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Criminal Law-Defense of Discriminatory Prosecution-Selection of a Defendant for Federal Prosecution Based upon a Constitutionally Unjustifiable Standard Violates the Due Process Clause of the Fifth Amendment

CRIMINAL LAW—DEFENSE OF DISCRIMINATORY PROSECUTION—SELECTION OF A DEFENDANT FOR FEDERAL PROSECUTION BASED UPON A CONSTITUTIONALLY UNJUSTIFIABLE STANDARD VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT—*United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972).

Defendant William Steele was charged in the United States District Court for the District of Hawaii with violating 13 U.S.C. § 221(a)[1] as a consequence of his refusal to answer questions on a census form. Prior to the alleged violation Steele had been an active and vocal participant in a census resistance movement in Hawaii which believed that the census was an unconstitutional invasion of privacy. In urging the public to resist compliance with census requirements, he had held a press conference, led a protest march and distributed pamphlets. Steele was joined in his crusade by at least three others: David Watamull, owner of a radio station which had broadcast census editorials; Donald Dickinson, a radio announcer who had spoken out against the census; and William Danks, who, as the head of the state chapter of Census Resistance, had distributed pamphlets and publicly criticized the census. All four were charged with violating 13 U.S.C. § 221(a) because of their refusal to supply information on the census forms. Although there were at least six other violators of the statute known to the government only the four vocal offenders were prosecuted. At trial Steele unsuccessfully contended that his refusal to answer the census questionnaire was an exercise of his constitutional rights;[2] he was convicted and fined fifty dollars. However, on appeal the United States Court of Appeals for the Ninth Circuit reversed the conviction in an opinion authored by Circuit Judge Eugene A. Wright.[3]

1. 13 U.S.C. § 221(a) (1954) provides:

> Whoever, being over eighteen years of age, refuses or willfully neglects, when requested . . . to answer, to the best of his knowledge, any of the questions on any schedule submitted to him in connection with any census or survey . . . applying to himself or to the family to which he belongs or is related . . . shall be fined not more than $100 or imprisoned not more than sixty days, or both.

The schedule submitted to Steele was the Department of Commerce Census Form 1970.

2. Steele, in effect, claimed he had a constitutionally protected right to be free from illegal searches and seizures, especially insofar as they involved an invasion of privacy. United States v. Steele, 461 F.2d 1148, 1150 n.3 (9th Cir. 1972). The district court reported no opinion.

3. United States v. Steele, 461 F.2d 1148 (9th Cir. 1972).

Steele presented three arguments to the court of appeals: (1) to enforce 13 U.S.C. § 221(a) would violate his Fourth Amendment right to privacy, (2) to compel the disclosure of census information would violate his Fifth Amendment right against self-incrimination, and (3) to selectively prosecute him and his companions because they had publicly advocated non-compliance with the census requirements would comprise discriminatory prosecution in violation of the Due Process Clause of the Fifth Amendment.[4] The court refused to hear the first argument, implicitly agreeing with the view espoused by the Second Circuit.[5] It abstained from deciding the case on the second issue,[6] and proceeded directly into Steele's third argument. The court concluded that Steele had successfully made out the defense of selective prosecution by demonstrating a purposeful discrimination by the census authorities against those who had publicly expressed opposition to the census.[7] Under these circumstances, the court of appeals felt compelled to reverse his conviction.

The defense of discriminatory prosecution derives from the landmark case of *Yick Wo v. Hopkins*.[8] There the Court established the princi-

4. *Id.* at 1150.

5. *Id.* at 1150 n.3, *citing* United States v. Rickenbacker, 309 F.2d 462 (2d Cir. 1962), *cert. denied*, 371 U.S. 962 (1963). In *Rickenbacker*, the defendant was convicted of violating 13 U.S.C. § 221(a) for failure to complete his 1960 census form. The court held that the census household questions of 1960 did not violate the defendant's right to privacy under the rubric of illegal searches and seizures, although some public opinion experts might regard the questionnaire as being larger than necessary.

6. Steele contended that if he had been required to divulge to census authorities the fact that more than five unrelated people lived in his single family dwelling, he would have been susceptible to criminal prosecution for violating a Honolulu zoning code. 461 F.2d at 1150. The government argued that the use immunity provisions of the census statute shielded the defendant from prosecution. *Id.* However, this argument would be invalid unless the court interprets the use immunity provisions as granting both "use" and "derivative use" immunity. *See* Kastigar v. United States, 406 U.S. 441 (1972). The court found no need to decide the issue.

7. 461 F.2d at 1152. See text accompanying notes 18-23 *infra*.

8. 118 U.S. 356 (1886). The San Francisco city ordinances objected to in *Yick Wo* required that proprietors of certain types of laundry establishments obtain written permission from the board of supervisors before commencing operation of their businesses. The petitioner, of Chinese ancestry, was refused permission to operate his business by the board and was subsequently prosecuted for violating the ordinances. He contended, in habeas corpus proceedings, that the board arbitrarily withheld permission to operate laundries from him and over 150 other persons of Chinese ancestry, while giving permission to all other non-Chinese laundry owners. The Court said:

> [T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances so adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical

ple that public officials were constitutionally bound to refrain from administering the law "with an evil eye and an unequal hand."[9] Subsequent cases have established that there is an unconstitutional denial of Fourteenth Amendment equal protection where state officials are unreasonably discriminatory in enforcing a valid statute.[10] The Due Process Clause of the Fifth Amendment furnishes a federal defendant with the same guarantee against discriminatory federal prosecution.[11] Steele was therefore equipped with a viable defense, although his ultimate success depended upon an adequate showing of the elements necessary to that defense.

A number of cases have held that a mere showing that the defendant was singled out for prosecution is not sufficient to establish a denial of federal constitutional rights.[12] It is a well-recognized principle that government officials need not charge all the offenders of a federal statute.[13] Despite the existence of this principle, the selective prosecution defense had been successfully employed by defendants[14] until *Oyler v.*

denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. *Id.* at 373.

9. *Id.* at 373-74.

10. There have been a number of cases recognizing the applicability of the Equal Protection Clause to discriminatory enforcement of penal statutes. *See e.g.*, People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128, 131-32 (1962) (Sunday closing law conviction reversed because trial court refused to admit evidence as to non-enforcement of statute); People v. Harris, 182 Cal. App. 2d 837, 842, 5 Cal. Rptr. 852, 855-56 (1960) (evidence of discrimination in the enforcement of a gambling statute held admissible); People v. Winters, 171 Cal. App. 2d 876, 889, 342 P.2d 538, 546 (1959) (same); Wade v. City & County of San Francisco, 82 Cal. App. 2d 337, 339, 186 P.2d 181, 182 (1947) (allegation of intentional discrimination in the enforcement of an anti-magazine solicitation ordinance held sufficient to state a cause of action for relief in a suit to enjoin the enforcement of the ordinance). *See generally* Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1106 n.12 (1961) [hereinafter cited as Comment].

11. 461 F.2d at 1151; *see* Washington v. United States, 401 F.2d 915, 922-23 (D.C. Cir. 1968); *cf.* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

12. *E.g.*, Oyler v. Boles, 368 U.S. 448, 456 (1962) (mere showing of failure to prosecute because of a lack of knowledge of prior offenses held not sufficient to establish a denial of equal protection); Rhinehart v. Rhay, 440 F.2d 718, 727 (9th Cir. 1971), *cert. denied*, 404 U.S. 825 (1971) (mere showing that others had violated the statute held not sufficient).

13. *See, e.g.*, Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960); Kadish & Kadish, *On Justified Rule Departures by Officials*, 59 CALIF. L. REV. 905, 936 (1971); Tieger, *Police Discretion and Discriminatory Enforcement*, 1971 DUKE L. REV. 717 (1971). *See generally* Note, *Equal Protection Clause: Enforcement of a Constitutionally Valid Ordinance: Administrator's Motive in Enforcing a Statute: People v. Walker*, 50 CORNELL L. REV. 309, 313 n.19 (1964) [hereinafter cited as Note].

14. *See* note 10 *supra* and accompanying text.

Boles[15] was decided by the Supreme Court in 1962. In *Oyler* the Court delineated the elements necessary to prove a successful case of selective prosecution; that is, the selection must be one that is "deliberate" and it must be based upon an "unjustifiable standard such as race, religion or other arbitrary classification."[16] These criteria have had a stifling effect upon the application of the *Yick Wo* principle to the selective prosecution defense.[17] Thus, until the *Steele* decision there had been little hope for its successful invocation.

In *Steele*, the defendant was able to prove a purposeful discrimination in the enforcement of the statute. He demonstrated that the information gathering system included in the census operating procedures would reveal the names of all persons who refused or failed to complete the census questionnaire.[18] This evidence clearly proved that the census authorities should have been aware of at least ten other violators of 13 U.S.C. § 221(a).[19] Although this was not a gross disparity, it was enough to show a purposeful discrimination.[20] In addition, Steele

15. 368 U.S. 448 (1962). Petitioner in *Oyler* sought release from prison by habeas corpus after conviction under a state recidivist statute contending, *inter alia*, that there were 904 other prisoners who were not given penalties as severe as his. The Court held that "failure to prosecute other offenders because of a lack of knowledge of their prior offenses" did not deprive petitioner of equal protection of the laws. *Id.* at 456.

16. *Id.* at 456.

17. Since the *Oyler* decision defendants have been unsuccessful in defending on the ground of prosecutorial discrimination. *See, e.g.*, Woodbury v. McKinnon, 447 F.2d 839 (5th Cir. 1971) (defendant failed to show an intentional or purposeful discrimination); United States v. Stagman, 446 F.2d 489 (6th Cir. 1971) (government need not prosecute every violator in order to prevent all its prosecutions from being labeled arbitrarily discriminatory); United States v. Gebhart, 441 F.2d 1261 (6th Cir. 1971) defendant failed to show an unjustifiable standard); United States v. Alarik, 439 F.2d 1349 (8th Cir. 1971) (*Oyler* standard recognized, but not applied); United States v. Hercules, Inc., Sunflower Army Ammunition Plant, 335 F. Supp. 102 (D. Kan. 1971) (no allegation of purposeful arbitrary discrimination stated); United States v. Alexander, 333 F. Supp. 1213 (D.D.C. 1971) (no unjustifiable standard shown); Peoples Cab Co. v. Bloom, 330 F. Supp. 1235 (W.D. Pa. 1971) (no unjustifiable standard alleged); United States v. Maplewood Poultry Co., 320 F. Supp. 1395 (N.D. Me. 1970) (held that mere fact other offenders were not prosecuted did not unconstitutionally deny defendant due process or equal protection of the law).

Recently, the Ninth Circuit in Rhinehart v. Rhay, 440 F.2d 718 (9th Cir. 1971), closely scrutinized the elements set forth in *Oyler*. Although there had been numerous prosecutions under the state sodomy statute, the defendant contended that persons who had violated the statute with impunity had not been prosecuted and that this was a denial of equal protection. The court disagreed and held that such a claim could only be successfully made if it could be shown that there was some form of *purposeful* discrimination in the actual enforcement of the statute. *Id.* at 727.

18. 461 F.2d at 1152.

19. *Id.*

20. *Id.* *Compare* People v. Harris, 182 Cal. App. 2d Supp. 837, 5 Cal.

proved that the prosecution of himself, Watamull, Dickinson and Danks was based on an unjustifiable classification—verbal expression of ideas. The evidence showed that census officials had compiled background dossiers on the four vocal offenders because they had publicly expressed opposition to the census questionnaire and were considered hard-core resisters.[21] Thus, the court determined there was strong inferential proof[22] that the authorities had purposefully discriminated against the defendant because he had publicly expressed his opposition to the census.[23] Mere prosecutorial discretion was held not to be a suitable rebuttal to this inference of selective prosecution.[24]

Cases previous to *Steele* had dwelled considerably upon the need for showing "purposeful and intentional" discrimination, but none had sought to define what may be considered an "unjustifiable" classification.[25] In *Steele*, the classification on the basis of verbal expression was

Rptr. 852 (1960) (evidence of discrimination in the enforcement of a gambling statute held admissible where arrest statistics on gambling showed the ratio of Negro to White arrests greater than ten to one over a three year period, with only Negroes being arrested in one of these years) *and* People v. Winters, 171 Cal. App. 2d Supp. 876, 342 P.2d 538 (1959) (case remanded for retrial to allow defendants to assert and prove intentional discrimination as a matter of defense, where it was contended that Negroes only composed 1/10 of the population, but were supposedly committing 90% of the gambling infractions) *with* Ah Sin v. Wittman, 198 U.S. 500 (1905) (Court held there was an insufficient showing of discriminatory prosecution, absent a demonstration that others had violated the law, where the evidence showed that only persons of Chinese ancestry had been prosecuted for violating the gambling laws).

21. *Id.*

22. Inferential proof has been defined in the context of selective enforcement to typically include "showings of general or specific instances of enforcement, of nonenforcement, and occasionally of comparative population statistics or similar data indicating the membership in the allegedly favored and disfavored classes." *See* Comment, *supra* note 10, at 1123.

23. 461 F.2d at 1152.

24. *Id.*

25. *See, e.g.*, Oyler v. Boles, 368 U.S. 448, 456 (1962); Snowden v. Hughes, 321 U.S. 1, 8 (1944); Washington v. United States, 401 F.2d 915, 924-25 (D.C. Cir. 1968); Moss v. Hornig, 314 F.2d 89, 92-93 (2d Cir. 1963); United States v. Rickenbacker, 309 F.2d 462, 464 (2d Cir. 1962), *cert. denied*, 371 U.S. 962 (1963); People v. Gray, 254 Cal. App. 2d 256, 63 Cal. Rptr. 211 (1967); People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962). *See* note 17 *supra* and accompanying text.

No rationale was given in *Oyler* for the inclusion of this criteria as the case dealt neither with race, religion nor arbitrary classification. *See* Note, *supra* note 13, at 312 n.15.

Previous to *Oyler*, it had been suggested that some classifications, such as race or religion, were intrinsically unreasonable. *See* Comment, *supra* note 10, at 1116. An "unreasonable classification" had been identified as one that did not bear "equally on all persons similarly situated with respect to the subject matter of the law in question." *Id.* Also *see* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L.

utterly unjustifiable on its face due to the First Amendment right involved.[26] This relieved the court of the necessity of an extended analysis of the meaning of unjustifiable. Had the discrimination not been based upon the exercise of such a fundamental right the defendant would have been faced with the possibility of the government showing a reasonable basis for the discriminatory classification, thereby successfully resisting the invocation of the defense.[27] However, even where such an unjustifiable classification as race is involved,[28] the government could withstand the prosecutorial discrimination defense by showing a compelling interest for such a classification.[29] It is quite unlikely that such a compelling interest could be shown.[30] Nevertheless, the defense appears to be limited by those criteria existing in other equal protection areas.[31]

A problem visible in *Steele*, and likely to arise whenever the defense is attempted, is that of obtaining proof of the purposeful discrimination. Here, the four defendants were involved in activities which enabled them to congregate with and ascertain other violators of the statute. Indeed, this was the method by which they were able to submit proof that there were at least six other offenders.[32] The defendant faces a real problem where he has little or no access to such critical information, or where the entity which has compiled the appropriate statistics is not amenable to supplying them to him. Indeed, if Steele had not been so fortunate in finding six other violators of the same statute, his defense would have

REV. 341, 436 (1949). "Unreasonable" used in that context was seemingly the forerunner of the term "unjustifiable," which the *Oyler* Court singled out as the requisite type of purposeful discrimination necessary to prove the selective prosecution defense, 368 U.S. at 456. Thus, insofar as these two terms may be equated, what is "unreasonable" may provide a clue to what may be considered an "unjustifiable standard."

26. The court stated:

> An enforcement procedure that focuses upon the vocal offender is inherently suspect, since it is vulnerable to the charge that those chosen for prosecution are being punished for their expression of ideas, a constitutionally protected right. *Id.* at 1152.

27. *Cf.* McLaughlin v. Florida, 379 U.S. 184, 190-91 (1964); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); McInnis v. Shapiro, 293 F. Supp. 327, 332 (N.D. Ill. 1968), *aff'd mem. sub nom.*, McInnis v. Ogilvie, 394 U.S. 322 (1969).

28. *Cf.* Loving v. Virginia, 388 U.S. 1, 4 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

29. *Cf.* Shapiro v. Thompson, 394 U.S. 618 (1969). Harlan, J., dissenting, stated the rule as applied by the majority: "[S]tatutory classifications which either are based upon certain 'suspect' criteria or affect 'fundamental' rights will be held to deny equal protection unless justified by a 'compelling' governmental interest." *Id.* at 658.

30. *See* Korematsu v. United States, 323 U.S. 214 (1944) (demonstrating that an extreme situation would be necessary in order for the government to justify its interest).

31. *See* notes 8 & 10 *supra* and accompanying text.

32. 461 F.2d at 1151.

been jeopardized by the government's refusal[33] to supply the relevant data and by the Regional Technician's testimony that he was only aware of violations by the defendants.[34]

Where the offense is one of a non-violent minor character, there appears to be a strong policy embodied in the Constitution that the social interest in punishing criminals is outweighed by that of protecting the individual's right to secure equal justice.[35] *Steele* is another illustration of this concept implicitly recognized in the vast majority of cases recognizing discriminatory prosecution.

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33. Steele, in a motion for a bill of particulars, asked the government how many others had violated the census statute. The United States Attorney's Office replied that such information was not available. In view of the elaborate information gathering system and the evidence produced by Steele that there were other offenders, the court equated this reply with a refusal to supply the data. *Id.*

34. *Id.* at 1152.

35. *See* Comment, *supra* note 10, at 1112. The most serious offenses thus far have been gambling infractions. *See* note 10 *supra*. However, there was one instance of a specious claim of discriminatory enforcement in a murder prosecution. People v. Zammorra, 66 Cal. App. 2d 166, 236, 152 P.2d 180, 216 (1944). The crime in *Steele* certainly was not of a heinous nature. Indeed, the district court saw fit to limit the maximum statutory fine of $100 to $50.