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Ninth Circuit Review—The Defense of Discriminatory Prosecution: United States v. Scott and United States v. Oaks

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IV. THE DEFENSE OF DISCRIMINATORY PROSECUTION: UNITED STATES V. SCOTT AND UNITED STATES V. OAKS*

In 1975, in two similar cases, the Ninth Circuit Court of Appeals rejected claims by defendants that they had been discriminatorily prosecuted.[1] In so doing, the court seemingly limited the applicability of an earlier decision, *United States v. Steele*,[2] in which the court established the principle that a defendant is entitled to an acquittal of criminal charges if it is shown that the authorities intentionally and discriminatorily prosecuted only those who chose to exercise their first amendment rights.[3] *Steele* itself was viewed as a change in the Ninth Circuit's policy regarding the defense of discriminatory prosecution, at least insofar as the court displayed an intention to examine prosecutorial motives in charging a defendant with criminal violations.[4] How-

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1. United States v. Oaks, 527 F.2d 937 (9th Cir. 1975); United States v. Scott, 521 F.2d 1188 (9th Cir. 1975).

2. 461 F.2d 1148 (9th Cir. 1972).

3. *Id.* at 1151. See notes 17-24 *infra* and accompanying text.

4. In 1969 the court exhibited a great reluctance to question the motives of the prosecuting authorities:

> [We] cannot inquire into the motives of the United States Attorney for prosecuting this appellant. The United States Attorney must be given wide latitude in order to effectively enforce the federal criminal laws.

Spillman v. United States, 413 F.2d 527, 530 (9th Cir.), *cert. denied*, 396 U.S. 930 (1969). *Spillman* involved an alleged violation of the Department of Justice's guidelines for prosecuting obscenity cases. The court noted, however, that the policy therein was of neither a constitutional nor statutory nature, but wholly voluntary. *Id.* Thus, the abrogation in *Steele* of the court's stated policy that it would not examine the motives of the prosecutor in part may be explained by the fact that discriminatory prosecution is of constitutional dimensions (see notes 7-10 *infra* and accompanying text), but it nonetheless appears to represent a shift in policy.

In an earlier case, Dear Wing Jung v. United States, 312 F.2d 73 (9th Cir. 1962), the court was even more explicit in refusing to examine the motivation for a particular prosecution. In that case the defendant was charged and convicted of knowingly making false and fraudulent representations in the naturalization proceedings of his wife. He made a pretrial motion to dismiss on the ground of discriminatory prosecution, alleging that he had been singled out because of his suspected radical inclinations. He sought to raise the issue again at trial by requesting a subpoena duces tecum for any Immigration and Naturalization Service lists upon which a Chinese-American group appeared and the criteria by which groups had been placed on such lists. The subpoena was quashed by the district court, an action affirmed by the court of appeals which stated:

> The decision whether to prosecute an offense against the United States rests with the United States Attorney rather than with the Immigration and Naturalization Service, which is merely the investigating agency.

Id. at 75. The court, however, failed to acknowledge the importance of such a mere "investigating agency" in initiating those cases from which the United States Attorney may eventually select.

The Ninth Circuit is not alone in expressing a predisposed reluctance to examine

ever, with the court's rejection in *United States v. Scott*[5] and *United States v. Oaks*[6] of identical claims of discriminatory prosecution, there is some doubt as to the continued vitality of this defense.

A. The Constitutional Basis of the Defense of Discriminatory Prosecution

The fourteenth amendment prohibits any state from "deny[ing] to any person . . . the equal protection of the laws."[7] This prohibition is also applicable to the federal government through the fifth amendment.[8] The equal protection clause is not limited to the enactment of fair and impartial laws, but also extends to the administration of those laws.[9] The defense of discriminatory prosecution, founded in the fourteenth amendment, is available to safeguard individuals from governmental officials who selectively enforce the laws in a discriminatory fashion.[10]

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prosecutorial motives. In United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973), the Third Circuit affirmed a district court order quashing a subpoena for Government files relating to the decision to investigate and seek charges against the defendants therein. The court agreed with the district court's statement that the " 'defendants [were] attempting to circumvent a long-accepted intolerance toward judicial inquisition into the process whereby prosecutorial decisions are formulated.' " *Id.* at 181, *quoting* United States v. Ahmad, 347 F. Supp. 912, 929 (M.D. Pa. 1972). However, the statement was predicated upon the court's conclusion that the defendants failed to present sufficient evidence which would give rise to an inference of discriminatory prosecution. *Id.* Thus, the apparent shift in the Ninth Circuit's policy in *Steele* primarily may be attributable to the strength of evidence giving rise to an inference of discriminatory prosecution. See note 52 *infra*; notes 17-24 *infra* and accompanying text; text accompanying note 22 *infra*. For a discussion of the defendant's burden to obtain an evidentiary hearing to establish a claim of discriminatory prosecution see notes 53-54 *infra* and accompanying text.

5. 521 F.2d 1188 (9th Cir. 1975).

6. 527 F.2d 937 (9th Cir. 1975).

7. U.S. CONST. amend. XIV.

8. Bolling v. Sharpe, 347 U.S. 497 (1954).

9. As the Supreme Court stated in Yick Wo v. Hopkins, 118 U.S. 356 (1886):

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373-74. Yick Wo was convicted of violating a San Francisco ordinance which prohibited any person from maintaining a laundry in a building not constructed of brick or stone without first obtaining a permit from the Board of Supervisors. Although the ordinance on its face was fair and impartial, the facts demonstrated that generally only Chinese were refused permission to operate in wooden facilities. The Court found that the Supervisors had impermissibly discriminated against Chinese and that such administrative discrimination violated the equal protection clause of the fourteenth amendment. The case is the germinal seed in the application of the equal protection clause to discriminatory enforcement of the law.

10. *Id.*

For a defendant to successfully establish a defense of discriminatory prosecution he must prove both that the statute was selectively enforced *and* that the enforcement was based on an unjustifiable standard.[11] Since the purpose of the equal protection clause is to secure individuals against deliberate and arbitrary discrimination, a claim of selective prosecution must be based on circumstances which amount to an intentional selection of the particular defendant for an improper purpose.[12]

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11. Oyler v. Boles, 368 U.S. 448, 456 (1962); United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974); United States v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972); Rhinehart v. Rhay, 440 F.2d 718, 727 (9th Cir. 1971); United States v. Sacco, 428 F.2d 264, 271 (9th Cir.), *cert. denied*, 400 U.S. 903 (1970); Moss v. Hornig, 314 F.2d 89, 92 (2d Cir. 1963); *see* United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973); United State v. Crowthers, 456 F.2d 1074 (4th Cir. 1972); Murguia v. Municipal Court, 15 Cal. 3d 286, 297-98, 540 P.2d 44, 51, 124 Cal. Rptr. 204, 211 (1975).

United States v. Robinson, 311 F. Supp. 1063 (W.D. Mo. 1969), however, represents a unique factual situation in which it appears that it was sufficient for the defendant to show that certain offenders had not been subject to prosecution. In that case the defendant, a private investigator, was convicted of engaging in illegal wiretapping. After trial he filed a motion for acquittal alleging that he had been the subject of impermissible discrimination in the enforcement of the federal wiretapping statute. The court agreed with the defendant, finding that during the time the defendant had engaged in the wiretapping activity, the Government, although not exempted from the provisions of the statute, had engaged in like conduct, but no prosecutions had been brought for such violations. Given the "similarity of circumstances of the interception and divulgence by defendant and the Government . . . no reasonable basis for systematic discriminatory enforcement of the statute [could] be found." *Id.* at 1065-66.

12. In Snowden v. Hughes, 321 U.S. 1 (1943), the Supreme Court stated that:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of *intentional or purposeful* discrimination.

Id. at 8 (emphasis added). In a much earlier case dealing with the actions of a state official in assessing property for tax purposes, the Court stated that a claim of discrimination must be founded on "something which in effect amounts to an intentional violation of the essential principle of *practical* uniformity." Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 353 (1918) (emphasis added). Reference to what is practical in the area of criminal prosecutions must, of course, encompass such considerations as the ratio of available law enforcement officers to known offenders and the severity of the violation in relation to other violations. However, the practicalities should be viewed in the context of protection of the constitutional rights of the particular defendant. In this respect, the practical uniformity standard, while viable in non-criminal proceedings, may place too much emphasis upon the concept of obtaining convictions. The question is analogous to issues involving the reasonableness of searches and seizures. The changing Supreme Court position on permissible police conduct is in part a result of the continuing conflict over whether fourth amendment "reasonableness" is to be viewed in the abstract or in relation to a specific constitutional definition. *See* United States v. Edwards, 415 U.S. 800 (1974); Chimel v. California, 395 U.S. 752 (1969). As was stated by Justice Frankfurter in the context of the reasonableness question under the fourth amendment:

> To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that

The Supreme Court in *Oyler v. Boles*[13] set forth the basic distinction between intentional, unjustifiable discrimination and permissible, selective enforcement. The Court noted that

> 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.[14]

An unjustifiable standard includes, in addition to those enumerated in *Oyler*, selection based upon the exercise of first amendment rights of free speech.[15] By contrast, if a standard is rationally related to the purpose for which the various criminal laws have been enacted, it will not constitute an arbitrary classification and will not violate the equal protection clause.[16]

> an "unreasonable search" is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response.

United States v. Rabinowitz, 339 U.S. 56, 83 (1950) (dissenting opinion), *overruled, Chimel, supra.* Likewise, to say that official conduct must comport with the standards of practical uniformity raises the question as to what is the test of practicability.

13. 368 U.S. 448 (1962). Oyler had been convicted and sentenced under West Virginia's habitual criminal statute. He filed a habeas corpus application alleging that the statute had been discriminatorily enforced in violation of the fourteenth amendment's equal protection clause. This allegation was based upon statistical data that a great number of individuals who fit within the statute's terms were not prosecuted. However, because he did not allege that his selective prosecution was intentionally based upon a discriminatory basis, the Court rejected his claim.

14. *Id.* at 456.

15. United States v. Falk, 479 F.2d 616, 620 (7th Cir. 1973); United States v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972); United States v. Crowthers, 456 F.2d 1074, 1078 (4th Cir. 1972).

16. In United States v. Sacco, 428 F.2d 264 (9th Cir.), *cert. denied,* 400 U.S. 903 (1970), the court in refining the criteria set forth in *Oyler*, held that a standard based upon suspected complicity in other unrelated crimes is not unjustified. Sacco was convicted of violating alien registration statutes. He alleged that he was denied due process and equal protection because he was singled out and relentlessly investigated as the result of other unrelated suspected criminal violations. The court held that

> 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 [Sacco] was being investigated, including the alien registration laws.

Id. at 271.

In United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973), the defendants, Father Phillip Berrigan and Sister Elizabeth McAlister, were convicted of smuggling letters into and out of a federal penitentiary without the knowledge or consent of the warden. Alleging that the smuggling of letters was commonplace and that only a few prosecutions

B. *United States v. Steele: The Ninth Circuit Application*

The Ninth Circuit's application of the defense of discriminatory prosecution was set forth in *United States v. Steele*.[17] Steele was one of only four individuals in Hawaii who had been prosecuted for refusing to answer questions which were on the Department of Commerce 1970 census form.[18] He was able to meet the burden of showing discriminatory prosecution by presenting to the court six other individuals who had committed the same offense but had not been prosecuted, and by showing that all four individuals prosecuted had participated in a census resistance movement.[19] There was evidence to establish that the information-gathering system should have apprised the Regional Technician of all offenders; yet, according to the testimony of the Regional Technician, he recalled that those four prosecuted were the only persons who reportedly failed to comply.[20] Additionally, background reports

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resulted therefrom (*id.* at 179), the defendants argued that the prosecution had been pursued for political reasons. *Id.* at 173. The court denied the attempts of the defendants to have the prosecution for smuggling of letters viewed by itself, without reference to other charges related to a conspiracy to kidnap Presidential Advisor Henry Kissinger, to destroy the heating system in federal buildings, and to stage raids on local branches of the Selective Service. *Id.* at 177. The court stated:

> Appellants' scheme was, by its very nature, bizarre in concept and purposefully dramatic. The plan was unusual; indeed, it was unique. . . .
>
> The sensational quality of the plan runs counter to the critical ingredients in appellants' discriminatory prosecution argument. . . . [T]he Kissinger kidnap plan and the Washington tunnel sabotage plan were not commonplace. Indeed they were conceptualized because of their bizarre quality in order to capture the imagination of the nation, if not the world. Under such circumstances, and in light of the evidence presented at trial, the argument that this prosecution was based upon anti-war sentiments is hardly convincing.

Id. at 179 (footnote omitted). Thus, the involvement of the particular defendant in other possibly criminal acts appear to be legitimate grounds for selective enforcement.

17. 461 F.2d 1148 (9th Cir. 1972).

18. Steele was charged with a violation of 13 U.S.C. § 221(a) (1970) which provides:

> Whoever . . . refuses or willfully neglects when requested . . . to answer, to the best of his knowledge, any of the [census] questions . . . shall be fined not more than $100 or imprisoned not more than sixty days, or both.

19. 461 F.2d at 1150-51. In the census resistance movement the defendants had advocated that the census was an unconstitutional invasion of privacy and urged the public to avoid compliance with the census authorities. The evidence as to other violators was produced by Steele, in spite of the Government's refusal to supply him with the number of persons in Hawaii who had committed the same offense. *Id.* at 1151. See note 52 *infra*.

20. *Id.* at 1151, 1152.

> A refusal would be reported in the chain of command, from the enumerator through a Crew Leader, a Field Supervisor, and a District Office Manager, to the Regional Technician, Mr. Gray. At least two officials would attempt to obtain the missing answers from the violator. The system would reveal the names of offenders, and visits by census officials would lay the factual foundation for proving specific criminal intent.

Id. at 1152.

had been compiled only on these four "hard core resisters."[21] The court believed that these facts provided a compelling inference of discriminatory selection.

> 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.[22]

Because an inference of discriminatory prosecution had been established, the prosecution was then "required to explain it away, if possible, by showing that the selection process actually rested upon some valid ground."[23] In view of the prosecution's failure to meet its burden of proof, the court accepted Steele's assertion, that he had been selected because of his first amendment activity, as the only plausible explanation.[24]

In both *Scott* and *Oaks* the defendants' claims were based upon *Steele*. In denying the claims in these cases, the Ninth Circuit clarified what it would consider to be a legitimate governmental justification for selectivity in prosecution.

C. *Scott and Oaks: Refining the Burden of Proof*

In *United States v. Scott*,[25] the defendant was convicted for failure to file income tax returns for the years 1969-1972.[26] On appeal, he alleged, *inter alia*[27], that he was selectively prosecuted for his vocal opposition to the income tax. Scott was National Chairman of the Tax

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21. *Id.* at 1151.

22. *Id.* at 1152.

23. The court stated in full:

> Since Steele presented evidence which created a strong inference of discriminatory prosecution, the government was required to explain it away, if possible, by showing the selection process actually rested upon some valid ground. Mere random selection would suffice, since the government is not obligated to prosecute all offenders, but no effort was made to justify these prosecutions as the result of random selection . . . .

Id.

This shifting of the burden of proof, once a prima facie claim of discriminatory prosecution has been made, might be directly related to the type of evidence produced by the defendant to support his claim, the prevalence of prosecution for the particular offense, and the basis upon which the defendant claims he was unjustifiably selected for prosecution. *See* notes 58-60 *infra* and accompanying text.

24. 461 F.2d at 1152.

25. 521 F.2d 1188 (9th Cir. 1975).

26. Scott was convicted of violating 26 U.S.C. § 7203 (1970).

27. Scott's other ground for appeal was that the presence of a government undercover agent during discussions between him and his advisors regarding trial strategy violated his fourth amendment rights. The court summarily denied this claim. 521 F.2d at 1195.

Rebellion Committee, an organization which advocated resistance to the Internal Revenue Code by refusing to file an income tax return, or by filing a blank one.[28] No evidence was presented that others who failed to file returns and did not take a vocal stand on the issue were not prosecuted.[29] Thus, Scott was unable to prove that the Government had actual knowledge of other violators who it chose not to prosecute. The court therefore was able to "clearly" distinguish the case from *Steele*.[30]

United States v. Oaks,[31] decided in December, 1975, bears a striking resemblance to *Scott*. Oaks was convicted of wilfully failing to file an income tax return[32] and for wilfully supplying a false withholding certificate.[33] Oaks had run unsuccessfully for a seat in the California Assembly in 1972, based on a platform that taxes were collected in violation of the Constitution.[34] He believed that he was selectively prosecuted because he publicly protested against the income taxes.

An evidentiary hearing was held in the district court, and a finding was made that Oaks " 'was not the [victim] of impermissible discrimination.' "[35] The district court found that as to the failure to file a return, 160 investigations were conducted by the IRS in Los Angeles between the tax years 1970-1973.[36] These investigations were commenced upon a balancing of the availability of an agent, the flagrance of

28. *Id.* at 1189 n.1.

29. *Id.* at 1195. The court quoted from the trial transcript as follows:

"THE COURT: Let me ask you this: Do you know other people who didn't file tax returns that the Government has not prosecuted? If so, I think you should make it known to Mr. Couris so he could start indicting them.

"MR. MATONIS: Well, your Honor, it is not my job as a lawyer to help the Government in cases of people who have or have not filed income tax returns."

Id., quoting Reporter's Transcript at 26.

30. *Id.*

31. 527 F.2d 937 (9th Cir. 1975).

32. 26 U.S.C. § 7203 (1970).

33. *Id.* § 7205.

34. United States v. Oaks, 508 F.2d 1403, 1404 (9th Cir. 1974). As summarized by the court in Oaks's initial appeal from conviction:

Oaks attempted to justify his failure to comply with the revenue laws on the basis of an elaborate monetary theory. He allegedly believed that he had not earned "dollars," since "dollars," under the Constitution and certain Supreme Court decisions, could only mean paper currency fully redeemable in gold or silver.

Id. In consideration of Oaks's contention of discriminatory prosecution, the court remanded the case for an evidentiary hearing. The second appeal ensued from a denial of his claim by the district court.

35. United States v. Oaks, 527 F.2d 937, 939 (9th Cir. 1975), *quoting* district court memorandum. The court of appeals agreed that "[t]here [was] ample evidence to support the findings of the district court." *Id.* at 940 n.3.

36. *Id.* at 939.

the suspected violation, and the deterrent effect associated with prosecution of a particular violation.[37] As a result of these investigations, forty-eight persons were recommended for prosecution. This decision was based upon the sufficiency of the evidence and the likelihood of conviction.[38] Of the original 160 singled out for investigation, forty-eight were involved with the Tax Rebellion Committee of which twenty-four were eventually prosecuted.[39]

As to Oaks's conviction on the second count, filing a false withholding certificate, the district court found that twenty-four investigations had been conducted, all of which concerned members of the Tax Rebellion Committee.[40] Three of these individuals were recommended for prosecution based on the IRS's estimation of the likelihood of conviction.[41] While the district court noted that the defendant's vocal activities "may well" have influenced the decision to prosecute, it could be concluded that " '[s]uch selective prosecution is deemed reasonable and appropriate.' "[42]

The Ninth Circuit, after setting forth the district court findings, tersely stated:

> The facts developed at the evidentiary hearing . . . do not establish either of the elements necessary for a successful defense of discriminatory prosecution.[43]

The support for the court's conclusion was by way of an analogy to the facts of *Scott*, inferring that *Oaks* likewise was distinguishable from *Steele*. Quoting from *Scott*, the court stated:

37. The district court found that

> "[i]n determining what potential violations of the tax laws that come to its attention shall be investigated with a view to possible prosecution, the I.R.S. seeks to take into account the following factors:
>
> (a) The availability of an agent to investigate the matter, in light of the total caseload and the limited personnel resources.
>
> (b) The flagrance of the suspected violation.
>
> (c) The suitability of the case for prosecution as a deterrent to other individuals."

Id., quoting district court memorandum.

38. The district court found that

> "[i]f an investigation is made and results in a conclusion that the law has been violated, the I.R.S. recommends prosecution in each instance where it concludes that it has sufficient competent evidence to support a conviction and that there is a reasonable chance of obtaining such conviction."

Id.

39. *Id.*

40. *Id.*

41. *Id.*; see note 38 *supra.*

42. 527 F.2d at 940, *quoting* district court memorandum. The district court stated that the vocal nature of his protest may have lead the IRS to estimate that prosecution of Oaks would have a greater deterrent effect. *Id.*

43. *Id.*

> "[A]ppellant has only demonstrated that the government had an announced policy of vigorous enforcement of the tax law against those who took a public stand against filing returns. There was no evidence presented that the government did not prosecute others who failed to file returns but who did not take a vocal stand on the issue. It is not surprising that the government might prosecute those cases in which the violations of the tax laws appeared most flagrant."[44]

The court is correct that *Scott* and *Oaks* are distinguishable from *Steele*; however, they are not distinguishable for the same reasons. Scott did not meet his burden of proof because he failed to produce any evidence of intentional selection.[45] Oaks, contrary to the court's conclusion that he failed to "establish *either* of the elements necessary," did produce evidence of intentional selection.[46] It would appear more appropriate to say that the presence of twenty-four nonvocal offenders in the group of persons prosecuted for failing to file[47] negated Oaks's claim that he was singled out for his public stand against the income tax. Thus it would appear that Oaks's claim failed because an inference of an unjustifiable standard could not be raised as had been done in *Steele*.[48]

Analyzing the case in this manner also reconciles *Steele* with the court's denial of Oaks's defense to the charge of filing a fraudulent withholding certificate. The fact that only members of the Tax Rebellion Committee were prosecuted for such an offense would raise an inference that the IRS would have to explain.[49] The finding by the district court that the prosecutions were based upon the IRS policy of prosecuting cases which most likely would result in a conviction[50] would be a sufficient explanation to rebut the inference.

Thus it appears that the *Oaks* decision turned not on whether there had been selection, but on whether the selection had been based on an unjustifiable standard. This analysis makes it clear that almost any justification for the selection offered by the prosecuting authorities will be sufficient to defeat a defendant's claim. At the same time, it will be extremely difficult for a defendant to obtain the necessary information to prove that the selection was in fact based on another, unjustifiable standard.

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44. *Id.* at 940 n.3, *quoting* United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975).

45. *See* note 29 *supra* and accompanying text.

46. *See* text accompanying notes 36-41 *supra.*

47. See text accompanying notes 38-39 *supra.*

48. See notes 18-22 *supra* and accompanying text.

49. *See* note 23 *supra* and accompanying text.

50. See notes 37-38 *supra.*

First, in terms of evidentiary burdens, since all relevant information to present a claim of discriminatory prosecution is in the government's possession,[51] the chances of prevailing without an evidentiary hearing are slight.[52] In order to obtain an evidentiary hearing, the court must be convinced that the claim is not merely a means of eliciting the prosecution's evidence before submission.[53] The appellate court in *Oaks*, in originally remanding the case, stated that hearings on claims of discriminatory prosecution, like other similar pretrial objections, "are usually in order when enough facts are alleged to take the question past the frivolous stage."[54]

Second, once a hearing has been obtained a defendant still has the burden of overcoming the presumption that the prosecution was commenced in good faith, based upon a justifiable standard rationally related to legitimate law enforcement purposes.[55] This can only be done by presenting a prima facie case of selective prosecution.[56] If a defendant can make this showing, then the burden of going forward with proof of nondiscrimination will rest on the government.[57] In *Steele*,

51. This would include statistics on enforcement of a statute, stated governmental policy for enforcement, and the criteria used in selecting suspects for investigation and recommendation for prosecution.

52. *Steele* is something of an anomaly in this respect. Steele was able, despite a governmental refusal to supply information, to uncover six nonprosecuted offenders. 461 F.2d at 1151. His success seems to be specifically attributable to the particular combination of factors in the case: a minimum penalty for violation; no prior prosecutions under the statute; and his ability, through his protest activities, to uncover other violators. The specificity of proof appears to be crucial to the successful assertion of a claim in Steele's case. *See* note 60 *infra*.

53. Nardone v. United States, 308 U.S. 338, 342 (1939). In United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974), the court stated that

> [u]pon the meagre 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. The effect could be to encourage use of the defense of selective prosecution, however baseless, as a means of obtaining discovery to which the defense would not otherwise be entitled.

Id. at 1211.

54. United States v. Oaks, 508 F.2d 1403, 1404 (9th Cir. 1974); United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974). *See also* Rhinehart v. Rhay, 409 F.2d 208 (9th Cir. 1969). In *Berrios* the court stated that in order for the defendant to be entitled "to subpoena documentary evidence required to establish a selective prosecution defense 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." 501 F.2d at 1211-12. See note 60 *infra*.

55. United States v. Falk, 479 F.2d 616, 620 (7th Cir. 1973).

56. United States v. Berrios, 501 F.2d 1207, 1212 n.4 (2d Cir. 1974); United States v. Falk, 479 F.2d 616, 623 (7th Cir. 1973); United States v. Crowthers, 456 F.2d 1074, 1078 (4th Cir. 1972).

57. United States v. Berrios, 501 F.2d 1207, 1212 n.4 (2d Cir. 1974); United States v. Crowthers, 456 F.2d 1074, 1078 (4th Cir. 1972); *see* note 23 *supra*.

after the burden of proof had shifted, the Government failed to offer an explanation of its selective prosecution.[58] In *Oaks*, on the other hand, the Government, by detailing its criteria for prosecution, was able to carry its burden.[59] These results indicate that unless a defendant establishes a case so blatant that it contradicts any rational justification,[60] the prosecution will be able to meet its burden of proof by presenting criteria for prosecution similar to that in *Oaks*.[61]

D. Vocal Opposition to the Law as a Justifiable Standard for Selection

In considering the charge against Oaks for filing a fraudulent withholding certificate, the district court determined that because of the circumstances surrounding Oaks's violation, including his vocal opposi-

58. United States v. Steele, 461 F.2d 1148, 1152 (9th Cir. 1972).

59. *See* notes 37-39 *supra* and accompanying text.

60. For example, in United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973), the defendants alleged that there had been few prosecutions under the statute that they were alleged to have violated. However, they did not produce any evidence as to the number of unprosecuted violations—only a general allegation that the conduct that was the subject of their conviction was "commonplace." *Id.* at 179. Likewise, in United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974), the defendant's attorney submitted an affidavit alleging that he "believed" that there had been only three prosecutions under the statute the defendant was convicted under, but that there were hundreds of violations. *Id.* at 1210. As noted by the court, the attorney did not name any of the unprosecuted violators. *Id.* at 1211. Thus, the court disagreed with the district court's ruling that the defendant was entitled to a discovery motion against the Government, but upheld the ruling since it was within the trial court's discretion.

On the other hand, in United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972), the defendants had been arrested for conducting anti-war activities on Pentagon grounds under a regulation that prohibited conduct that "creates loud and unusual noise, or which obstructs the usual use of entrances . . . ." *Id.* at 1076. In support of their claim that the regulation was enforced only against them because of the political nature of their conduct, the defendants presented evidence of sixteen other gatherings on the Pentagon grounds which created greater disturbances, but which were not the subject of prosecutions. *Id.* at 1078-79.

Finally, in United States v. Falk, 479 F.2d 616 (7th Cir. 1973), the defendant was charged with failure to possess a Selective Service card. He alleged that he was prosecuted because he had engaged in draft counseling.

> [H]e asserted that the prosecution against him for violation of the card-carrying requirements was brought not because he had violated the statute but to punish him for and stifle his and others' participation in protected First Amendment activities.

Id. at 619-20. To support his claim, the defendant made an offer of proof that more than 25,000 persons had disposed of their cards; that the Department of Justice had an announced policy of not prosecuting those who had turned in their cards rather than burned them; and the Assistant United States Attorney prosecuting the case said that he was aware of the defendant's anti-draft activities and that was one of the reasons that he was being prosecuted. *Id.* at 621, 622. The court reversed Falk's conviction, and remanded the case for a hearing on his claim of discriminatory prosecution.

61. See notes 37-38 *supra* and accompanying text.

tion to the tax laws, his prosecution would be justified as "reasonable and appropriate," because of its "relatively great deterrent value."[62] The circuit court, in reviewing the district court's findings, found "no evidence that improper criteria were used by the Internal Revenue Service in its investigation and recommendation of prosecution."[63] By adopting these findings in whole, and without comment, the circuit court did not address itself to possible first amendment issues arising from Oaks's activity.

Of course, if Oaks's activity was unprotected under the first amendment, then he clearly would have failed to sustain his claim since any selectivity would not have been based on an unjustifiable standard. Additionally, any claim by Oaks that he had been selectively prosecuted for his other activities, including advocacy of violation of the law, would have failed, given that such "standard for selection is . . . rationally related to the various criminal laws for violation of which [Oaks] was being investigated. . . ."[64]

Like Steele, however, Oaks had engaged in advocating violation of a valid statute. Because the *Steele* court, at least implicitly, held that Steele's activity was protected by the first amendment,[65] and because the *Oaks* court did not take exception to this, it may be concluded that Oaks also was engaging in activity protected by the first amendment. Although the *Oaks* court might have been justified in finding Oaks's activity unprotected because of the seriousness and nature of his violation compared to that of Steele, the court did not address itself to this issue.[66] Thus, in the Ninth Circuit this type of advocacy, at least,

62. The district court's finding stated in part:

"The awareness by the I.R.S. of the fact that the defendant publicly explained in detail how he had frustrated the tax withholding laws and urged others to follow his example may well have influenced the I.R.S. in selecting him as a person whose prosecution would have relatively great deterrent value. Such selective prosecution is deemed reasonable and appropriate."

527 F.2d at 940, *quoting* district court memorandum.

63. *Id.* at 940 n.3.

64. United States v. Sacco, 428 F.2d 264, 272 (9th Cir. 1970). See note 16 *supra.*

65. 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.

461 F.2d at 1152.

66. The court in *Oaks* and *Steele* did not consider the activity in light of Brandenburg v. Ohio, 395 U.S. 444 (1969), wherein the Supreme Court struck down Ohio's Syndicalism Statute on the basis of first amendment protections. In that case the Ku Klux Klan had been charged with advocating " 'the necessity or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform . . . .' " *Id.* at 449 n.3. After reviewing its previous decisions, the Court stated that

the principle that the constitutional guarantees of free speech and free press do not

would appear to be constitutionally protected under the first amendment.

Therefore, the court should have confronted the question of whether the justification offered for Oaks's prosecution was a sufficient state interest to outweigh his constitutional rights. In this regard, the court should have made a determination of whether the defendant's action would be significantly hampered in the exercise of his rights, or whether other individuals would be less likely to exercise their first amendment rights because of fear of prosecution. Where the possibility of selective prosecution has been shown, a court, unlike the court in *Oaks*, should not be so casual in justifying a standard which is based, in part, upon prosecutorial economy and "great deterrent value."

At the very least, a balancing test must be employed to weigh the deterrent value against the chilling effect[67] on first amendment rights.[68] If, on balance, it is determined that the value of prosecuting the vocal offender outweighs any possible restriction on first amendment activity, then it can be said that a policy of priority prosecution is "reasonable and appropriate."

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permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id. at 447. While it is possible that neither Oaks nor Steele had engaged in activity that was likely to produce "imminent lawless action," both had, in fact, advocated violation of the law. Since Steele's activity was found to be protected, the *Oaks* court might have been more concerned with the effect of the type of lawlessness advocated by Oaks. Clearly, the Government could continue its daily functions without there being total compliance with the law requiring one to fill out census forms, but it could not continue to function without the revenue generated by the tax laws.

This same type of thinking may explain the difference in the Court's approach to those cases involving advocacy of resistance to the United States war effort during World War I. *See* Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919). *See also* the concurring opinion of Justice Douglas in *Brandenburg*, 395 U.S. at 450 ("Though I doubt if the 'clear and present danger' test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace." *Id.* at 452). See note 67 *infra* and accompanying text.

67. *See* Dombrowski v. Pfister, 380 U.S. 479, 494 (1965).

68. Such balancing tests, although subject to frequent debate among Justices of the Supreme Court (*compare* Justice Harlan's majority opinion in Konigsberg v. State Bar of California, 366 U.S. 36, 37-56 (1961), *with* Justice Black's dissenting opinion, *id.* at 56-80), have been accepted as the proper approach for resolving competing claims of those who seek to exercise first amendment rights and of the state which seeks to control that exercise. *See, e.g.*, Bates v. Little Rock, 361 U.S. 516 (1960); American Comm'n Ass'n v. Douds, 339 U.S. 382 (1950); Kovacs v. Cooper, 336 U.S. 77 (1949); Prince v. Massachusetts, 321 U.S. 158 (1944); Cox v. New Hampshire, 312 U.S. 569 (1941); Schneider v. State, 308 U.S. 147 (1939).

While the Ninth Circuit's decision in *United States v. Steele* appeared to give renewed vitality to the defense of discriminatory prosecution, the recent decisions in *United States v. Oaks* and *United States v. Scott* have apparently limited its applicability. Specifically, these later cases have made it clear that a prima facie claim of discriminatory prosecution will require the defendant to produce evidence of other persons who engaged in the same conduct for which the defendant is being prosecuted, but who are not themselves being prosecuted. Additionally, it must be proven that the selection of the defendant was based upon an impermissible standard. Although Steele was able to meet this latter burden inferentially by establishing that all those prosecuted had participated in first amendment activity, *Scott* and *Oaks* indicate that such an inference will only be raised in cases approximating the peculiar factual situation of *Steele*. Notwithstanding the failure of the court in *Oaks* to recognize that the Government's criteria for selection may have infringed on the defendant's first amendment rights, these cases also indicate that a mere allegation of a permissible standard for selection will defeat a claim of discriminatory prosecution. Therefore, it now appears that few defendants successfully will be able to claim discriminatory prosecution as a defense to criminal charges.