpose. Yet judicial review of unequal enforcement of the laws should not depend on the type of crime committed.

An interesting case in this context is *United States v. Berrigan.*[224] The defendants, convicted of smuggling letters into and out of a prison,

220. Serious offense in this context refers to a crime not merely regulatory in nature—*i.e.,* a crime of violence or a crime where property is lost, destroyed or stolen.

221. *See* Note, *The Ramifications of United States v. Falk on Equal Protection From Prosecutorial Discrimination, supra* note 188, at 63. The author notes, however, that the distinction between *malum prohibitum* and *malum in se* should be rendered invalid by *Oyler v. Boles. Id.* at 63. A similar point of view is expressed in Comment, *Curbing the Prosecutor's Discretion; United States v. Falk,* 9 HARV. C.R.-C.L. L. REV. 372, 381 n.58 (1974), where the author argues that such a distinction is groundless, since discriminatory prosecution in either case constitutes unequal and unconstitutional treatment. *But see* Note, *Discriminatory Enforcement of Federal Laws—United States v. Falk, supra* note 188, at 948 (adoption of *Falk* approach will hinder enforcement of any law if proscribed action is *malum prohibitum*).

222. It seems fairly obvious that serious crimes are routinely prosecuted. Prosecutors are under intense pressure to prosecute crimes which "frighten, outrage or intrigue the public." Vorenberg, *Decent Restraint of Prosecutorial Power,* 94 HARV. L. REV. 1521, 1526 (1981).

223. United States v. Crow Dog, 532 F.2d 1182, 1196-97 (8th Cir. 1976), *cert. denied,* 430 U.S. 929 (1977) (defendant, a member of the activist American Indian movement, indicted for detaining postal inspector and robbing pistol belonging to United States); United States v. Berrigan, 482 F.2d 171, 179-80 (3d Cir. 1973), *aff'g* United States v. Ahmad, 347 F. Supp. 912 (M.D. Pa. 1972) (defendants, radicals and ardent opponents of United States military involvement in Viet Nam, indicted for conspiring to kidnap Henry Kissinger, destroy underground heating system of Washington, D.C., engage in "draft board raids", and smuggle various letters); United States v. Hubbard, 474 F. Supp. 64, 77 (D.D.C. 1979) (members or agents of the Church of Scientology charged as burglars, thieves, perjurers, and conspirators); United States v. Banks, 368 F. Supp. 1245, 1252-53 (W.D.S.D. 1973) the indictment of defendants, members of the activist Indian movement, arose out of occupation-seige of Wounded Knee in Spring, 1973).

224. 482 F.2d 171 (3d Cir. 1973), *aff'g* United States v. Ahmad, 347 F. Supp. 912 (M.D. Pa. 1972).

contended that they were victims of discriminatory prosecution. The defendants had originally been indicted for conspiracy to kidnap Henry Kissinger, to send through the mails a letter containing a threat to kidnap Henry Kissinger, to destroy the underground heating system in Washington, D.C., to interfere with the Selective Service system by engaging in "draft board raids," and to smuggle or attempt to smuggle letters into and out of a federal prison.[225] A jury convicted the defendants only of the charge of smuggling letters.[226]

The defendants alleged that their prosecutions had been based on their anti-war activity.[227] To that effect, defendants offered evidence of Federal Bureau of Investigation surveillance of them and statements made by former F.B.I. director Hoover about them.[228] Despite the evidence, the Court of Appeals for the Third Circuit agreed with the lower court that adequate showing of discriminatory prosecution had not been made.[229] Looking at the entire prosecution, the court concluded that "[w]hen all the circumstances of this prosecution are considered, the prosecution under § 1791 was a justifiable aspect of the entire prosecution, viz., the conspiracy, the overt acts, and the violation of § 1791."[230] The court was apparently swayed by the alleged conspiracy for which the defendants were prosecuted.[231] Although the jury did not find them guilty of that plot, the court was unwilling to seriously consider the defendant's contentions concerning the prosecutions for smuggling letters.[232]

Generally, after the *Crowthers-Steele-Falk* line of cases, courts have been extremely reluctant even to consider challenges to a prosecution on the ground that it was intended to prevent the defendant's exercise of constitutionally protected rights.[233] Although the above

225. 482 F.2d at 173.

226. *Id.* The statute under which defendants were convicted for smuggling letters out of a federal prison was 18 U.S.C. § 1791 (1969), as augmented by 28 C.F.R. § 6.1 (1973).

227. 482 F.2d at 173. Although one commentator has argued that *Berrigan* was a case of "bad faith" rather than "selective" prosecution, Amsterdam, *supra* note 167, at 23, the bad faith prosecution has become entwined with selective prosecution. In *Berrigan*, the defendants were arguing that their prosecution was merely an attempt to prevent the exercise of their first amendment rights. Proof of such an allegation would clearly constitute discriminatory prosecution, as defined by the courts.

228. *See* United States v. Ahmad, 347 F. Supp. at 928-29.

229. 482 F.2d at 179-80.

230. *Id.*

231. *Id.* at 179.

232. The lower court had pointed out that there had been three previous prosecutions under § 1791. United States v. Ahmad, 347 F. Supp. at 928. It would seem to follow that even if the court had seriously considered defendants' claim, the three prior prosecutions would have served to obviate their claim.

233. *See, e.g.*, United States v. Bennett, 539 F.2d 45, 54 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976) (summary rejection of defendant's claim of discriminatory

cases concern the exercise of first amendment rights—usually some form of political protest—a challenged prosecution may also be an attempt to prevent the exercise of other constitutionally protected rights. However, it is unknown how these other constitutionally-based challenges would fare in court.[234]

It appears that there are few circumstances under which the courts will strike down a prosecution brought to prevent the exercise of constitutional rights. Although *Crowthers, Steele,* and *Falk* are distinguishable from other cases in which defendants have unsuccessfully challenged their prosecutions as intended to stifle their exercise of constitutional rights, the cases nevertheless exude judicial concern for prosecutorial autonomy.

IV. Presentation of the Claim of Discriminatory Prosecution

A. Methods

The prevailing method for challenging a prosecution as invidious or in bad faith is by a pre-trial motion to dismiss.[235] Although this challenge is generally called the discriminatory prosecution defense, the challenge is not in a strict sense a defense at all. There have been a few cases, however, in which a defendant has brought the challenge as a defense. For example, the *Robinson* court granted the defendant's motion for acquittal in reversing his conviction. And in *Falk,* the defendant made both a pre-trial motion to dismiss and a motion for acquittal.[236] The *Falk* court did not overturn the defendant's conviction; instead, it vacated the judgment of conviction and remanded the cause for an evidentiary hearing on the discriminatory prosecution issue.[237]

In 1961 the Supreme Court indicated that individuals could *defend* against any proceeding actually prosecuted on the ground of uncon-

prosecution for resisting prison rectal examination, despite defendant's contentions that hundreds of others had not been prosecuted for same conduct and that he was being prosecuted solely for being an active "jailhouse lawyer").

234. Although it is theoretically true that a claim of discriminatory enforcement can rest on the alleged desire to prevent the exercise of *any* constitutional right, it is unclear how this principle is applied in reality. For example, in Bordenkircher v. Hayes, 434 U.S. 357 (1978), the Supreme Court held that it was not impermissible for a prosecutor to bring higher charges after a defendant rejects a proposed plea bargain, despite the resulting stifling of the defendant's sixth amendment right to a trial. *Id.* at 365. The *Bordenkircher* Court appeared to rest its decision on judicial solicitude toward the plea bargaining system, *id.* at 363-64, and was apparently unconcerned about the defendant's sixth amendment right to counsel. To the extent that *Bordenkircher* focused upon the plea bargaining system, it may be an aberration in terms of discriminatory prosecution cases.

235. For a further discussion of the procedure of challenging a prosecution, *see* notes 239-44 *infra* and accompanying text.

236. 472 F.2d at 1103.

237. 479 F.2d at 624.

stitutional discrimination.[238] However, since the Court has never actually reached the question, it can hardly be cited for the proposition that a discriminatory prosecution is actually an affirmative defense.

The circuit court in *United States v. Berrigan* pointed out that an unlawfully discriminatory prosecution does not reflect upon the guilt or innocence of the accused.[239] Rather, the question concerns a constitutional defect in the initiation of the prosecution.[240] The question of discriminatory prosecution is not one for the trier of fact—it is for the judge.[241] It appears to be generally agreed that the question should be raised as a pre-trial motion to dismiss under Rule 12(b)(1) of the Federal Rules of Criminal Procedure.[242] Requests for discovery of governmental information should also be made before trial, under Rule 12(b)(4) of the Federal Rules.[243] Most defendants who challenge a prosecution as being discriminatory do so as a motion to dismiss before trial; if the motion is denied, the question is reserved for appeal.[244]

Another method of presenting the claim is by seeking injunctive relief; however, this procedure appears obsolete and has been described as inappropriate.[245] Injunctive relief has been granted in three cases in which the court enjoined the discriminatory enforcement of the *statute*.[246] The last such case was in 1970[247] and it appears unlikely that the courts will entertain injunctive actions when defendants can simply and more economically make pre-trial motions to dismiss.[248]

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238. Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582, 588 (1961); *see also* Edelman v. California, 344 U.S. 357, 359 (1953).

239. 482 F.2d at 175.

240. *Id.*

241. *Id.*

242. *Id. See, e.g.*, United States v. Radetsky, 535 F.2d 556, 571 (10th Cir. 1976); United States v. Oaks, 508 F.2d 1403, 1404-05 (9th Cir. 1974). Rule 12(b)(1), FED. R. CRIM. P., provides that "[a]ny defense, objection, or request which is capable of determination without the trial of the general issue may be raided before trial by motion . . . [t]he following *must* be raised prior to trial: (1) Defenses and objections based on defects in the institution of the prosecution. . . ." (emphasis added).

243. 482 F.2d at 175. FED. R. CRIM. P. 12(b)(4) provides that requests for discovery pursuant to Rule 16 must be raised prior to trial. Rule 16 concerns disclosure of evidence by the government and by the defendant.

244. *See, e.g.*, United States v. Swanson, 509 F.2d 1205, 1209 (8th Cir. 1975); United States v. Wiley, 503 F.2d 106, 107 (8th Cir. 1974).

245. Cardinale & Feldman, *supra* note 15, at 682.

246. *See* City of Evansville v. Gaseteria, 51 F.2d at 237, discussed *supra* at text accompanying notes 40-49; Zayre of Georgia, Inc. v. Atlanta, 276 F. Supp. at 894, discussed *supra* at text accompanying notes 75-79; Zayre of Georgia, Inc. v. City of Marietta, 416 F.2d at 253, discussed *supra* at text accompanying notes 80-90.

247. *Zayre of Georgia, Inc. v. City of Marietta*, discussed at notes 80-90 *supra* and accompanying text.

248. There is potential waste of judicial resources for a court to enjoin a prosecution which may never take place. Although there may may be a certain stigma attached to being prosecuted for violation of criminal statute, there does not seem

Given that the issue of prosecutorial discrimination does not really turn on the guilt or innocence of the accused, it has been suggested that defendants not be allowed to raise the issue for the purpose of striking down the prosecution. Rather, it is urged, the presence of an improper prosecutorial purpose or motive should effect the sentencing decision.[249] The problem with this approach, however, is that it attaches greater importance to punishing the guilty than it does to safeguarding constitutional rights and freedoms. The price paid for protection of constitutional freedoms is that at times a guilty person must be set free.[250] In fact, given that discriminatory enforcement generally occurs with respect to less serious or regulatory crimes, the price is quite low.

B. The Prima Facie Case

The cases are in complete agreement that the burden is on the defendant to make out a prima facie case of discriminatory prosecution.[251] There is always a presumption that a prosecution is undertaken in good faith,[252] and that presumption is generally difficult to overcome. This section attempts to describe exactly what constitutes sufficient evidence in order to make out the necessary prima facie case.[253] The two necessary elements are (1) a demonstration that others similarly situated have not been prosecuted, and (2) substantive evidence of discrimination.

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to be any liberty or property interest guaranteed by the Constitution to prevent such a prosecution.

249. Cardinale & Feldman, *supra* note 15, at 692.

250. *See* Mapp v. Ohio, 367 U.S. 643, 659-60 (1961) (exclusionary rule for illegal searches and seizures). In cases of discriminatory prosecution and illegally obtained evidence, the real issue is the *governmental* misconduct, and not the guilt or innocence of the accused. *See also* Note, *The Ramifications of United States v. Falk on Equal Protection from Prosecutorial Discrimination, supra* note 188, at 74.

251. *See, e.g.*, United States v. Berrios, 501 F.2d at 1211; United States v. Falk, 479 F.2d at 620-21; United States v. Steele, 461 F.2d at 1151; United States v. Crowthers, 456 F.2d at 1078. *See also* United States v. Union Nacional de Trabajadores, 576 F.2d 388, 395 (1st Cir. 1978); United States v. Ojala, 544 F.2d 940, 943 (8th Cir. 1976); United States v. Crow Dog, 532 F.2d 1182, 1196 (8th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977); United States v. Oaks, 527 F.2d 937, 940 (9th Cir. 1975); United States v. Scherer, 523 F.2d 371, 377 (7th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); United States v. Malinowski, 472 F.2d 850, 860 (3d Cir. 1973).

252. For cases which evidence the presumption that a prosecution is undertaken in good faith, *see* the cases listed in note 251, *supra; see also* United States v. Torquato, 602 F.2d 564, 569 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979); United States v. Bennett, 539 F.2d 45 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976); United States v. Radetsky, 535 F.2d 556, 571 (10th Cir. 1976).

253. *See* Cardinale & Feldman, *supra* note 15, at 676-80, for a comprehensive discussion of the elements of the prima facie case.

It is clear that the defendant must, at the appropriate time,[254] put forward *some* evidence of discriminatory prosecution.[255] Merely moving for dismissal on these grounds, however, without introducing some substantive evidence of discrimination is not sufficient.[256] Simply put, introduction of evidence showing only the first element, that others similarly situated have not been prosecuted, without evidence of the second element, substantive evidence of discrimination, will most likely not establish the prima facie case.[257] Nor is it sufficient simply to allege and introduce evidence that the prosecution was "invidious" or "in bad faith" if there is no evidence of the first element.[258] There must be evidence of both the first and second elements to sustain the defendant's burden.

It is enormously difficult for a defendant to establish the prima facie case because there must be relatively substantial evidence that others similarly situated have not been prosecuted.[259] Merely produc-

254. The defendant generally moves for dismissal before trial.

255. United States v. Ream, 491 F.2d 1243, 1246 (5th Cir. 1974); United States v. Hubbard, 474 F. Supp. 64, 77 (D.D.C. 1979).

256. United States v. Ream, 491 F.2d at 1246.

257. For cases in which the defendant failed to put forward evidence of the second element of the defense, *see* United States v. Stout, 601 F.2d 325, 328 (7th Cir.), *cert. denied,* 444 U.S. 979 (1979); United States v. Kahl, 583 F.2d 1351, 1352 (5th Cir. 1978); United States v. Wallace, 578 F.2d 735, 741 (8th Cir.), *cert. denied,* 439 U.S. 898 (1978); United States v. Johnson, 577 F.2d 1304, 1308-09 (5th Cir. 1978); United States v. Peskin, 527 F.2d 71, 86 (7th Cir. 1975); United States v. Yingling, 368 F. Supp. 379, 384 (W.D. Pa. 1973).

258. For cases in which the defendant did not put forward evidence of the first element of the defense, *see* United States v. Heilman, 614 F.2d 1133, 1138-39 (7th Cir. 1980); United States v. Torquato, 602 F.2d 564, 569-70 (3d Cir.), *cert. denied,* 444 U.S. 941 (1979); United States v. Union Nacional de Trabajadores, 576 F.2d 388, 395 (1st Cir. 1978); United States v. Kelly, 556 F.2d 257, 264 (5th Cir. 1977); United States v. Bourque, 541 F.2d 290, 292-93 (1st Cir. 1976); United States v. Scherer, 523 F.2d 371, 377 (7th Cir. 1975), *cert. denied,* 424 U.S. 911 (1976); United States v. Malinowski, 472 F.2d 850, 860 (3d Cir. 1973); United States v. Dawson, 400 F.2d 194, 204 (2d Cir. 1968); United States v. Shober, 489 F. Supp. 393, 404-05 (E.D. Pa. 1979).

259. *See, e.g.,* United States v. Carson, 434 F. Supp. 806 (D. Conn. 1977), in which the court held that a prima facie case was made out. The court noted that:

> Carson argues that he was specially chosen for prosecution in the instant case because (1) the person injured is a member of the FBI, and (2) the government is attempting to cover up the misconduct of one of its agents.
>
> Initially, in support of the motion to dismiss, counsel for the defendant in a detailed affidavit set forth an offer of proof asserting that numerous complaints of excessive force and brutality have been made against local police officers and state troopers in the State of Connecticut; that virtually all these complaints involved allegations of police misconduct that were more extreme than in the present case; and that with the exception of two cases, no federal prosecution was instituted. The affidavit particularized these general allegations by reference to statistical evidence obtained from the records of the Connecticut State Police, by specifying the factual circumstances of other incidents, and by hearsay reports received from various attorneys who have represented numerous complainants in so-called "police brutality" cases. Based on this preliminary showing, the defendant requested an evidentiary hearing to support his claim of selective and discriminatory treatment.

ing evidence that one other person similarly situated was not prosecuted will not support a prima facie case.[260] The first element appears to be most satisfactorily proven by statistical evidence.[261] For example, in one case a defendant introduced evidence that there were 51,000 tax delinquency investigations in a state during a three year period; that 4,000 instances of possible criminal tax violations in the state were brought to the attention of the Internal Revenue Service Intelligence Division; and that the Division recommended for prosecution during that period only 9 failure-to-file cases.[262] There, the court held that the statistical evidence, along with direct evidence of the second element—the fact that defendant's case was initiated immediately following his public announcement that he would not comply with the filing requirements as a means of protest against the Vietnam war—was sufficient to make out a prima facie case of discriminatory prosecution.[263]

In *United States v. Falk*,[264] the trial court found that the defendant had not made out a prima facie case. Although the court of appeals originally affirmed that finding, it reversed in a rehearing *en banc*, holding that the defendant had, after all, made out a prima facie case. The evidence offered in *Falk* included the fact that the government, despite its awareness of over 25,000 violators of the Selective Service laws and the general policy of nonenforcement, had singled out the defendant, an active draft protestor, for prosecution.

Although the elements of a prima facie case can be stated with ease, it is rather difficult to quantify the amount of evidence required. However, two principles do emerge—that the determination of the sufficiency of the evidence is made on a case-by-case basis, and that

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> Since the defendant's moving papers made out at least a *prima facie* case of improper discrimination in enforcing the law, an evidentiary hearing was conducted.

Id. at 807.

260. United States Labor Party v. Oremus, 619 F.2d 683, 691 (7th Cir. 1980); United States v. Banks, 368 F. Supp. 1245, 1252 (W.D.S.D. 1973).

261. However, statistical evidence alone will generally not be sufficient to support a prima facie showing. Although it will often satisfy the first element of a discriminatory prosecution claim, it will usually be inadequate to show the second element. Moreover, statistical evidence, if available, is often the only evidence a defendant can obtain. *See* Note, *The Right to Nondiscriminatory Prosecution: The Effect of Announced Screening Policies*, 36 LA. L. REV. 1107, 1110 (1976); S. Krieger, *Defense Access to Evidence of Discriminatory Prosecution*, 1974 U. ILL. L.F. 648, 654-56 (1974).

262. United States v. Ojala, 544 F.2d 940, 943 (8th Cir. 1976).

263. *Id.* at 943. It should be noted that although the defendant did make out a prima facie case of discriminatory prosecution, he will not prevail upon his claim. *Id.* at 945. For another case in which the defendant made out a prima facie case, *see* United States v. Carson, 434 F. Supp. at 809-10, discussed *supra*, at note 259.

264. 472 F.2d 1101, *rev'd*, 479 F.2d 616 (7th Cir. 1972) (en banc). For a further discussion of *Falk*, *see* notes 188-205 *supra* and accompanying text.

the defendant's prima facie showing is extremely difficult to make. One commentator has suggested that a less burdensome requirement be imposed on the defendant.[265]

C. The Hearing

Once the defendant has established a prima facie case, he or she is entitled to a hearing on the issue of discriminatory prosecution.[266] The defendant, at that point, is also entitled to discovery of governmental information.[267] However, cases rarely advance to the discovery stage because of the defendant's initial inability to put forward a prima facie case without the government's information; second, discovery may not be granted out of judicial respect for prosecutorial autonomy.[268]

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265. Givelber, *supra* note 10, at 112, would hold a prima facie case to be: (1) evidence that a generally unenforced law has been sporadically enforced against a very few of the knowable violators; *or* (2) evidence that a law has been enforced against only a fraction of the knowable violators, and that fraction is unrepresentative of the total group of violators with respect to a characteristic which is irrelevant to law enforcement purposes. Once a prima facie case is made out, Givelber would have the prosecutor explain the basis for his enforcement decisions, with the court looking to the reasonableness and accuracy of his explanation and the legitimacy of his purpose. *Id.* at 123.

266. United States v. Falk, 479 F.2d at 623-24. *See generally* Amsterdam, *supra* note 167, at 18-23.

267. *Falk,* 479 F.2d at 623-24. The court directed that in the hearing, the defendant could question the prosecutor as to the content of his previous statements to defendant's counsel. Defendant and his counsel alleged that the prosecutor's statements showed that defendant had been singled out for special prosecution because of his draft counseling activities. *Id.* at 619-20.

268. *See, e.g.,* United States v. Catlett, 584 F.2d 864, 868 (8th Cir. 1978) (defendant's motion to discover governmental information denied in the course of court's upholding government's alleged policy of prosecuting individuals who publicly assert their refusal to pay taxes); United States v. Kahl, 583 F.2d 1351-55 (5th Cir. 1978) (trial court's discretion governs with regard to discovery motions and will not be overturned unless clear abuse of discretion shown; United States v. Johnson, 577 F.2d 1304, 1309 (5th Cir. 1978) (since defendant failed to make prima facie showing of discriminatory prosecution, he could not discover governmental information which he contended would have helped him establish his claim); United States v. Kelly, 556 F.2d 257, 265 (5th Cir. 1977) (district court's reluctance to question prosecutor's exercise of discretion, without defendant first demonstrating his claim might have merit, was upheld); United States v. Leggett & Platt, Inc., 542 F.2d 655, 657 (6th Cir. 1976), *cert. denied,* 430 U.S. 945 (1977) (trial court's dismissal of case for government's failure to produce information vacated and case remanded for reconsideration of whether documents requested were irrelevant or privileged); United States v. Bennett, 539 F.2d 45, 54 (10th Cir.), *cert. denied,* 429 U.S. 925 (1976) (despite defendant's assertions that hundreds of other prisoners not prosecuted for same conduct as defendant and that he was being prosecuted for exercising first amendment rights as active "jailhouse lawyer," court found no error in denial of discovery motions); United States v. Baechler, 509 F.2d 13, 15 (4th Cir. 1974), *cert. denied,* 421 U.S. 993 (1975) (in prosecution under Selective Service Act, where defendant claimed he had been singled out for prosecution, no error in disallowing defendant's request for selective service records indicating how many men registered in United States, his state, and for all records of selective service dealing with nonregistration or potential registrants); United States v. Berrigan, 482 F.2d 171, 181 (3d Cir. 1973) (defendants, indicted for and convicted of smuggling letters into and out of a federal prison, and who alleged discriminatory prosecution, could discover neither government files relating to decision to investigate and seek indictments in their case nor files relating to decisions to prosecute any viola-

Since the *Falk* decision, there have been some reported cases in which hearings on the issue of prosecutorial discrimination were held. The defendants in these cases nevertheless have been overwhelmingly unsuccessful.[269] Although the court in *Falk* indicated that where the defendant raises a reasonable doubt about whether his prosecution was the result of purposeful discrimination, the burden of going forward with proof of nondiscrimination would shift to the prosecutor,[270] the burden of going forward that the courts have actually placed on the prosecutor has been minimal. A number of commentators have concurred in the idea that the burden of proof should shift to the govern-

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tions of statute under which defendants indicted); *see also* United States v. Dawson, 400 F.2d 194, 203 (2d Cir. 1968) (defendant's subpoenas requiring appearance of IRS agent and production of IRS documents at trial sought information unreasonably tangential to essential question or guilt, and thus properly quashed); Dear Wing Jung v. United States, 312 F.2d 73, 75 (9th Cir. 1962) (court properly quashed defendant's subpoena seeking INS lists of organizations, which included the Chinese-American Democratic Youth Club, since decision to prosecute rests with the United States Attorney, not INS, which is merely an investigating agency). For a further discussion of the defendant's inability to put forward a sufficient prima facie case without access to government's information, *see* notes 273-306 *infra* and accompanying text.

269. For example, in United States v. Carson, 434 F. Supp. 806, 809-10 (D. Conn. 1977), the indictment of a state police officer under the federal civil rights statute for assaulting a Federal Bureau of Investigation agent was not dismissed after a hearing on the issue of discriminatory prosecution because the record showed other indictments under the same statute; there was no evidence that the government indicted the defendant based on any arbitrary, invidious or unjustifiable standard such as race, religion, political affiliation or the desire to prevent the exercise of a constitutional right; there were no unusual procedures followed in the decision-making process to prosecute the defendant, there was no evidence of bad faith motivation, and the decision to prosecute was based on lawful and responsible standards. Also, in United States v. Ojala, 544 F.2d 940, 940-45 (8th Cir. 1976), a defendant who was indicted for income tax violations and who made a prima facie showing of discriminatory prosecution did not prevail upon his claim because evidence adduced at the hearing showed that the government's selection of the defendant, based on his public refusal to pay taxes, was valid. And in United States v. Oaks, 527 F.2d 937, 939-940 (9th Cir. 1975), a defendant who was indicted for income tax violations and who made a prima facie showing of discriminatory prosecution did not prevail upon his claim because evidence adduced at the hearing showed that only one-half of those prosecuted, including defendant, belonged to defendant's tax rebellion group, and that the government's policy in prosecuting reflected both the flagrancy of the violation and the potential deterrent value of a particular case. In United States v. Mirabile, 503 F.2d 1065 (8th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975), the court upheld the lower court's finding that the evidence adduced at a hearing on the issue of the alleged selective prosecution of the defendant, who had been indicted for mail fraud, was insufficient to support the defendant's claim. And in *In re* Dellinger, 502 F.2d 813, 817-18 (7th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975), the court confirmed a lower court's denial of defendant's claim of selective prosecution where defendants, indicted for criminal contempt at the "Chicago 7" trial, were granted a hearing on the issue of selective prosecution and the evidence adduced at the hearing showed that the government had a rational basis for prosecuting the case. Also, in United States v. Maplewood Poultry, 320 F. Supp. 1395, 1396 (D. Me. 1970), at an evidentiary hearing on the issue of selective prosecution, evidence which showed that the defendants were the only two concerns against which the government had initiated criminal prosecutions, even though there were numerous other industrial sources of pollution of the bay, did not make out a case of denial of due process or equal protection in the absence of a showing of intentional or purposeful discrimination.

270. 479 F.2d at 624. *See also* United States v. Crrowthers, 456 F.2d at 1078.

ment once the defendant makes a prima facie showing.[271] The courts, however, have consistently rejected this idea. Judicial acceptance of prosecutorial explanations and recognition of the prosecutor's need for extreme latitude appear to make it virtually impossible for defendants to prevail on this issue. The conclusion is inescapable that a defendant will prevail only in the most blatant or egregious case of discrimination.[272]

D. Problems in Obtaining the Evidence

As demonstrated by the above discussion, a defendant who believes that he or she has been "singled out" for prosecution will have an extremely difficult, if not impossible, task in proving prosecutorial discrimination. The burden of proof is on the defendant, but the evidence necessary to sustain that burden is almost always in the hands of the government. Although it has been suggested that the prosecutor be held more accountable for his or her selection,[273] it is virtually impossible to obtain evidence showing why a prosecutor brought a particular case. Often the only evidence a defendant will have is his or her beliefs. There will be an evidentiary hearing only if the defendant can put forward what has been called a "colorable entitlement" for proceeding with the inquiry.[274] It is only after such initial showing by the defendant that governmental information may be discoverable, and often the government will attempt to prevent disclosure.

There are few cases in which a prosecutor has actually testified.[275] Generally, the court will find that the prima facie showing has not been

271. *See* Amsterdam, *supra* note 167, at 14; Givelber, *supra* note 10, at 106; Note, *The Ramifications of United States v. Falk on Equal Protection From Prosecutorial Discrimination, supra* note 188, at 70; Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1098-99 (1969).

272. *See, e.g.,* United States v. Steele, 461 F.2d 1148 (9th Cir. 1972), where the only four persons prosecuted in Hawaii for violating the census laws were four vocal protestors. *Id.* at 1150. Since the government had to know of the other offenders, the court struck down the prosecutions of the four protestors. *Id.* at 1152. *See* notes 178-87 *supra* and accompanying text for a further discussion of *Steele.*

273. Vorenberg, *supra* note 222, at 1560. *See also* Note, *The Right to Nondiscriminatory Prosecution: The Effect of Announced Screening Policies,* 36 LA. L. REV. 1107, 1113 (1976).

274. United States v. Berrigan, 482 F.2d at 181.

275. In United States v. Mirabile, 503 F.2d 1065, 1067 (8th Cir. 1974), *cert. denied,* 420 U.S. 973 (1975), the prosecutor gave limited testimony with respect to the issue of his selection of the defendant for prosecution. The United States Attorney in *In re* Dellinger, 502 F.2d 813, 817 (7th Cir. 1974), *cert. denied,* 420 U.S. 990 (1975), gave more than 50 pages of testimony concerning his basis for prosecuting the defendant. The court of appeals in United States v. Falk, 479 F.2d at 623, ordered on remand that the defendant could examine the prosecutor at a hearing on the issue of selective prosecution. In other cases, there has been government testimony by someone other than the prosecutor. *See, e.g.,* United States v. Steele, 461 F.2d at 1151-52 (Regional Technical for census in Hawaii); United States v. Carson, 434 F. Supp. 806, 808 (Deputy Chief of Civil Rights Division of Depart-

met and therefore, governmental or prosecutorial information will not be discoverable.[276] However, there have been two cases in which courts have, upon a claim of discriminatory prosecution but without a prima facie showing by the defendant, ordered the production of government documents for in camera inspection and subsequent disclosure of relevant portions to defense counsel.

In *United States v. Berrios*,[277] the government appealed the district court's dismissal of indictments against the defendants after one defendant, Pablo Berrios, alleged selective and discriminatory prosecution. Berrios had been indicted for violating a federal statute[278] which provided that "no person who has been convicted of the crime of arson, among others, shall within 5 years of such conviction serve as an officer or employee of a labor organization."[279] Berrios became a Trustee and member of the Executive Board of Teamsters Union Local 840 within five years of an arson conviction. The other defendants had been charged with violating the same statute by willfully and knowingly permitting Berrios to hold union office after his conviction.[280]

Berrios contended that he had been singled out for prosecution because of his opposition to former President Nixon and because of

ment of Justice). Finally, in some cases, the prosecutor makes unsolicited statements, *e.g.*, United States v. Falk, 479 F.2d at 622, or statements while in conference with the court, *e.g.*, Dixon v. District of Columbia, 394 F.2d 966, 967 (D.C. Cir. 1968).

276. United States v. Kahl, 583 F.2d 1351, 1354 (5th Cir. 1978) (Internal Revenue Service intelligence reports on tax protestor activity sought by defendant deemed irrelevant and privileged); United States v. Johnson, 577 F.2d 1304, 1309 (5th Cir. 1978) (discovery of internal IRS documents denied because defendant failed to make necessary prima facie case); United States v. Kelly, 556 F.2d 257, 264 (5th Cir. 1977) (citing United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974) (defendant could not subpoena prosecutors to testify about their exercise of prosecutorial discretion without first establishing prima facie case of discriminatory prosecution); United States v. Bennett, 539 F.2d 45, 54 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976) (defendant denied discovery because he failed to establish prima facie case of discriminatory prosecution); United States v. Baechler, 509 F.2d 13, 15 (4th Cir. 1974), *cert. denied*, 421 U.S. 993 (1975) (court disallowed defendant's request for selective service records indicating how many men registered in United States and in defendant's state and for all records of selective service dealing with nonregistration or potential registrants because it had not been shown that evidence requested would be necessary for adequate defense); United States v. Berrigan, 482 F.2d 171, 188-92 (3d Cir. 1973) (defendants could not discover government files relating to decision to investigate and seek indictments in the defendant's case and in all cases of prosecutions brought under statute in question because defendants failed to make adequate prima facie showing); Dear Wing Jung v. United States, 312 F.2d 73, 75 (9th Cir. 1962) (defendant's request for information concerning organizations listed in files of Immigration and Naturalization Service denied because INS is "merely" an investigatory and not a prosecutorial agency). *But see* United States v. Leggett & Platt, 542 F.2d 655, 658 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977) (to override governmental interest in secrecy, balancing test should be applied and need for documents must outweigh interest in secrecy).

277. 501 F.2d 1207 (2d Cir. 1974).

278. 29 U.S.C. § 504 (1976).

279. 501 F.2d at 1209.

280. *Id.*

his efforts to unionize an enterprise that was closely connected with Nixon's family.[281] At an oral argument to determine whether a hearing on the charge of selective prosecution would be necessary, the judge instead ordered the government to turn over to the court a memorandum that had been sent by the prosecutor to the United States Department of Justice recommending that prosecution of the defendants be initiated.[282] The judge ruled that after an in camera inspection and removal of any confidential information, he would make the memorandum available to defense counsel. When the government refused to comply with the court's order for evidentiary production,[283] the judge then held that Berrios' allegations warranted a hearing on the selective prosecution issue and that Berrios' "offer of proof" was sufficient to create a prima facie case of selective prosecution.[284] The judge consequently dismissed the indictment upon Berrios' motion.[285]

On appeal, the Court of Appeals for the Second Circuit vacated the district court's order and remanded the case for further proceedings.[286] The court held that the trial judge had gone "too far in directing the government to surrender the memorandum 'for release to the defendants of any portions thereof which the court shall determine are not required to be kept confidential.' "[287] However, the court held that the government would still have to disclose the memorandum to the judge for inspection. The judge was to disclose to defense counsel only material contained therein which would be relevant, or tend to establish, the elements of Berrios' defense of selective and discriminatory prosecution.[288] The court was somewhat skeptical of the district judge's action,[289] and it clarified what it believed was necessary to entitle a defendant to subpoena documentary evidence to

281. *Id.* at 1209-10. Specifically, Berrios contended that he had been singled out for prosecution because he was one of the few teamsters officials who had outspokenly supported Senator McGovern rather than former President Nixon in 1972. *Id.* at 1209. Additionally, he had been spearheading an effort to unionize the Marriott Restaurant chain, an enterprise that apparently was closely connected with the Nixon family. *Id.* For a further discussion of Berrios' claim, *see* note 211 *supra.*

282. 501 F.2d at 1208-09.

283. The government explained that the prosecutor had learned of Berrios' criminal record while investigating a charge of arson lodged against him for an attempted firebomb attack on a Marriott restaurant. Berrios was acquitted of this charge after a jury trial. 501 F.2d at 1210.

284. *Id.* at 1210-11.

285. *Id.* at 1211.

286. *Id.* at 1213.

287. *Id.* at 1212 (quoting from opinion and order of Judge Judd, filed Jan. 7, 1974).

288. 501 F.2d at 1212-13.

289. The Court said: "Upon the meager preliminary showing made here, we doubt whether we would have granted a hearing or ordered the production of evidence for such a hearing, since Berrios appears frankly to have embarked upon a fishing expedition." *Id.* at 1211.

establish a selective prosecution defense, stating that "we would first require some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." [290] Commenting on the weakness of Berrios' claim, to the extent that Berrios had neither pointed to the existence of other unprosecuted violations of the same statute nor represented that the government's files would support his beliefs, the court nevertheless recognized "that the decision to permit a hearing and, in anticipation thereof, to authorize a subpoena of evidence in the government's possession, lies largely in the trial judge's discretion." [291]

A case that proceeded in a similar vein was *United States v. Cammisano*.[292] In *Cammisano,* the defendants had challenged indictments charging them with violations of the Meat Inspection Act,[293] claiming they had been singled out for prosecution because of their Italian ancestry.[294] The district court dismissed the indictments [295] after the prosecutor's refusal to comply with an order requiring the government to disclose for in camera inspection six broad categories of government documents which the defendants had requested, contending that they would support their claims of selective prosecution.[296]

The government, appealing the dismissal of the indictment, noted that it had complied with part of the production order,[297] and argued that the defendants' allegations were insufficient to warrant production

290. *Id.* at 1211-12.

291. *Id.* at 1212.

292. 546 F.2d 238 (8th Cir. 1976).

293. Defendants were indicted under 21 U.S.C. §§ 610, 676 (1976). 546 F.2d at 239.

294. *Id.* Another defendant, Miles, claimed he was being selectively prosecuted because of his association with Italians. *Id.* The lower court had noted that there was a question as to whether the defendants were instead being prosecuted for their alleged mob connections. United States v. Cammisano, 413 F. Supp. 886, 891 n.5 (W.D. Mo. 1976).

295. 413 F. Supp. at 888.

296. 546 F.2d at 239.

297. *Id.* at 240. The government had produced the following requested documents:

> All general directives of the Department of Agriculture to its employees, especially but not limited to inspectors, concerning procedures for reporting of possible violations of Section 601ff, Title 21, U.S.C. [sic], to the Department of Agriculture and to the Department of Justice.
>
> All general directives of the Department of Justice to its employees concerning procedures for handling of reports relating to violation of Section 601ff, Title 21 U.S.C. [sic].
>
> Any list compiled, maintained and/or published by the Department of Justice or any agency under its supervision which lists so-called organized crime figures in the Western District of Missouri.

546 F.2d at 239-40 nn.1, 2 & 6.

of the other requested documents,[298] because the defendants had failed to make a "colorable claim" of selective prosecution. The Court of Appeals for the Eighth Circuit cited the *Berrios* "colorable basis" standard: "[W]e would first require some evidence tending to show the existence of the essential elements of the defense *and that the documents in the government's possession would indeed be probative of these elements.*" [299] The court rejected the government's contentions that the defendants failed to show a "colorable basis" for their selective prosecution claim, and that the documents already produced refuted the defendants' claims. The court referred to the district judge's observation that the evidence adduced at that point was inconclusive; there was some evidence that tended to support the defendants' claims that they had been singled out for prosecution because of their Italian ancestry.[300] The court appeared to be swayed by the unrefuted evidence that a Federal Bureau of Investigation agent had told one of the defendants that he was going to put the defendant in jail unless the defendant went to work for him.[301]

The court concluded that the trial judge, in ordering further in camera inspection of the government documents, had not exceeded his broad discretionary powers.[302] However, the court did hold that the production order, as it stood, was overbroad in at least one respect. The part of the order requiring information as to all violations of the

298. *Id.* at 240. The government had not produced the following:

> All correspondence, inter-department communications, intra-department communications and referral documents relating to the particular violations alleged in this prosecution which were made, retained and/or transmitted within the Department of Agriculture, within the Department of of [sic] Justice and between them, together with all reports attached to such documents, correspondence and communications except as have already been provided defendants with notations as to which items have been so provided.
>
> All correspondence, inter-department communications, intra-department communications and referral documents together with all supporting documents and reports, relating to any violations of Sections [sic] 601ff, Title 21 U.S.C. which occurred in the Western District of Missouri during the period January, 1972, to and through December, 1974, and which were made, retained and/or transmitted within the Department of Justice and between them, whether such correspondence, communications and documents resulted in prosecution or not.
>
> All correspondence, inter-department communications, intra-department communications and referral documents, together with all supporting documents and reports relating to any violations of Sections [sic] 601ff, Title 21 U.S.C., which occurred in the United States for the period January, 1972 to and through December, 1974, and which were made, retained and/or transmitted within the Department of Agriculture, within the Department of Justice and between them, whether such correspondence, communications and documents resulted in prosecution or not.

546 F.2d at 239-40 nn.3, 4 & 5.

299. *Id.* at 241 (citing United States v. Berrios, 501 F.2d at 1211-12 (emphasis in original)).

300. 546 F.2d at 239. *See also* 413 F. Supp. 886, 890.

301. 546 F.2d at 242.

302. *Id.*

statute nationwide between 1972 and 1974 was deemed unlikely to shed any light upon the alleged "Italian" prosecutions in the area of Kansas City, Missouri.[303] The court vacated the dismissal in order to give the prosecutor the opportunity to submit to the district court the remainder of the materials specified in the discovery order. Interestingly, the government subsequently moved to dismiss the indictment rather than to permit defense counsel to examine the data which the government had produced for the court's in camera examination.[304] The government's motion to dismiss was granted.[305]

The *Berrios* and *Cammisano* opinions are noteworthy because they reflect judicial insight into the proof problems facing defendants who believe their prosecutions have been discriminatory. Instead of merely reciting the broad discretion and autonomy afforded the prosecutor, these courts sought to balance the interests of both defendants and prosecutors. By ordering in camera inspection of government documents, the court can protect the prosecutor's interest in confidentiality. At the same time, by disclosing to defense counsel nonconfidential information relevant to the issue of selective or discriminatory prosecution, defendants have an opportunity to obtain the evidence they will need to prove discrimination. Defendants are not then put in the untenable position of having the burden of proof without access to the necessary evidence.[306] *Berrios* and *Cammisano* are surely a step in the right direction.

However, it should be noted that a rule of in camera inspection and subsequent disclosure to defense counsel of relevant nonconfidential prosecutorial information will be of value to the defendant only if such information is actually maintained by the prosecutor. In this context, the need for prosecutorial guidelines becomes clear. Although there is strong support for the maintenance of prosecutorial policy guidelines and procedures,[307] it does not appear that such information is routinely kept by prosecutors' offices. Promulgating and following guidelines and procedures not only aids a defendant who claims that his or her prosecution is discriminatory, but is also useful to the prosecutor in

303. *Id.*

304. 433 F. Supp. 964, 965 (W.D. Mo. 1977).

305. *Id.* at 967.

306. Krieger, *Defense Access to Evidence of Discriminatory Prosecution*, 1974 U. ILL. L.F. 648, 661 (1974) (forceful argument asserted for disclosure of government information to defense counsel, or at least to judge for in camera inspection to alleviate defendant's impossible burden).

307. *A.B.A. Project*, *supra* note 21 §2.5; *Principles*, *supra* note 20, at 2; Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1, 10-25 (1975); Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 681-82; Vorenberg, *supra* note 222, at 1523.

the "reasoned exercise" of his or her discretion [308] and in achieving "fair, efficient and effective enforcement of the criminal law." [309] A requirement [310] that prosecutors' offices maintain guidelines and statements of procedure would be both useful and reasonable. Such guidelines or statements of prosecutorial procedure should normally be made accessible to defense counsel, as well as to the public.[311]

In addition, and especially relevant with respect to the issue of discriminatory prosecutions, it is not unreasonable to require prosecutors to make and keep in their files information about why particular prosecutions are brought.[312] At first glance, such a requirement might seem overburdensome. However, this suggestion is not intended to force prosecutors to justify every prosecution. It is simply a record-keeping requirement of a prosecutorial process that does, or should, go on.

Typically, a prosecutor will consider a number of factors in deciding whether or not to bring a particular case.[313] These considerations should be reflected in the office's charging guidelines or formalized policy statement. The prosecutor could then indicate which

308. *Principles, supra* note 20, at 1.

309. *A.B.A. Project, supra* note 21, § 2.5.

310. This requirement could be implemented through legislative action or by rule or order of the United States Attorney General. *See* 28 C.F.R. § 0.5 (1980).

311. For a particularly persuasive argument that prosecutorial policy should be published and hence accessible to defense counsel *see* Abrams, *supra* note 307, at 25-34. Abrams argues that there should be a free flow of government information, particularly with respect to prosecutorial policy. Such policy has political implications and involves basic societal concerns. Therefore, prosecutorial policy should be subject to scrutiny, evaluation and criticism. *Id.* at 26-27. Abrams discusses and rebuts arguments made against the publication of prosecutorial policy. *Id.* at 28-34. Especially noteworthy is his discussion of the argument that publication of policy will improperly modify the deterrent effect of the criminal law. Abrams says:

> The principle that emerges may be set forth as follows: Where the reasons for adopting the policy are grounded in *substantive* concerns relating to the appropriateness of full, partial, or no enforcement of the law in question, the policy should be published. Where, however, the reasons for the policy involve matters of convenience such as allocation of resources, or other *administrative* considerations, the policy need not be published. The premise is that while some policies amount to a substantive modification of the criminal law that the public has a right to know about, the prosecutor should not detract from the deterrent effect of a criminal statute merely for the purposes of administrative convenience.

Id. at 30 (emphasis in original).

312. In *Principles, supra* note 20, at 14, it is stated that, "whenever the attorney for the government declines to commence or recommend federal prosecution, he should ensure that his *decision and reasons therefor* are communicated to the investigating agency involved and to any other interested agency, and are *reflected in the files of his office.*" (emphasis added). If prosecutors should keep information about why particular prosecutions are not brought, it is not unreasonable to require information about why particular prosecutions are brought. *See* Vorenberg, *supra* note 222, at 1552-53, for a persuasive argument for such prosecutorial record-keeping as a means of ensuring prosecutorial accountability.

313. For a discussion of the factors a prosecutor considers, *see* the discussion in Part I *supra*.

particular factors or considerations were present in a particular prosetion. These records should normally, and quite easily, be kept in the prosecutor's file.[314]

In most cases, a prosecutor's decision to bring charges should go unchallenged. However, in those cases where the defendant claims and makes some initial showing that his or her prosecution is discriminatory, the prosecutor, upon the court's order, could turn over his or her files to the court with subsequent disclosure of relevant, nonconfidential information to defense counsel.[315] In most cases it is hoped that the prosecutor's decision to charge would fall clearly within the parameters of the guidelines. In cases where the prosecutor's decision to charge appears extraordinary or aberrant with respect to the charging guidelines, the defendant will have some concrete evidence to put forward to support his or her charge of discriminatory prosecution.[316]

V. CONCLUSION

Although the prosecutor exercises a great deal of discretion in the decision to charge, that discretion may not be exercised in a discriminatory manner violative of the equal protection guarantee embodied in the fifth and fourteenth amendments. Discriminatory enforcement occurs when the prosecutor singles out for prosecution an individual or individuals on the basis of an arbitrary classification such as race, religion, or nationality, or to prevent the exercise of constitutionally protected rights. A discriminatory prosecution is invalid and may be

314. It is advocated here that prosecutor's offices should both issue guidelines or policy statements *and* keep records of the circumstances behind charging decisions. This author believes that prosecutors *do* follow unwritten guidelines; if they are not following such guidelines, they should be. Although it would certainly require some effort to promulgate formal guidelines, this author would argue that prosecutor's offices can and should take that action. Another commentator has argued that prosecutors first be required to keep records of their decisions to charge, and, eventually, from a compilation of those records, issue guidelines. *See* Vorenberg, *Narrowing the Discretion of Criminal Justice Officials,* 1976 DUKE L.J. 651, 694-97. Although this compilation process might result in a more reasoned deliberation than the immediate issuance of guidelines, it presents the problem of additional delay in the formulating of guidelines. Prosecutorial decisions in the interim would still run the very real risk of being ad hoc or arbitrary. In either case —whether the guidelines follow or precede the record-keeping requirement—prosecutors should regularly be keeping these guidelines and records.

315. This in camera disclosure would be of the type envisioned in *Berrios* and *Cammisano,* discussed *supra* at notes 277-306 and accompanying text.

316. It is not within the scope of this paper to suggest how much weight should be accorded to evidence of noncompliance with prosecutorial guidelines. It seems clear that a prosecution should not be struck down simply because a prosecutor did not follow his or her office's guidelines; however, an *unexplained* failure to follow the guidelines might suffice to render the prosecution invalid. Perhaps the burden of proving nondiscrimination should shift to the prosecutor upon a showing that the prosecution was not brought according to the usual procedure, or by following the guidelines. However, it should be noted that the method of shifting the burden proposed in *Falk,* 479 F.2d 616, 623-24 (7th Cir. 1973) (en banc), was not followed in subsequent cases. Thus, the efficacy of this suggestion will hinge upon the court's willingness to *actually* shift the burden.

struck down by the court, generally pursuant to a pre-trial motion by the defendant and an evidentiary hearing.

In recent years there have been many claims of discriminatory federal prosecutions. Surprisingly, almost all of the challenges concerned defendants who claimed their prosecutions were brought to stifle their exercise of constitutionally protected rights. It is not surprising that most of these challenges have failed, as they were often brought by vocal tax protestors prosecuted for failure to file returns or pay taxes. The government routinely showed that all known tax violators are prosecuted, and protestors are, by their nature, simply more visible.

It is not easy to be as sanguine about the outcome of other claims of discriminatory prosecution. The difficulties facing the defendant, who may very well have a valid claim, in meeting his or her burden of proof are nearly insurmountable. There is a presumption of prosecutorial good faith, and the defendant must put forward a rather substantial prima facie showing simply to obtain a hearing on the issue. Although it is justifiable to put some initial burden on the defendant, it is not justifiable, as courts have done, to make the defendant's burden overwhelming—especially since the information which could prove or disprove the defendant's claims is usually in the prosecutor's hands and is often not discoverable. The author does not advocate the complete opening up of prosecutorial files. Nevertheless, it does appear necessary to change the present system.

A reworking of the concept of the prima facie case is needed, since at present, the defendant's prima facie showing is virtually impossible to make. However, at the outset, this author would suggest a doctrinal clarification. A claim of discriminatory prosecution is based upon the equal protection clause. Therefore, it would make a great deal of sense to unify the standards necessary to allege selective enforcement with those required to make out an equal protection violation. This is hardly a novel idea in theory, although it may well be unique in practice. An examination of what is required to show discriminatory enforcement, in fact, reveals an equal protection analysis. Discrimination among those "similarly situated" is a fundamental tenet of equal protection jurisprudence.[317] The same is true of the requirement that the discrimination be based upon some impermissible classification, such as race, religion or national origin. However, the problem arises in application. Courts have taken a very narrow reading of what constitutes an "unjustifiable . . . or . . . arbitrary classification" [318] for purposes of discriminatory enforcement. Discrimination

317. *See generally* Tussman and ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

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

on the basis of race, national origin, and in some cases, the exercise of first amendment rights appears to be the only ground for allowing the defendant to attack prosecutorial abuse. Since the scope of the equal protection clause is far broader, the scope of impermissible prosecutorial discrimination should be expanded to the parameters of that constitutional provision.[319] In addition to doctrinal consistency, the proposed unification would also provide judges, faced with a novel claim of selective enforcement, with a ready body of precedent to consult—equal protection cases. Most importantly, this will make the defendant's burden of establishing a prima facie case easier. The requirement that others similarly situated were not prosecuted is a necessary one under the equal protection clause. However, there is nothing to prevent the court from accepting, for example, evidence of general nonenforcement of a statute [320] as satisfaction of this prong of defendant's prima facie showing. This would be entirely consistent with the reality that the prosecutor is the party with access to this kind of information. The defendant would then have to allege and make some initial showing that he was intentionally discriminated against on the basis of any classification that would be deemed impermissible under the equal protection clause.

The next step in the process is crucial. Since the defendant has made a prima facie showing as outlined above, the burden must *actually* shift to the prosecution to prove non-discrimination. Although the court in *Falk* indicated that the burden would shift to the prosecution, subsequent cases reveal the courts' reluctance to actually shift the burden.

This scheme will strike a balance between the interests of both the defendant and the prosecutor. The defendant's prima facie showing will no longer be impossible to make—it will be enough to allege that which would suffice for any ordinary equal protection violation. At the same time, the defendant's threshold showing will not be so low as to subject both the prosecutor and the courts to a deluge of unfounded claims. To be sure, this model places more of a burden on the prosecutor to justify his or her selection. However, the defendant will still be required to make a fairly strong prima facie showing. And, as discussed throughout this article, the prosecutor is in an infinitely better position to meet this burden than is the defendant.

319. For example, discrimination on the basis of sex in the prosecution of certain crimes might serve as a basis for attacking a prosecution. In the case of a prosecution under a regulatory statute, the defendant ought to be able to assert that his or her prosecution bears no rational relation to the purpose of the statute.

320. A generally unenforced law could be shown by evidence of a policy of nonenforcement or numerical data demonstrating few prosecutions in a given number of years.

Another suggestion, and one that has been followed in *Berrios* and *Cammisano,* is the disclosure of prosecutorial files to the court for in camera inspection following the defendant's initial showing of discrimination. The defendant's initial burden could be based upon the prima facie showing suggested above. The court would then make available to defense counsel relevant, nonconfidential information concerning the claims. Of course, crucial to this procedure is the required regular maintenance of prosecutorial guidelines in the charging decision and information or records indicating why the particular case was brought. This procedure has the advantage of permitting the development of serious claims of prosecutorial discrimination while at the same time safeguarding the prosecutor's interest in confidentiality. Although many defendants may allege that their prosecutions are discriminatory, "frivolous" claims can easily be weeded out and valid claims will have an opportunity to be heard. The criminal justice system would benefit from making the prosecutor, who is vested with the power of enforcing violations of the laws, more accountable for the lawfulness of his or her actions.