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Equal Protection from the Law: The Substantive Requirements for a Showing of Discriminatory Law Enforcement

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EQUAL PROTECTION *FROM* THE LAW: THE SUBSTANTIVE REQUIREMENTS FOR A SHOWING OF DISCRIMINATORY LAW ENFORCEMENT

*by Alan J. Russo**

I. INTRODUCTION

The preceding decade has witnessed a general judicial trend toward assuring that unfair law enforcement practices are not constitutionally employed to obtain criminal convictions.[1] Accordingly, the United States Supreme Court has recognized,[2] and a number of state courts have held,[3] that the Equal Protection Clause of the Fourteenth Amendment[4] prohibits invidious discrimination in the enforcement of valid state

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1 *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Mapp v. Ohio, 367 U.S. 643 (1961).

2 *See* Cox v. Louisiana, 379 U.S. 536, 557-58 (1965) (alternative holding), discussed in Section III *infra*; Oyler v. Boles, 368 U.S. 448, 451-57 (1962) (dictum); Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961) (dictum). Earlier Supreme Court authority includes Edelman v. California, 344 U.S. 357, 359 (1953) (dictum); Ah Sin v. Wittman, 198 U.S. 500, 506-08 (1905) (dictum).

Contentions of discriminatory law enforcement frequently have relied on Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886), which held that although a laundry licensing ordinance may have been "fair on its face," its application "with an evil eye and an unequal hand," so as to discriminate against persons of Chinese origin, constituted a denial of equal protection. *Yick Wo*, however, dealt with an administrative licensing board, and some state and lower federal courts have refused to apply it to law enforcement agencies which administer penal laws. *See, e.g.*, Buxbom v. City of Riverside, 29 F. Supp. 3 (S.D. Cal. 1939); People v. Montgomery, 47 Cal. App. 2d 1, 13-14, 117 P.2d 437, 445-46 (1941); Commonwealth v. Bauder, 14 Pa. D. & C.2d 571, 584-87 (Lehigh County Ct.), *aff'd mem.*, 188 Pa. Super. 424, 145 A.2d 915 (1958); *cf.* Soc'y of Good Neighbors v. Van Antwerp, 324 Mich. 22, 36 N.W.2d 308 (1949), *noted in* 59 YALE L.J. 354 (1950). It would appear that this restrictive interpretation of the Yick Wo principle has been rejected by the recent U.S. Supreme Court decisions cited above.

3 *See, e.g.*, People v. Gray, 254 Cal. App. 2d 256, 63 Cal. Rptr. 211 (1967); People v. Harris, 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (1960); City of Ashland v. Heck's, Inc., 407 S.W.2d 421 (Ky. 1966), discussed in section II. C. *infra*; People v. Walker. 14 N.Y.2d 901, 252 N.Y.S.2d 96, 200 N.E.2d 779 (1964), discussed in Section III *infra*; People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962), Annot., 4 A.L.R.3d 393 (1968); Bargain City U.S.A., Inc. v. Dilworth, Phila. Legal Intelligencer, June 22, 1960, p. 1, col. 1 (Phila. County Ct., C.P. 1960); *cf.* City of South Euclid v. Bondy, 28 Ohio Op. 2d 316, 200 N.E.2d 508 (Mun. Ct. 1964).

4 U.S. CONST. amend. XIV, § 1. This section provides, in part: ". . . [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

penal laws. These authorities have declared that under certain circumstances a penal law may not be applied in a discriminatory manner against one defendant if other persons similarly situated are not also prosecuted.

A defendant seeking to defeat a criminal prosecution through a showing of discriminatory enforcement is confronted with a considerable divergence of judicial opinion both as to substantive and procedural matters.[5] Two basic substantive issues which have contributed to this divergence are: 1) whether, and to what extent, the defendant must establish an *intent* to discriminate on the part of enforcement authorities, and 2) whether the Constitution prohibits discrimination, such as the unequal enforcement of a law against particular racial groups. The Supreme Court dealt briefly with both of these issues eight years ago in the case of *Oyler v. Boles.*[6] It is the purpose of this article to examine critically the treatment of these issues in this case and in other relevant decisions, and to suggest certain substantive standards through which the pursuit of equal justice might be furthered in this area.

In *Oyler v. Boles*, each of two petitioners, upon his third criminal conviction,[7] was sentenced to life imprisonment in accordance with the West Virginia habitual criminal statute.[8] The petitioners sought writs

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[5] *See* Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961); Note, *Discriminatory Law Enforcement and Equal Protection from the Law*, 59 YALE L.J. 354 (1950); Annot., 4 A.L.R.3d 404 (1965); *see also* Berry, *Spirits of the Past—Coping with Old Laws*, 19 U. FLA. L. REV. 24, 35-37 (1966); Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 409-13 (1964); Rodgers & Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 9-13 (1966).

[6] 368 U.S. 448 (1962), *noted in* 48 A.B.A.J. 375 (1962); 25 GA. B.J. 330, 332 (1963); 76 HARV. L. REV. 100, 118 (1962); 24 U. PITT. L. REV. 185 (1962).

[7] Petitioner William Oyler's third conviction was for murder in the second degree, which offense normally carried a penalty of from five to eighteen years imprisonment; petitioner Paul Crabtree was convicted of forging a $35 check, which crime normally carried a penalty of from two to ten years imprisonment. 368 U.S. at 449-50.

[8] W. Va. Code Ann. §§ 6130, 6131 (1961) [now W. Va. Code Ann., ch. 61, §§ 61-11-18 and 61-11-19 (1965)]. These sections provide, in part:

> When it is determined, as provided in section nineteen hereof, that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary, the person shall be sentenced to be confined in the penitentiary for life.
>
> It shall be the duty of the prosecuting attorney when he has knowledge of former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary to give information thereof to the Court immediately upon conviction and before sentence.

As is discussed at note 85 *infra*, the enforcement of these provisions by the prosecuting attorney and trial court would clearly appear to be mandatory, rather than discretionary.

of habeas corpus, alleging, *inter alia*, that only a small minority of those subject to life imprisonment under the Act had in fact been so sentenced, though its application was mandatory. Under these circumstances, they argued, they were being discriminated against as habitual offenders, and thus were being denied the equal protection of the laws.[9]

The Court, in an opinion by Justice Clark,[10] rejected these contentions on two grounds: 1) They "set out no more than a failure to prosecute others because of a lack of knowledge of their prior offenses,"[11] and 2) in any event, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation where it is not further alleged that "the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification."[12]

II. The Requirement of Purposeful or Intentional Discrimination

A. The general rule

The Court determined in *Oyler* that the Equal Protection Clause of the Fourteenth Amendment is not violated by a differential treatment of recidivists resulting from the prosecutor's ignorance of other offenders' prior convictions. This finding is consistent with the generally accepted rule that without a showing of purposeful discrimination,[13] mere unequal application of an impartial statute or ordinance does not violate the Constitution.[14]

This rule has formed the basis for several decisions subsequent to *Oyler*.[15] In *People v. Derison*,[16] the defendant was charged with a

[9] 368 U.S. 448, 454-56 (1962).

[10] Justice Harlan joined in the Court's opinion and wrote a concurring opinion. Justice Douglas, joined by Chief Justice Warren and Justices Black and Brennan, dissented on grounds not relevant to the present discussion. The Court affirmed the action of the West Virginia Supreme Court of Appeals, which had denied Oyler and Crabtree's petitions for writs of habeas corpus without opinion.

[11] 368 U.S. 448, 456 (1962).

[12] *Id.*

[13] "Purposeful discrimination" is used in the present context to refer to unreasonable purposeful discrimination—*i.e.*, selectivity in enforcement which bears no rational relationship to the broad purpose of the criminal law.

[14] *See, e.g.*, Edelman v. California, 344 U.S. 357, 359 (1953) (dictum), which refers to the "necessity of showing systematic or intentional discrimination;" *cf.* United States v. Rickenbacker, 309 F.2d 462, 464 (2d Cir. 1962), *cert. denied*, 371 U.S. 962 (1963).

[15] *See, e.g.*, Moss v. Hornig, 314 F.2d 89 (2d Cir. 1963), discussed in the text at note 36 *infra*; Whitney Stores, Inc. v. Summerford, 280 F. Supp. 406, 411 (D.S.C. 1968); State v. Gamble Skogmo Inc., 144 N.W.2d 749, 765 (N.D. 1966).

[16] 57 Misc. 2d 1003, 294 N.Y.S.2d 339 (Long Beach City Ct. 1968).

violation of municipal zoning laws because his building was being used for multi-family occupancy in an area zoned for one-family use. It was stipulated that of approximately 1,500 homes in the one-family zone, about one-third were being occupied illegally by more than one family.[17] Under these circumstances, the defendant contended that his prosecution under the zoning laws was constitutionally prohibited.

In rejecting this argument, the court declared:

> Disregard or nonenforcement of an ordinance, no matter how widespread, standing alone, can never make such a statute a 'dead letter.' . . . [D]efendant herein has, at best, attempted to show mere nonenforcement against others similarly situated. He has shown no arbitrary, intentional, unfair, clear or invidious discrimination against him in the enforcement of the zoning laws.[18]

Hence the unequal application of the laws did not vitiate his conviction.[19]

B. The application of the general rule in Oyler v. Boles

Although the general requirement of purposeful discrimination is well established,[20] the Court's finding that the petitioners in *Oyler v. Boles* failed to allege it[21] is open to serious question. As has been noted, the petitioners in *Oyler* argued that they were being denied their equal protection rights because the recidivist statute[22] under which they were sentenced had been applied to only a small minority of those similarly situated. The majority was unable to determine whether the alleged inequality was caused by the prosecutors' ignorance of prior offenses of three time offenders, or indeed, whether it did result from a deliberate policy.[23]

In the brief which the petitioners submitted to the U.S. Supreme Court, they repeatedly asserted their contention that the "discrimination

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17 *Id.* at 1004, 294 N.Y.S.2d at 340. Apparently, the vast majority of violators were not then being prosecuted.

18 *Id.* at 1007-08, 294 N.Y.S.2d at 344.

19 *Accord,* People v. Solkoff, 53 Misc. 2d 893, 280 N.Y.S.2d 455 (Long Beach City Ct. 1967) (same issue and result); *but see* People v. Millstein, 54 Misc. 2d 493, 283 N.Y.S.2d 353 (Long Beach City Ct. 1967), *aff'd mem.,* 57 Misc. 2d 137, 291 N.Y.S.2d 919 (App. T. 1968), discussed in Section II. C. *infra.*

20 However, see the discussion in Section II. C. *infra.*

21 368 U.S. at 456.

22 W. Va. Code Ann. §§ 6130, 6131 (1961) [now W. Va. Code Ann., ch. 61, §§ 61-11-18 and 61-11-19 (1966)], quoted in note 8 *supra.*

23 368 U.S. at 456.

was unquestionably purposeful."[24] Moreover, the majority opinion quotes petitioner Oyler's allegation that numerous "men who were *known offenders* throughout the State of West Virginia were not sentenced as required by the mandatory Statutes. . . ."[25] (emphasis added.) In the context of the case, "known offenders" seems to refer to prisoners whose prior convictions were known to the prosecuting attorneys at the time of sentencing.

In support of their contentions, the petitioners had introduced statistics showing that from 1940 to 1955, 983 men, each having three or more convictions, were sentenced to the West Virginia penitentiary. Of these, only seventy-nine received life terms in accordance with the habitual criminal statute.[26] Furthermore, of seven habitual criminals sentenced in his county during this fifteen and one-half year period, Oyler was the only one to receive a life term under the Act.[27] A study cited and quoted from in the petitioners' brief[28] indicated that West Virginia prosecutors often did have knowledge of defendants' prior convictions in such cases, but rarely filed informations alleging them, primarily because of the harsh penalties that the statute imposed.[29]

The determination that the petitioners in *Oyler* had failed to allege more than "a failure to prosecute others because of a lack of knowledge of their prior offenses"[30] would appear to be erroneous. Conceivably the Court's ruling in this regard may have been based not primarily on the sufficiency of the petitioners' allegations, but rather, on the difficulty of their proving constitutionally prohibited discrimination.[31] If this interpretation is correct, then perhaps the case should have been

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[24] Brief for Petitioners at 25, Oyler v. Boles, 368 U.S. 448 (1962). The petitioners stated, as a "question presented" by the case:

> In state court criminal proceedings in which petitioners have been imprisoned for life under a mandatory state habitual criminal act, have petitioners been denied the equal protection of the laws in violation of the Fourteenth Amendment if they can show that the law is being intentionally and purposefully applied and administered by state prosecuting attorneys with an unequal hand so as practically and materially to discriminate between persons in similar circumstances? *Id.* at 2-3.

[25] 368 U.S. at 455.

[26] Brief for Petitioners at 59, Oyler v. Boles, 368 U.S. 448 (1962).

[27] *Id.* In another county, life terms were given to only two of 193 prisoners punishable as habitual criminals; in yet another county, four of 104 eligible convicts were given life sentences. *Id.* As to the mandatory nature of the statute, see note 85 *infra.*

[28] Brief for Petitioners at 20-24, Oyler v. Boles, 368 U.S. 448 (1962).

[29] Brown, *West Virginia Habitual Criminal Law*, 59 W. VA. L. REV. 30, 36-45 (1956). *See also* Note, *The Supreme Court, 1961 Term*, 76 HARV. L. REV. 54, 120-21 (1962).

[30] 368 U.S. at 456.

[31] *Cf.* Snowden v. Hughes, 321 U.S. 1, 17-19 (1944) (Douglas and Murphy, JJ., dissenting).

remanded to the state court to afford the petitioners an opportunity to prove their allegations.[32]

C. *Should a showing of purposeful discrimination always be required?*

A logically permissible interpretation of the Fourteenth Amendment might be that any unequal application of a state penal statute, whether or not purposefully discriminatory, is constitutionally prohibited if some offenders would suffer its penal sanctions while others, although similarly situated, would not. But such a construction has been universally rejected on the theory that the finiteness of human and financial resources precludes the universal enforcement of a law without exception.[33]

On the other hand, where the enforcement of a penal law is lax and sporadic, though not necessarily absent to the point of desuetude, arguably, this fact alone should serve to establish a prima facie case of unconstitutional discrimination when the law is finally invoked.[34] In support of this position, it may be contended that requiring a defendant actually to plead and prove purposeful discrimination in such cases

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[32] *Cf.* 368 U.S. at 456. However, the Court might have considered such an opportunity unnecessary, in view of its alternative holding that "selective enforcement," even if alleged in Oyler, was not there constitutionally prohibited.

[33] *See, e.g.*, the cases cited in notes 14 and 15 *supra*; *The Right to Nondiscriminatory Enforcement of State Penal Laws*, *supra* note 5 at 1115; *cf.* Abernathy, *Police Discretion and Equal Protection*, 14 S.C.L.Q. 472, 475-76 (1962).

[34] Sunday closing laws and adultery laws are examples of enactments which are frequently accorded lax or sporadic enforcement, although they cannot in all cases properly be considered desuetudenal.

"Desuetude is a civil law doctrine rendering a statute abrogated by reason of its long and continued non-use." United States v. Elliott, 266 F. Supp. 318, 325 (S.D.N.Y. 1967). It is accepted in the law of Scotland, but is not part of English jurisprudence. *Id.* The status of the doctrine in American law is unclear. *Compare* District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953) *with* Poe v. Ullman, 367 U.S. 497 (1961). *Compare also* 1 J. SUTHERLAND, STATUTORY CONSTRUCTION § 2034 (3d ed. 1943) *with* A. BICKEL, THE LEAST DANGEROUS BRANCH 143-156 (1962). *See generally* Berry, *supra* note 5; Bonfield, *supra* note 5; Rodgers & Rodgers, *supra* note 5. In addition to equal protection problems, the attempted enforcement of a desuetudenal statute may present serious questions regarding the "fair notice" necessary to assure due process of law. Generally, as the authors of one article on the subject have noted, "(t)he very presence of the elements of desuetude—notorious violation, acquiescence by those charged with enforcement, the passage of years—bespeak more than prosecutorial integrity when some wretch is singled out, tried, and convicted. The only person ever prosecuted under the Georgia income tax perjury statute was Martin Luther King." Rodgers & Rodgers, *supra* note 5, at 11-12. As to the possible partial desuetude of California abortion law, *see* Sands, *The Therapeutic Abortion Act: An Answer to the Opposition*, 13 U.C.L.A. L. REV. 285, 306-07 n.139 (1966).

places upon him so severe a burden as to unduly narrow the scope of the Equal Protection Clause.[35] A comparison of two relatively recent cases, *Moss v. Hornig*[36] and *City of Ashland v. Heck's, Inc.*,[37] may illustrate this point.

In *Moss v. Hornig*, the plaintiff, a shoe store operator facing a state court prosecution for violation of a Sunday closing law,[38] sought a federal injunction against the prosecution.[39] He contended that he was being denied the equal protection of the laws because other violators were not being prosecuted. He further alleged "an intentional or purposeful discrimination against him"[40] by Hornig, the prosecuting attorney.

To support these contentions, he evoked testimony that only two persons, including himself, had been prosecuted under the closing law since its creation. Moreover, based on similar testimony, the Court of Appeals concluded that it was "not unlikely" that he and one other offender were the only persons so prosecuted in the geographic area during the preceding twelve years.[41] The plaintiff also evoked testimony that Hornig knew other stores were open but failed to prosecute.[42] He also argued on appeal that he was prepared to present evidence which would prove purposeful discrimination, but that erroneous trial court rulings precluded this. In declining to enjoin the state prosecution, the Second Circuit held that "Moss has failed to prove purposeful discrimination which is required in order to establish a denial of equal protection. . . ."[43]

City of Ashland v. Heck's, Inc., with which *Moss v. Hornig* may be juxtaposed, also concerned a Sunday closing law.[44] In *Heck's*, various

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35 Furthermore, as one commentator has observed, inequality in law enforcement "is particularly acute where a law has ceased to reflect contemporary public opinion: it is then that enforcement is sporadic and most likely to be discriminatory." *Discriminatory Law Enforcement and Equal Protection from the Law, supra* note 5, at 354.

36 314 F.2d 89 (2d Cir. 1963).

37 407 S.W.2d 421 (Ky. 1966).

38 Conn. Gen. Stats. § 53-300 (1958).

39 Relief was sought under 42 U.S.C. § 1983 (1964). The court initially held that this provision was applicable to the Equal Protection Clause of the Fourteenth Amendment. 314 F.2d at 92.

40 *Id.* at 93.

41 *Id.* at 93 n.6.

42 *Id.* at 93.

43 *Id.* at 94. The court found that the significance of the excluded evidence was not apparent from the record; reversal of the trial court's decision was therefore not required.

44 Ky. Rev. Stats. § 436.160 (1962).

types of retail establishments, including supermarkets, drugstores and car washes, customarily remained open for business on Sunday in the city of Ashland, despite a statute prohibiting them from doing so. However, when Heck's, a discount department store new to the city, similarly conducted business on Sunday, citations were issued to several of its employees. Six cases involving Heck's personnel came to trial, and a fine plus costs was imposed in each instance.[45]

Thereafter, Heck's and its manager[46] obtained an injunction against the city, its mayor, police chief and police judge. The injunction restrained them from enforcing the closing law against Heck's or its employees, unless their arrest and prosecution under it were part of the just and equal enforcement of the statute.[47]

In affirming the issuance of this injunction, the Court of Appeals of Kentucky declared:

> Probably no law contrived by man for his own governance ever has been or will be enforced uniformly and without exception. But the Constitution does not demand perfection. It is only the obvious and flagrant case that warrants relief, and unquestionably this instance, in which appellees are the only persons found guilty in Ashland in a quarter century, falls in that category. Certainly we do not construe the judgment, nor can it be construed, as appellants say, to mean that the successful prosecution of any charge under the Sunday law will require proof that every other known violator has been or is being prosecuted.
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> In fairness to the municipal officers who are engaged in this litigation, let it be understood that there is no suggestion of a dishonest or opprobrious motivation in their actions and policies. On the contrary, it is manifest that they are the innocent victims of a persisting legislative neglect, disinclination or inability (whichever it may be) to come to grips with the problem—indeed, the obligation—of bringing a poor law into conformity with the facts of life. Nevertheless, 'the equal protection of the laws' vouchsafed by the 14th Amendment to every person is not qualified; it is absolute; it cannot be denied, either

[45] 407 S.W.2d 421, 422-23 (Ky. 1966). Heck's was open on Sunday, October 20, 1963, and remained open on the following four Sundays. On each of these days, citations were issued to its employees. Operators of several other businesses which had previously remained open on Sunday without police interference were also issued citations during this period. However, all of the cases not involving Heck's employees were either dismissed or continued indefinitely. These cases involved car washes, drug stores and grocery stores. The presiding police judge indicated that he would regard such businesses (but not Heck's) as "works of necessity," and therefore statutorily exempt from the Sunday closing law.

[46] The manager of Heck's was one of the persons to whom citations were issued.

[47] 407 S.W.2d 421, 423 (Ky. 1966).

in bad faith or in good faith.[48]

The view expressed by the majority in *Heck's*, though contrary to the overwhelming weight of authority in not requiring a showing of purposeful discrimination,[49] would appear to be more sound than the typical position taken in *Moss v. Hornig*. Particularly is this so with respect to laws which have been long disregarded. Purposeful discrimination is generally difficult, if not impossible, to prove in such cases. As one court has observed: "Evidence of discriminatory enforcement usually lies buried in the consciences and files of the law enforcement agencies involved and must be ferreted out by the defendant."[50] Direct proof in the form of testimonial or other evidence of conscious discrimination is not likely to be available.[51]

As for indirect proof, the rarity of prior convictions would probably prevent a defendant from showing a pattern of discriminatory enforcement against a particular class of which he is a member.[52] Hence he

48 *Id.* at 424-25.

49 The decision fails to indicate that the plaintiff's alleged purposeful or intentional discrimination by law enforcement authorities, and the issuance of citations to operators of other businesses strongly suggests the contrary.

As indicated above, the local police court interpreted the Sunday closing law to apply only to department stores such as Heck's, and not to other retail establishments carrying some of the same merchandise. However, the Court of Appeals rejected this interpretation.

Arguably, though contrary to the view expressed in the text, the *Heck's* decision does not strongly support the position that a showing of purposeful discrimination is unnecessary. Rather, one might contend, the appellate court *in effect* held merely that the statute, as construed by the police court, made an "unreasonable classification" among businesses; and that since the classification had been applied in favor of Heck's competitors, the law would have to be regarded as equally unenforceable against Heck's. *See generally* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969) on the "reasonable classification" doctrine.

It should be noted, however, that the court in *Heck's* declared enforcement against the plaintiffs to be unlawfully discriminatory under the "precept of Yick Wo v. Hopkins," and did not mention the "reasonable classification" doctrine. 407 S.W.2d 421, 422 (Ky. 1966).

50 People v. Gray, 254 Cal. App. 2d 256, 266, 63 Cal. Rptr. 211, 217 (1967).

51 Enforcement authorities would be unlikely to admit to practicing unconstitutional discrimination.

52 With respect to more frequently applied laws, a defendant may be able to show a pattern of enforcement against certain classes of persons and not (or not as vigorously) against others. For example, in People v. Harris, 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (1960), the defendants were Negroes charged with violating anti-gambling laws. They sought to show intentional discrimination against Negroes in enforcing the laws, and offered to prove a police policy of conducting gambling investigations primarily in black neighborhoods, and a ratio of black to white arrests of greater than ten to one, over a three-year period. The court in *Harris* held that the defendants were entitled to present such evidence.

However, where a law is enforced sporadically, there probably would not be sufficient statistical data or other evidence to show a pattern of class discrimination.

might well have to resort to proving merely that the law has not been enforced against the type of conduct at issue, or at best, that many other known violators have not been prosecuted. Conceivably, he might also show a motive for purposeful discrimination. However, evidence of this sort generally has been found insufficient to prove an intent to discriminate.[53] Accordingly, requiring proof of such intent with respect to rarely applied penal laws would seem to severely limit the scope of protection from unequal treatment afforded by the Fourteenth Amendment.

Seemingly when a defendant is prosecuted under a usually disregarded law, an equal protection claim should succeed[54] even when it is clear that there has in fact been no purposeful discrimination. Under such circumstances, the defendant will have been fortuitously prosecuted[55] for conduct normally engaged in without legal sanctions. More significantly, the state, by adopting a policy of lax and sporadic enforcement, will have created a situation in which such arbitrary discrimination is permitted to occur. Finally, by accepting an equal protection argument, we would not be thwarting a significant state interest, since the law at issue probably will have "ceased to reflect contemporary public opinion."[56]

The contention that the Equal Protection Clause should be deemed to bar even unintentionally discriminatory prosecutions under long disregarded laws must be qualified to the following extent: If a court determines that such a prosecution is part of a recently initiated general effort to apply the law more vigorously, then the defendant's equal protection rights would not appear to be violated thereby. Absent purposeful discrimination, the mere fact that others have gone unprosecuted should not help a defendant, unless the inevitable disparity between those violating the law and those penalized is being increased by a

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53 *See, e.g.*, People v. Darcy, 59 Cal. App. 2d 342, 351, 139 P.2d 118, 124 (1943), in which the defendant, a communist charged with perjury in an election registration affidavit, unsuccessfully contended that he was being denied equal protection in that "hundreds of thousands" of identical violators were not being prosecuted, and that he was being singled out because of his political affiliation. *See generally The Right to Nondiscriminatory Enforcement of State Penal Laws, supra* note 5, at 1122-31.

54 Subject to the qualification noted in the following paragraph.

55 Though it should never be used for such purpose, prosecution itself tends to penalize a defendant. Even in the absence of arrest or incarceration, it may consume his time and resources, and cause emotional trauma and injury to reputation.

Hence, the defendant who escapes conviction on the constitutional ground of discriminatory enforcement has suffered to some extent because of his unlawful conduct.

56 *Discriminatory Law Enforcement and Equal Protection from the Law, supra* note 5, at 354; *cf.* Berry, *supra* note 5, at 34-36.

state policy of lax or sporadic enforcement.[57]

This approach is approximated in *People v. Millstein*[58] where the defendants were charged with zoning law violations resulting from the over-occupancy of their property. They argued that numerous unpunished violations of the zoning ordinance over an extended period of time, plus the city's "tacit acquiescence therein,"[59] served to bar enforcement of the law against them. In an opinion considering this contention, it was declared:

> In this Court's view . . . disregard of an ordinance (with either the tacit or active consent of a municipality) may become so widespread as to make the statute a 'dead letter,' and attempted enforcement thereof abhorrent to the judicial conscience because, in effect, discriminatory as to the defendant selected for prosecution.[60]

In so observing, the court nowhere suggested or indicated that intentional discrimination by law enforcement authorities against a defendant must be shown.[61]

Despite this broad statement of the general rule as the court conceived it, the zoning ordinance was held to be constitutionally enforceable under the facts of *Millstein*. In support of this holding, the court noted that "the earlier laxity in enforcement has not been so widespread or so long tolerated as to destroy the statute and render it wholly impotent; [and] that a pattern of substantial vigor in enforcement has been established in recent years and is now in effect. . . ."[62] Under these circumstances, the defendants' convictions appear to have been constitutionally valid.

III. Selective Enforcement Against Individuals Versus Class Discrimination

In *Oyler v. Boles*, as has been discussed, the petitioners contended that they were being denied the equal protection of the laws because the habitual criminal statute, under which they were sentenced, had been ap-

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[57] However, the long disuse of a law may be a mitigating factor in determining penal sanctions. *Cf.* District of Columbia v. John R. Thompson Co., 346 U.S. 100, 117 (1953) (dictum).

[58] 54 Misc. 2d 493, 283 N.Y.S.2d 353 (Long Beach City Ct. 1967), *aff'd mem.*, 57 Misc. 2d 137, 291 N.Y.S.2d 919 (App. T. 1968), *criticized in* People v. Derison, 57 Misc. 2d 1003, 294 N.Y.S.2d 339 (Long Beach City Ct. 1968).

[59] 54 Misc. 2d at 494, 283 N.Y.S.2d at 355.

[60] *Id.* at 495, 283 N.Y.S.2d at 355-56.

[61] Nor did the court indicate that the same rule would not apply with respect to state statutes.

[62] 54 Misc. 2d at 497, 283 N.Y.S.2d at 357.

plied to only a small minority of the recidivists who fell within the scope of the Act. As an alternative ground for rejecting this contention the Court declared:

> Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged.[63]

This determination seems to indicate that relief for denial of equal protection rights is available only where law enforcement authorities have singled out for differential treatment a defined *class*, such as a racial or religious group, of which the accused is a member.[64] By its terms, however, the Fourteenth Amendment prohibits the states from denying "to *any person* within its jurisdiction the equal protection of the laws." (emphasis added.) A construction which restricts the applicability of the Equal Protection Clause to instances of class discrimination, would appear to narrow its scope to a degree unwarranted by its language.[65]

Snowden v. Hughes[66] is cited by the Court in *Oyler* to support its interpretation. In *Snowden*, the plaintiff alleged that the defendants, as members of the Illinois State Primary Canvassing Board, had refused to certify him as a candidate for public office, though they were required to do so by State law. While he disclaimed any contention that class or race discrimination was involved,[67] the plaintiff argued that this refusal constituted a denial of his equal protection rights.

The majority of the Court rejected this contention on the ground that he had failed to allege facts tending to show that the Board was making any intentional or purposeful discrimination between persons or

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[63] 368 U.S. at 456.

[64] *But see* Moss v. Hornig, 314 F.2d 89, 92-93 (2d Cir. 1963). The terms "conscious exercise of selectivity in enforcement" and "discriminatory enforcement" would appear to have the same meaning with respect to the application of a mandatory statute, despite their varying connotations. *Cf.* Note, 24 U. PITT. L. REV. 185, 186-87 (1962).

[65] Moreover, recent United States Supreme Court decisions require state action to *compensate* for private inequality of wealth among criminal defendants. Griffin v. Illinois, 351 U.S. 12 (1956) (indigent's right to have free transcript); Douglas v. California, 372 U.S. 353 (1963) (indigent's right to appellate counsel). It would appear anomalous to require the state to create substantially equal defense opportunities, while permitting it to irrationally discriminate against individuals in exercising its prosecutorial functions in the first instance.

[66] 321 U.S. 1 (1944).

[67] *Id.* at 7-8.

classes.[68] It was observed that equal protection is denied only where intentional or purposeful discrimination is shown "on the face of the action taken with respect to a particular class or person. . . [or] by extrinsic evidence showing a discriminatory design to favor one individual or class over another. . . ."[69]

Consequently, the majority opinion in *Snowden* does not support the position that only class discrimination violates the Equal Protection Clause. On the contrary, the opinion appears repeatedly to recognize that purposeful discrimination against particular individuals, as well as that based on arbitrary group classifications, is constitutionally prohibited.

Mr. Justice Frankfurter, in a concurring opinion in *Snowden*, is more explicit than the majority on this point. The Fourteenth Amendment, he notes, "does not permit a state to deny the equal protection of its laws because such denial is not wholesale."[70] Rather, conscious discrimination by a state which touches the complaining individual alone would violate the Fourteenth Amendment.[71]

In the context of the criminal law, *Cochran v. Kansas*[72] would appear to support the same principle. In *Cochran*, the petitioner, a penitentiary inmate, contended that state prison officials had refused him privileges of judicial appeal which were afforded others. He did not allege, as *Oyler* seems to require, that this discrimination was based upon an arbitrary classification such as race or religion. Nonetheless, the Court, in a unanimous opinion, declared that his contention, if proven, would constitute a violation of his equal protection rights.[73] Hence, the denial of his habeas corpus petition was reversed, and the case was remanded to the state court for a determination of fact regarding his allegation.

More recently, in *Cox v. Louisiana*,[74] the United States Supreme Court reversed a civil rights leader's conviction for obstructing public pas-

68 *Id.* at 7. Justice Rutledge concurred in the result while Justice Frankfurter wrote a concurring opinion. Justice Douglas, joined by Justice Murphy, dissented.

69 *Id.* at 8.

70 *Id.* at 15.

71 *Id.* at 16, wherein it is also asked rhetorically: "And if the highest court of a state should candidly deny to one litigant a rule of law which it concededly would apply to all other litigants in similar situations, could it escape condemnation as an unjust discrimination and therefore a denial of the equal protection of the laws? See *Backus v. Fort Street Union Depot Co.*, 169 U.S. 557, 571."

72 316 U.S. 255 (1942).

73 This point, divorced from procedural matters, was apparently conceded by the state. *Id.* at 257-58.

74 379 U.S. 536 (1965).

sages.[75] The conviction, it was held, violated the defendant's first amendment rights because local authorities had been afforded uncontrolled discretion to permit or prohibit parades and street meetings. Justice Goldberg, writing for the Court, further declared: "[I]nherent in such a system . . . is the obvious danger to the right of a person or group not to be denied equal protection of the laws . . . . It is clearly unconstitutional to enable a public official . . . to engage in invidious discrimination among persons or groups . . . by selective enforcement of an extremely broad prohibitory statute."[76]

The Court did not directly confront the issue of individual versus group discrimination in *Cox v. Louisiana.* Nonetheless, its refusal to distinguish between the violation of equal protection rights accorded groups from those accorded individuals would seem to impliedly reject the apparent *Oyler* view that only class discrimination is prohibited. Consequently, the indication in *Oyler* that discriminatory enforcement against individuals is permissible when not based on arbitrary group classifications appears to be both unsupported by prior United States Supreme Court rulings and unheeded in subsequent Court pronouncements. The holding appears to have been followed, however, in some state court proceedings.[77] The United States Supreme Court has long recognized that *legislative enactments* may validly classify persons and treat some differently from others. Such classifications are reasonable and do not deny equal protection if they include "all and only those persons who are similarly situated with respect to the purpose of the law."[78]

Oyler perhaps may be viewed as holding that selective applications of penal laws are reasonable and valid so long as they are based on classifications rationally related to the purpose of the laws. Thus

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[75] The conviction had been obtained under La. Rev. Stat. § 14:103.1 (Cum. Supp. 1962).

[76] 379 U.S. at 557-58. Justices Black and Clark wrote concurring opinions. Justice White, joined by Justice Harlan, concurred in part, but dissented from the Court's decision regarding the statute herein discussed.

[77] *See, e.g.,* Drews v. State, 236 Md. 349, 204 A.2d 64 (1964), *appeal dismissed,* 381 U.S. 421 (1965) (Warren, C.J., and Douglas, J., dissenting).

[78] Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 346 (1949); *see, e.g.,* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); Barbier v. Conolly, 113 U.S. 27, 31 (1885); *see generally Developments in the Law—Equal Protection, supra* note 49, at 1076-1132. Of course, when the very purpose of a law is to discriminate, the law is not validated under the "reasonable classification" doctrine. *See, e.g.,* Truax v. Raich, 239 U.S. 33, 40-41 (1915); Strauder v. West Virginia, 100 U.S. 303 (1879); Tussman & tenBroek, *supra* at 356-57.

if the recidivist statute were applied to the petitioners and not to others within its scope because the petitioners' crimes, viewed in the aggregate, seemed more serious, then under this interpretation, the selective enforcement against them probably would have been constitutional. Since the petitioners might have presented a societal threat greater than other habitual criminals, this would conform to our law's general purpose which is to protect society from the dangers of further criminal activity.[79]

On the other hand, if the law were selectively enforced against the petitioners because of "aspects of personality" shared by members of certain types of groups, such as race, religion or political beliefs, then the selection would have been irrelevant to the law's purpose, and thus unconstitutional.[80]

Conceivably selective enforcement in *Oyler* might be based, not on aspects of personality common to members of a generally recognized group, but rather, on aspects of personality peculiar to the petitioners, such as the personal animosity of enforcement authorities toward them as individuals. If such personal animosity indeed constituted the basis for their selection, then at least analytically, the petitioners would have been members of a class, *viz.*, those individuals whom enforcement authorities personally disliked. This classification would appear irrelevant to the purpose of the law, and therefore arbitrary.[81] Arguably, if the petitioners in *Oyler* had clearly contended that personal animosity against them was the reason for the unequal law application, then grounds for finding a denial of equal protection would have been alleged according to the standard which Justice Clark's language suggests.[82]

The unreasonableness of basing enforcement decisions on personal animosity toward individual offenders apparently was recognized in *People v. Walker*.[83] In *Walker*, the defendant initially had been convicted of violating a city housing law.[84] The appellate court ultimately dismissed the complaint upon a showing that the defendant's prosecution was in retaliation for her exposure of certain government corruption. Under such circumstances, it was held that the prosecution

79 *Cf.* Brown, *supra* note 29, at 30.

80 *Cf. The Right to Nondiscriminatory Enforcement of State Penal Laws*, *supra* note 5, at 1118-19 n.66.

81 *Cf. id.*

82 *But see* Moss v. Hornig, 314 F.2d 89, 92-93 (2d Cir. 1963).

83 50 Misc. 2d 751, 271 N.Y.S.2d 447 (App. T. 1966), *remanded from* 14 N.Y.2d 901, 200 N.E.2d 779, 252 N.Y.S.2d 96 (1964).

84 N.Y. Multiple Dwelling Law § 61-A (McKinney 1946).

had deprived her of her equal protection rights.

The argument that personal animosity creates an "arbitrary classification" should not be permitted wholly to obscure the question of whether enforcement authorities, in applying mandatory penal laws,[85] may make reasonable classifications of the general nature of legislative classifications. In this regard, one court, has utilized the reasonable classification doctrine to affirm the enforcement of a Sunday closing law, comprehensive in scope, solely against grocery stores. The court declared that since the legislature might have barred only grocery stores from doing business on Sunday, the police, in applying a general statute, might validly make the same classification.[86]

Another question concerns the possible equal protection limits on the exercise of police or prosecutorial discretion of a non-legislative nature. Prosecutors have long been accorded broad discretion in determining whether to prosecute, who to prosecute, which offenses to charge, and which penalties to seek. Two individuals who have committed the same offense might properly be treated differently, for instance, if "one is a young first offender and the other older, with a criminal record, or one played a lesser and the other a dominant

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[85] The recidivist statute at issue in Oyler v. Boles, W. Va. Code Ann. 6130, 6131 (1961) [now W. Va. Code Ann. ch. 61, §§ 61-11-18 and 61-11-19 (1966)], quoted at note 8 *supra*, appears by its wording clearly to be mandatory, and the West Virginia Supreme Court of Appeals repeatedly has viewed it as such. *See, e.g.*, State *ex rel.* Cox v. Boles, 146 W. Va. 392, 120 S.E.2d 707 (1961); State *ex rel.* Yokum v. Adams, 145 W. Va. 450, 114 S.E.2d 892 (1960); State *ex rel.* Housden v. Adams, 143 W. Va. 601, 103 S.E.2d 873 (1958); State *ex rel.* Browning v. Tucker, 142 W. Va. 830, 98 S.E.2d 740 (1957). In *Oyler* itself, the trial court "indicated that the life sentence was mandatory under the statute . . . ." 368 U.S. 448, 450 (1961). While briefly suggesting in a footnote the possibility that the state court's denial of relief in *Oyler* indicated that it considered the statute non-mandatory, and that such a determination would be binding on the United States Supreme Court, Justice Clark did not further pursue the point, and stated in the text of the majority opinion, "This Act provides for a mandatory life sentence upon the third conviction . . . ." *Id.* at 455 n.10, 449.

[86] Taylor v. City of Pine Bluff, 266 Ark. 309, 289 S.W.2d 679, *cert. denied*, 352 U.S. 894 (1956). *Compare Taylor with* City of Ashland v. Heck's, Inc., 407 S.W.2d 421 (Ky. 1966); Bargain City U.S.A., Inc. v. Dilworth (Phila. County Ct., C.P. 1960), in Phila. Legal Intelligencer, June 22, 1960, at 1, col. 1. Prior to *Oyler v. Boles*, the United States Supreme Court appears to have recognized the validity of reasonable classifications in the administration of nonpenal laws. *See* Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947), *discussed in The Right to Nondiscriminatory Law Enforcement of State Penal Laws, supra* note 5, at 1117-18; *cf.* Kent v. Dulles, 357 U.S. 116 (1958), *discussed in* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 72-73 (1965), in which a federal statute relating to passports, which might otherwise have been found unconstitutional because it lacked a limiting standard for its exercise, was found valid as a result of the classifications which customarily had been made in administering it.

role, one the instigator and the other a follower. . . ."[87] It would seem that courts generally would be more reluctant to invalidate an exercise of such case-by-case discretion than they would be to strike down an objectionable classification of a legislative nature.[88] But where, as in *People v. Walker*, the basis for an exercise of discretion is shown to be wholly irrelevant to the purposes of the law, a defendant who suffers thereby would appear clearly to have been denied equal protection.[89] This issue was considered in *Newman v. United States*.[90]

In *Newman*, the appellant and another defendant were indicted for housebreaking and petty larceny. Subsequently the other defendant was allowed to plead guilty to lesser charges, though the appellant was not. This differential treatment, the appellant argued, denied him equal protection.[91] Chief Judge Bazelon rejected this contention in a con-

87 Newman v. United States, 382 F.2d 479, 482 (D.C. Cir. 1967); *cf.* Epperson v. United States, 371 F.2d 956, 958 (D.C. Cir. 1967). On the general problem of the "low visibility" of police and prosecutorial discretion and the need for guiding procedures and standards, *see, e.g.*, Abernathy, *supra* note 33; Cates, *Can We Ignore Laws? —Discretion Not to Prosecute*, 14 ALA. L. REV. 1 (1961); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960); Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 904 (1962); Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925 (1960); Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955), wherein it is observed: "The discretionary power exercised by the prosecuting attorney in initiation, accusation and discontinuance of prosecution gives him more control over an individual's liberty and reputation than any other public official." *Id.* at 1057.

88 Moreover, an irrational exercise of police or prosecutorial discretion would appear harder to prove when it is not based on a legislative type of classification. *Cf.* the discussion accompanying notes 50-53 *supra*. However, the distinction drawn in the text between legislative and non-legislative exercises of discretion is far from absolute. Thus, a series of case by case determinations may present a general pattern and appear to follow a rule. Also, a policy of selective allocation of police resources in terms of geography and time may at some point produce a situation of virtual nonenforcement of certain laws in some areas, accompanied by enforcement in others; such a policy might be viewed as a legislative type of classification. *Cf.* People v. Harris, 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (1960), discussed at note 52 *supra*; *The Right to Nondiscriminatory Enforcement of State Penal Laws*, *supra* note 5, at 1119-22.

89 However, if one law violator out of many escapes prosecution for "irrational" reasons (such as familial or political affiliations or bribery), a court might be reluctant to permit several others to escape conviction on grounds of discriminatory enforcement. *The Right to Nondiscriminatory Enforcement of State Penal Laws*, *supra* note 5, at 1115 n.56. Thus, it would appear that in *isolated* cases of favoritism, the societal interest in effective law enforcement would be found to outweigh the interest in equal justice. In any event, a defendant perhaps would find it very difficult to prove that a particular violator was irrationally permitted to escape legal sanctions, and an attempt to make such a showing might give rise to numerous collateral issues.

90 382 F.2d 479 (D.C. Cir. 1967).

91 Though the Fourteenth Amendment by its terms applies only to the states, it has been recognized that a denial of the equal protection of the laws by federal authorities

curring opinion observing that the appellant had "made no attempt to establish the reasons for the different treatment, and so it is impossible for him to maintain that the difference was irrational or otherwise unconstitutional."[92] Writing for the court, Judge (now Chief Justice) Burger found, however, that the matter was wholly within the realm of prosecutorial discretion. He further noted:

> The concurring opinion would reserve judicial power to review 'irrational' decisions of the prosecutor. We do our assigned task of appellate review best if we stay within our own limits, recognizing that we are neither omnipotent so as to have our mandates run without limit, nor omniscient so as to be able to direct all branches of government. The Constitution places on the Executive the duty to see that the 'laws are faithfully executed' and the responsibility must reside with that power.[93]

The policy of judicial restraint advocated by Chief Justice Burger would seem, in the present context, to give insufficient weight to the sparsity of alternative methods whereby ordinary citizens may cause erring law enforcement authorities to exercise their discretion more rationally. The typical case of unreasonable, selective enforcement against an individual would not likely bring public opinion or political pressure to bear upon such authorities. As one court has observed: "Perhaps one of the unarticulated reasons why discriminatory enforcement is recognized as a defense to a criminal prosecution is pretty much the same as the basis for the rule excluding illegally obtained evidence. We refuse to admit such evidence because we know of no other way to force law enforcement agencies to obey the law."[94]

IV. CONCLUSIONS

In order to be acquitted in a penal proceeding on grounds of discriminatory enforcement, a defendant generally has been required to show that enforcement authorities have purposefully singled him out,

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constitutes a violation of the Due Process clause of the Fifth Amendment. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954).

92 382 F.2d at 482.

93 *Id.* at 482, n.9 (dictum). A different panel of judges of the U.S. Court of Appeals for the District of Columbia Circuit, however, has recently expressed a different view. In Washington v. United States, 401 F.2d 915 (D.C. Cir. 1968), the court, per Robinson, J., declared that "at least since Yick Wo v. Hopkins, prosecutors, like other governmental representatives, were constitutionally bound to refrain from administering the law 'with an evil eye and an unequal hand.' This the Supreme Court seems clearly to have recognized, and other courts have held . . . ." *Id.* at 924-25 (footnotes omitted) (dictum).

94 People v. Gray, 254 Cal. App. 2d 256, 266, 63 Cal. Rptr. 211, 217 (1967).

while not acting against others for similar violations. The mere fact that an impartial law has been applied unequally does not establish a denial of fourteenth amendment rights. This requirement of purposeful discrimination is justified as to most penal laws insofar as universal enforcement is a practical impossibility.

If a law is usually disregarded and rarely enforced, however, its application in isolated cases may properly be found to deny equal protection even in the absence of a showing of purposeful discrimination. Whether an intent to purposefully discriminate exists, the state, by adopting a lax and sporadic enforcement policy, will have substantially increased the inevitable disparity between those violating the law and those penalized therefor. Moreover, the acceptance of an equal protection argument in such cases probably would not thwart a significant state interest, since usually disregarded laws will usually have ceased to reflect contemporary opinion. On the other hand, these arguments against a purposeful discrimination requirement seem inapplicable to a prosecution that is part of a recently commenced general effort to enforce a theretofore disregarded law more vigorously.

Where the legislature has created selective classifications to enforcing a universally applicable penal law, a defendant prosecuted thereunder clearly will have been denied equal protection if such classifications are not rationally related to the law's purpose.

If a prosecution is the product of selective enforcement of a *non*-legislative nature, the selectivity usually is deemed to be within the realm of permissible prosecutorial discretion. But, if the criteria for an exercise of such discretion are wholly unrelated to the purpose of the law, a defendant who suffers thereby would seem to have been denied equal protection to the same extent as one subjected to arbitrary classifications of a legislative nature. In both situations, dismissal of the charges, though disturbing because a law violator would escape punishment, appears to be the only effective way of assuring the evenhandedness of law enforcement practices.