1974

Defense Access to Evidence of Discriminatory Prosecution

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Given its relative lack of experience with the executive privilege problem, the judiciary will inevitably make mistakes in striking the balance between disclosure and efficiency. If mistakes are to be made, however, they should be made in favor of disclosure. The harm done to the litigant by concealment is immediate and irreparable; the harm done to the government by disclosure is delayed and relatively slight in any single case. If experience reveals that disclosure has been granted at the expense of injury to the executive, the legislature can protect the executive from further injury. As the many statutes now in effect indicate, the legislature has been quite willing to provide this protection to the executive. The disappointed litigant, however, might find it rather difficult to secure legislative relief.

In conclusion, a review of the major issues reveals that reconciling the competing interests of executive efficiency and control of official misconduct is the crux of the executive privilege problem. The first issue is the amenability of the executive to judicial process. Some would argue that this prerequisite to controlling official misconduct cannot be achieved because the executive cannot be compelled to obey court orders. A more realistic appraisal indicates that successful executive disobedience of a court order is unlikely and that subjecting the chief executive to judicial process does not impair his efficiency. The second issue is whether a naked claim of privilege by the executive is sufficient to prevent disclosure. Due process requires that litigants be provided a hearing to ensure that officials do not claim the privilege arbitrarily or to conceal official misconduct; many courts have demanded that this hearing be judicial to minimize the likelihood of improper claims of privilege. Finally, because granting an absolute privilege seriously harms litigants without correspondingly increasing administrative efficiency, a qualified privilege is preferable. To maximize control over official misconduct, this qualified privilege should be weakest in cases involving allegations of serious governmental misconduct. At each stage of this analysis, the basic consideration is that of combining maximum disclosure to the litigant with minimum harm to governmental efficiency. In seeking the proper balance between disclosure and efficiency, courts must be careful not to sacrifice honest government merely to achieve marginal increases in efficiency.

Daniel Farber

DEFENSE ACCESS TO EVIDENCE OF DISCRIMINATORY PROSECUTION

Selective enforcement of the criminal law is the practice of prosecuting "some and not . . . others, when all have engaged in conduct similarly prohibited by a given criminal law, and when all have an equal chance of being convicted." This practice is an integral part of the American criminal justice system, which traditionally has accepted the assumption that a prose-

121. The statutes are set out in 8 Wigmore § 2371, at 754; § 2378, at 799 n.9.

The prosecutor is not required to treat every offender alike. As Justice Burger has stated: "[M]any factors can enter into the prosecutor's decision. Two persons may have committed what is precisely the same offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges." The prosecutor is entitled to consider the past criminal records of the offenders, the time and resources of the prosecutor's staff, and the public's current attitude toward the offense. The prosecutor's task is to weigh the relevant factors and to decide in his discretion which offenders to prosecute.

The courts have been reluctant to review the prosecutor's exercise of his discretion, because they feel that the power to enforce the law belongs to the executive branch of government. They fear that by reviewing prosecutorial decisions, they would be indirectly making enforcement decisions themselves, thus usurping the power of the executive branch and violating the separation of powers doctrine. Moreover, courts suggest that prosecutors, who make enforcement decisions on a daily basis, have greater expertise than courts in the process of weighing the relevant factors. Finally, courts assert that judicial inquiry into the enforcement decision might necessitate examination of the internal discussions and memoranda of the prosecutor's staff. This type of inquiry would inhibit free discussion within the prosecutor's office.

Despite their reluctance to review prosecutorial decisions, many courts recognize that judicial review is sometimes necessary. As early as 1886 the Supreme Court suggested, in Yick Wo v. Hopkins, that judicial intervention may be necessary if the prosecutor's conduct violates the constitutional rights of the accused:

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.

5. Newman v. United States, 382 F.2d 479, 482 (D.C. Cir. 1967): "[I]t is not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers." See also United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965).
10. Id. at 373-74. The discrimination found by the court in Yick Wo, however, did not result from a prosecutorial decision, but from a decision by a licensing board not to issue laundry permits to Chinese. The subsequent arrests of the defendants were for failure to secure a permit. Since Yick Wo dealt with the discriminatory discretion of a licensing board, some courts have ruled that prosecutorial decisions are not reviewable by courts. See Comment, The Right to Nondiscriminatory Enforcement of State Penal Laws, 61 COLUM. L. REV. 1103, 1106 n.12 (1961). Nevertheless, other courts have extended the holding of Yick Wo to cases involving abuse of prosecutorial discretion. E.g., Oyler v. Boles, 368 U.S. 448, 456 (1962).
Today, most courts will review the prosecutor’s decision if the defendant shows that the prosecutor’s selective enforcement may have violated his constitutional rights. If the court finds that the prosecutor’s conduct did violate the defendant’s rights, it will dismiss the case. The reason for allowing judicial intervention in cases of discriminatory enforcement is similar to the reason for the exclusionary rule: the need for judicial control of prosecutorial abuse.

Even those courts that recognize the defense of discriminatory prosecution have generally deemphasized the need for judicial control of prosecutorial abuse. Rather, they have stressed the need for judicial deference to prosecutorial decisions. This emphasis has had two results. First, courts have placed a heavy burden of proof on the defendant by requiring him to make a prima facie showing of purposeful discrimination before the burden of justifying the prosecution shifts to the state. Second, courts have limited defense access to evidence of purposeful discrimination in the hands of the prosecutor. Due to this limitation on defense access to evidence of discrimination, defendants have generally been unable to carry their heavy burden of proof. Consequently, judicial efforts to control abuses of prosecutorial discretion have been unsuccessful and have provided little relief to victims of those abuses.

Judicial control of prosecutorial abuse could be made more effective either by placing a less stringent burden of proof on the defendant or by reducing the limitations on defense access to evidence in the hands of the prosecutor. This comment will explore the second alternative. First, the traditional test for judging claims of discriminatory prosecution will be outlined. Then, the defendant’s burden of proof will be analyzed. Next, the types of proof available to establish the defendant’s claim of discrimination and the sufficiency of each type of proof will be discussed. Finally, the possibility of reducing limitations on defense access to proof in the hands of the prosecutor will be examined.

A claim of discriminatory prosecution is usually raised by the defendant on a motion to quash the prosecution. As in a motion to suppress illegally seized evidence, the issue is whether the court, “as an agency of the government, should . . . lend itself to a prosecution the maintenance of which would violate the constitutional rights of the defendant.” Consequently, the decision is made by the judge, not the jury. The defendant’s claim is treated

13. See generally K. Davis, supra note 2, at 188-90.
14. Givelber, supra note 1, at 90.
15. Professor Givelber has suggested this approach:
Rather than requiring a defendant to prove the prosecutor’s knowledge and motivation in order to establish a denial of equal protection, a court should hold that the burden of going forward shifts to the state once the defendant proves that only a few of the knowable violators of a law have been prosecuted or that the group prosecuted for violating a law differs from the group not prosecuted in characteristics irrelevant to law enforcement purposes.
Id. at 106.
16. For an examination of the procedural techniques for raising a claim of discriminatory prosecution see Annot., 4 A.L.R.3d 404 (1965).
by the court as a motion for dismissal, which will be granted if intentional and purposeful discrimination is shown. In considering the claims, the court must first determine whether the prosecutor has treated similarly situated offenders more leniently than the defendant. Then, it must decide whether the selective enforcement was deliberately based on an unjustifiable standard. Mere laxity in enforcement by the prosecutor or his lack of knowledge of other offenders is no basis for a claim of discriminatory prosecution. Thus, proof of nonenforcement of a penal law is not sufficient evidence to establish a claim; the selection must be based on an unjustifiable standard.

The courts have indicated that any "arbitrary criterion" constitutes an unjustifiable standard. Although the term is rarely defined, an "arbitrary criterion" is a basis for selection that is not rationally related to the purposes of the criminal law under which the defendant is charged. For example, in United States v. Robinson, the government prosecuted a private detective for illegal wiretapping but had never prosecuted government officials who committed the same offense. The government justified the distinction by arguing that government wiretaps were in the public interest. Because the court determined that the statute's purpose was to forbid all types of illegal wiretapping, it found no rational distinction between the activities of the defendant and the government officials, and sustained the claim of discriminatory prosecution. A prosecutorial decision based on legitimate law enforcement criteria, however, is not arbitrary. For instance, a prose-

18. Id. at 15-17, 225 N.Y.S.2d at 133.
23. Moss v. Hornig, 314 F.2d 89, 92 (2d Cir. 1963); Comment, supra note 10, at 1127.
24. Professor Givelber suggests an alternative standard to the traditional test of purposeful discrimination. He argues that "once there has been proof of classification, then the court must determine whether the reasons for the unequal treatment of similarly situated people bear a rational relationship to legitimate state purposes." Givelber, supra note 1, at 117.
26. United States v. Sacco, 428 F.2d 264, 271 (9th Cir. 1970). In Sacco, the defendant argued that he was prosecuted for violating alien registration laws because of his suspected role in organized crime. The court held that this basis for selection was rationally related to the alien registration statutes.
28. Id. at 1065-66. See also Bargain City U.S.A. Inc. v. Dilworth, 29 U.S.L.W. 2002 (Phila. County C.P., June 10, 1960), in which the court ruled that a police commissioner adopted an arbitrary standard for enforcement of Sunday blue laws. The commissioner limited enforcement of the law to large retail establishments. The court implied that this standard was not rationally related to the purposes of the statute. On appeal, the county court's injunction of this practice was not reinstated because the police commissioner was no longer in office. 407 Pa. 129, 134, 179 A.2d 439, 443 (1962).
cutor who selectively prosecutes older offenders with criminal records and does not prosecute younger first offenders for the same crime, may be using a legitimate standard.\textsuperscript{29} Likewise, if prosecutorial time and manpower is limited, randomly selecting cases for prosecution may not be arbitrary.\textsuperscript{30}

Courts have found standards in two situations especially suspect: when selection was based on the defendant's race or religion, and when selection was based on the exercise of a constitutional right by the defendant. In \textit{Oyler v. Boles},\textsuperscript{31} the Supreme Court indicated that the prosecutor had used an unjustifiable standard if his basis of selection was the race or religion of the defendant. Prosecutions motivated by the defendant's exercise of a constitutional right are equally suspect. In three recent cases, \textit{United States v. Crowthers},\textsuperscript{32} \textit{United States v. Steele},\textsuperscript{33} and \textit{United States v. Falk},\textsuperscript{34} the courts have indicated that discriminatory prosecution may exist when selection is based on the exercise of protected first amendment activities.

In \textit{Crowthers}, antiwar protesters were prosecuted for violating a disorderly conduct regulation that prohibited loud noise and obstruction of passageways at the Pentagon. Although the court acknowledged that the evidence supported a finding that the protesters had violated the regulation, it found that other groups, including the West Point Choir and an assemblage listening to the Vice President, had previously obstructed the passageways and created noise but had not been prosecuted. Consequently, the court held that the government had prosecuted the protesters, not because of the amount of their obstruction or noise, but because of the government's disapproval of the ideas they expressed. Since the purpose of the prosecution was to inhibit the expression of an unpopular viewpoint, the court sustained the claim of discriminatory prosecution.\textsuperscript{35}

\textsuperscript{29} Newman v. United States, 382 F.2d 479, 481-82 (D.C. Cir. 1967). \textit{See also} United States v. Alarik, 439 F.2d 1349, 1350-51 (8th Cir. 1971); People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 21, 225 N.Y.S.2d 128, 136 (1962). In Alarik, the defendant was convicted for refusing to register for the draft. He argued that while he was prosecuted for failure to register, abettors and counselors of draft evasion were not prosecuted. The court ruled that this standard was not arbitrary. In \textit{Utica Daw's} the court stated that "[s]elective enforcement may . . . be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that . . . further prosecutions will be unnecessary." 16 App. Div. 2d at 21, 225 N.Y.S.2d at 136.

\textsuperscript{30} United States v. Steele, 461 F.2d 1148, 1152 (9th Cir. 1972). \textit{But see} Bargain City U.S.A. Inc. v. Dilworth, 29 U.S.L.W. 2002 (Phila. County C.P., June 10, 1960), in which the court held that limited prosecutorial personnel did not justify enforcement of Sunday blue laws only against large retail establishments.


\textsuperscript{32} 456 F.2d 1074 (4th Cir. 1972).

\textsuperscript{33} 461 F.2d 1148 (9th Cir. 1972).

\textsuperscript{34} 479 F.2d 616 (7th Cir. 1973). In Dixon v. District of Columbia, 394 F.2d 966 (D.C. Cir. 1968), the court, without examining the circumstances to see whether selective enforcement had occurred, found discriminatory enforcement because the prosecution was in response to the defendant's exercise of a constitutional right. The government agreed not to press charges for traffic violations against the defendant if the defendant agreed not to file a complaint with the Human Relations Council. The defendant agreed, and the government initially did not prosecute him. The defendant later filed a complaint with the Council, and subsequently, the government pressed charges against him. The court held that "[t]he government may not prosecute for the purposes of deterring people from exercising their right to protest official misconduct and petition for redress of grievances." \textit{Id.} at 968.

\textsuperscript{35} 456 F.2d at 1078-79.
In *Steele*, the second case, the defendant was convicted of failing to answer census questions. Although others had failed to answer census questions, the government prosecuted only the outspoken members of a census resistance movement. The court ruled that "[a]n 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."38

In *Falk*, the third case, the defendant was convicted for nonpossession of his draft cards. He alleged that he was prosecuted because of his draft counseling activities, noting that 25,000 other registrants had also turned in their draft cards but had not been prosecuted. The court held that the defendant had made a prima facie showing of discriminatory prosecution and stated that "just as discrimination on the basis of religion or race is forbidden by the Constitution, so is discrimination on the basis of the exercise of protected First Amendment activities."37 Judge Cummings, dissenting in *Falk*, criticized the contention of the *Steele* and *Falk* courts that an enforcement procedure which focuses on the vocal offender rests on an unjustifiable standard. He argued that the prosecutor should be able to consider the defendant's personal characteristics, including his visibility and influence over others.88 Thus in *Falk*, if the government prosecuted the defendant to deter other draft violations and to secure general compliance with the selective service law, it had not used an unjustifiable standard, but a legitimate law enforcement technique.39

This reasoning may be valid if the prosecution of outspoken violators is "part of a bona fide rational pattern of general enforcement."90 The use of selective enforcement for this purpose, however, raises significant questions in regard to the chilling effect on first amendment rights. Thus in *Falk*, even if the purpose of the defendant's prosecution was to deter others from handing in their draft cards, this legitimate prosecutorial purpose must be balanced against the chilling effect on the rights of others who had previously turned in their cards, to participate in draft counseling activities. Furthermore, Judge Cummings' approach is invalid if the prosecutor charges the outspoken violators without any intention of prosecuting other offenders.41 Consequently, if the prosecutor's only purpose is to quiet outspoken violators, the prosecutor has used an unjustifiable standard.

Because of the policy of judicial deference to prosecutorial decisions, most courts have placed a heavy burden of proof on the defendant to show selective enforcement and intentional discrimination by an unjustifiable standard. The initial presumption always is that a prosecution is undertaken in good faith.42 Thus the defendant must present evidence that creates a

36. 461 F.2d at 1152. The decision in *Steele* was followed in United States v. Danks, 357 F. Supp. 193, 195 (D. Hawaii 1973), in which the court reversed the conviction of another outspoken member of the census resistance movement.

37. 479 F.2d at 620-24.

38. *Id.* at 634. See also Judge Cummings' opinion in the panel decision in *Falk*, 472 F.2d at 1107.


41. *See id.*

strong inference of discriminatory prosecution before the burden shifts to
the state to justify the selection. Courts vary in their statement of the burden. Some courts say that the defendant must make out a "prima facie case of improper discrimination," while others contend that the defendant must submit "convincing evidence of discriminatory prosecution." Still others assert that the defendant must prove discriminatory enforcement "by a preponderance of the evidence." All these statements suggest that before the state is required to justify its selection criteria, the defendant must not only prove selective enforcement—he must also make out a prima facie case that the prosecutor intentionally used an unjustifiable standard.

The defendant can use two types of evidence to make out his prima facie case: statistical proof and direct proof. He can usually establish the first element of his case, selective enforcement, with statistical evidence. This evidence can take the form of governmental or other records showing few or no prosecutions of other offenders for the same crime. For example, in *Robinson*, the defendant, a detective charged with illegal wiretapping, introduced evidence of an A.B.A. study showing that the government had never prosecuted any government employees who had violated the statute. The statistical evidence can also take the form of proof that specific other offenders who had committed the same offense had not been prosecuted. Thus, in *Steele*, the defendant, who was prosecuted for his refusal to complete a census form, introduced evidence that six other persons had committed the same offense, but had not been prosecuted. Similarly, in *Crowthers*, the defendants, who were charged with obstructing Pentagon hallways, demonstrated that on 16 previous occasions other groups had obstructed the halls of the Pentagon but had not been prosecuted. In both *Steele* and *Crowthers* the courts found the evidence sufficient to establish a showing of selective enforcement.

The defendant can also use statistical evidence to prove the second element of his prima facie case, intentional discrimination based on an unjustifiable standard. The proof can consist of showing a statistical pattern of enforcement against certain classes of persons and not against others, from which the court can infer intentional discrimination. To raise this infer-

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43. United States v. Falk, 479 F.2d 616, 623 (7th Cir. 1973) (en banc).
46. Courts also differ in their specific procedural approaches to the introduction of proof of discriminatory enforcement. Some courts require the defendant to introduce sufficient evidence to sustain the burden of proof with his motion to dismiss. Only if the defendant sustains the burden will the court hold a hearing at which the state will have to justify the prosecution. See United States v. Falk, 479 F.2d 616, 623 (7th Cir. 1973) (en banc). Other courts, however, will hold a hearing as soon as the defendant moves for dismissal. See United States v. Ahmad, 347 F. Supp. 912, 926 (M.D. Pa. 1972). At the hearing the defendant must prove a prima facie case of discriminatory enforcement.

Whether the hearing is held before or after the defendant sustains his burden, the burden of proof placed on the defendant is the same: he must establish a prima facie showing of selective enforcement and intentional discrimination by an unjustifiable standard.
48. 461 F.2d at 1151.
49. 456 F.2d at 1077-78.
ence, the defendant must show that the pattern of enforcement indicates a prosecutorial policy of selecting between similarly situated persons according to whether they possess a certain characteristic, and that this characteristic suggests the use of an unjustifiable standard. In *People v. Harris,* for example, the defendant introduced evidence that both whites and blacks had violated statutes prohibiting gambling. In a 3-year period, however, the ratio of black to white arrests was greater than 10 to 1; in one year, only blacks had been arrested. The defendant argued that this pattern in the selection of gambling offenders indicated a discriminatory prosecutorial policy based on race. Further, he argued that race was an unjustifiable standard for selection. The court held that intentional discrimination might be inferred from this pattern. Similarly, in *Robinson* the court inferred discriminatory intent from a pattern of enforcement which showed a selection for prosecutions of wiretapping violators according to whether they were government employees. Statistical evidence, however, cannot by itself establish a prima facie showing of intentional discrimination by an unjustifiable standard. Thus in *Harris* the appellate court did not determine that the statistical proof itself established a prima facie showing of intentional discrimination. Similarly, the *Robinson* court relied not only on evidence of the statistical pattern of enforcement, but also on evidence of a government policy encouraging government wiretaps.

Although most courts have found statistical evidence insufficient to establish a prima facie case of intentional discrimination, Judge Cummings' dissent in *Falk* suggested that a defendant should not be allowed to use any other kind of evidence. Falk, who was prosecuted for nonpossession of draft cards, alleged that others had turned in their draft cards but had not been prosecuted. He offered to introduce evidence of government policy statements outlining a general policy against prosecuting those who had handed in their draft cards. Falk also offered to prove, through the testimony of an assistant United States Attorney, that he was prosecuted because he was a draft counselor. Judge Cummings rejected any direct inquiry into the prosecutor's motivation to prove prosecutorial bad faith, and suggested defendants should only be allowed to prove prosecutorial bad faith inferentially from the pattern of enforcement. In order to establish a claim of discrim-

51. United States v. Falk, 479 F.2d 616, 628 (7th Cir. 1973) (en banc) (Cummings, J., dissenting).
54. 182 Cal. App. 2d at 842, 5 Cal. Rptr. at 855-56. In remanding the case for a hearing on the evidence of discriminatory prosecution, the court emphasized not only the statistical proof of a pattern of discrimination, but also the testimony of a police officer that the city's policy was to patrol black but not white areas for violations of the gambling law.
55. 311 F. Supp. at 1064. The court noted a message from President Roosevelt to then Attorney General Jackson, stating that illegal wiretapping was an acceptable method of protecting the national security.
56. Judge Cummings wrote the panel's opinion in United States v. Falk, 472 F.2d 1101 (7th Cir. 1972), and the dissenting opinion in the en banc hearing, 479 F.2d 616 (7th Cir. 1972).
57. Judge Cummings' test for claims of discriminatory prosecution appears to be the traditional test which requires a showing of *purposeful* discrimination. He asserted that the inference from the pattern of enforcement must show an "impermissible purpose" of the prosecutor. 472 F.2d at 1108. Furthermore, he stated that the defendant must allege that the prosecutor was *aware* of the selective enforcement. 479 F.2d at
inatory intent, the defendant would be required to show that the effect of the prosecutorial policy—as inferred from a pattern of enforcement—was to distinguish among similar offenders by an unjustifiable standard. Thus, Falk would have to show that other registrants who had turned in their draft cards were similar to him, except that they had not engaged in first amendment activities. Judge Cummings found that Falk had failed to introduce evidence from which a court could "infer invidious discrimination from a pattern of selective enforcement against members of a distinct race, religion, sex, or other definable class."

Judge Cummings' analysis may be valid when the defendant alleges discrimination between different classes of persons. In Steele and Crowthers, for example, the court inferred intentional discrimination from a pattern of enforcement against only one class of offenders. In Steele, the court found a pattern of prosecutions of census resistance movement leaders and nonprosecution of others. Similarly, in Crowthers the court determined that only groups offensive to the government were prosecuted. In cases like Falk, however, in which the defendant shows a general pattern of nonenforcement and alleges discrimination against himself alone and not against a class, defense attempts to inferentially establish discriminatory intent have usually failed. From one prosecution for the offense, a court will have difficulty discovering what particular standard the prosecutor used for selection. The problem with Judge Cummings' approach is that in cases of general nonenforcement of the particular law, all violators are not so similarly situated that a court can easily discern the one principal standard for prosecution. Even when class discrimination is alleged, inferential proof may not suffice to establish intentional discrimination. The traditional test for assessing claims of discriminatory enforcement is not whether the effect of prosecutorial policy is to distinguish between individuals by an unjustifiable standard, but whether the prosecutor intended to distinguish between individuals by an unjustifiable standard. Since statistical proof of a pattern of enforcement is insufficient in most cases to establish prosecutorial bad faith, the defendant
can only establish his claim by introducing direct evidence of "what the prosecutor knew, what the prosecutor decided, and why he decided it." Consequently, if Judge Cummings' approach were adopted, defendants would rarely be able to prove discriminatory prosecution, and meaningful judicial control of prosecutorial abuse would be impossible.

Three types of direct evidence can be used to prove prosecutorial bad faith: statements of broad prosecutorial policy, government memoranda on the case in question and on cases not prosecuted, and testimony by prosecutors and other government officials. Determining whether particular evidence is sufficient to establish discriminatory intent requires consideration of several factors: whether the evidence suggests the use of a justifiable as well as unjustifiable standard; whether it indicates the bad faith of the government, and not merely of an individual government official; and whether it can be substantiated by other types of proof.

Statements of broad prosecutorial policy by those in charge of the enforcement process can indicate the standards used by the prosecutor. For example, a policy suggesting that only blacks should be prosecuted for a certain crime specifically indicates the use of an unjustifiable standard. Similarly, if the policy advocates nonenforcement of a statute, it indicates that unprosecuted violations were not merely the result of lax enforcement and that the prosecution in question was motivated by the particular characteristics of the defendant. This argument was raised by the defendant in *Falk*. A 1969 policy statement of the Director of the Selective Service System indicated that the government should not prosecute registrants who turned in their draft cards, but should allow local draft boards to handle the cases administratively. The court held that this policy statement and the general nonenforcement of the law prohibiting nonpossession of draft cards were elements of the defendant's prima facie showing of intentional discrimination. The major question that arises concerning the use of policy statements as evidence of prosecutorial bad faith is whether a prosecutor can be locked into a rigid policy by an internal policy statement, especially if circumstances indicate that the policy has been terminated. In *Falk*, Judge Cummings asserted that the government could not be estopped from changing its policy because of the statement suggesting nonenforcement. Further, he contended that a 1970 Supreme Court decision forbidding punitive administrative procedures by draft boards might have influenced a change in the processing of those who handed in their draft cards. These arguments may be valid if enforcement statistics indicate a resumption of prosecutions. If, however, the statistics do not show a resumption of prosecutions, the correct inference is that the policy has not been changed. Although a prosecutor might argue that the prosecution in question represents a repudiation of the past policy of nonenforcement and a resumption of enforcement, he should be estopped from asserting a change in policy until he proves the resumption of a general pattern of enforcement.

vviously had held religious services in the concourse. 456 F.2d at 1079. In neither *Steele* nor *Crowthers* did the court explicitly state that statistical evidence by itself was insufficient to prove intentional discrimination. The courts, however, did indicate that the direct proof was an important reason for the decisions.

67. 472 F.2d at 1109.
Memoranda in the prosecutor's files about the case in question or about cases not prosecuted can suggest prosecutorial bad faith. If specific reasons for the prosecution decision are expressed, the court can discover the standard of selection used by the prosecution. The difficulty with this evidence is that some memoranda may express the opinion of only one staff member rather than the actual reason behind the prosecution decision. Consequently, unless approved by the person who made the actual decision to prosecute, a memorandum cannot be sufficient to establish bad faith. Furthermore, the court must balance any justifiable standards discussed in the memoranda against the unjustifiable standard to determine the principal motive for the prosecution.

The third major type of direct evidence of intentional discrimination is the testimony of a prosecutor or other government official. The basic problem concerning the sufficiency of testimonial evidence to establish bad faith is the difficulty of ascertaining the actual standard used by the prosecutor. A written memorandum or policy statement provides the court with objective evidence of prosecutorial purpose which predates both the prosecution and the defendant's claim of discriminatory prosecution. Testimonial evidence, on the other hand, is less reliable, since a prosecutor is unlikely to admit that he engaged in unconstitutional discrimination at a hearing on a claim of discriminatory prosecution.

Four types of testimonial evidence can be used to show discriminatory prosecution: testimony about the enforcement policy of the government, testimony about the general procedures used in prosecutions in the past and in this case, testimony about prior admissions made by the prosecutor, and direct testimony about prosecutorial motives. The first type of testimonial evidence is testimony by a government official about the general policy of the government toward violations of a particular law. Several courts have indicated that this type of evidence can establish prosecutorial bad faith. In Harris, for example, the defendant offered testimony by a police officer that the city's policy was to patrol black but not white areas for gambling violations. The court found that this testimony might establish discrimination.

Similarly, the court in Falk ruled that an assistant United States Attorney's testimony concerning a governmental policy against indicting those who handed in their draft cards might prove prosecutorial bad faith. In Bargain City U.S.A. Inc. v. Dilworth, a state court held that evidence of prosecutorial policy was sufficient to prove intentional discrimination. In that case, the police commissioner testified that he had established a policy of enforcing Sunday blue laws only against large retail establishments. Although these courts never stated why this evidence was sufficient to prove bad faith, the major strength of this type of evidence is that it is objective.

69. See Edelman v. California, 344 U.S. 357 (1953), and United States v. Ahmad, 347 F. Supp. 912 (M.D. Pa. 1972). In Edelman, the defendant subpoenaed police records to prove other violations. The subpoenas, however, were quashed because the affidavits did not meet state requirements. In Ahmad, the defendant requested prosecutorial memoranda on both their case and the cases of other violators of the statute.

70. Comment, supra note 62, at 1122.

71. 182 Cal. App. 2d at 839, 5 Cal. Rptr. at 853.

72. 479 F.2d at 623.

73. 29 U.S.L.W. 2002 (Phila. County C.P. June 10, 1960). Although the court never specifically stated what the unjustifiable standard was, it appears to be arbitrariness.
in the sense that it could be substantiated by other participants in the prosecutorial process.

The second type of testimonial evidence is testimony about the general procedures used in prosecutions in the past and in the case at hand. In Steele, the court found that this type of evidence, together with statistical evidence of discrimination, was sufficient to prove intentional discrimination.\(^\text{74}\) A government official testified that dossiers had been compiled on the defendants, although dossiers were not regularly compiled on census violators. The court found that this variation in procedure evidenced bad faith. Prosecutors can, however, use different procedures in different cases for legitimate law enforcement purposes. Consequently, as suggested in State v. Jourdain,\(^\text{75}\) and United States v. Ahmad,\(^\text{76}\) testimony concerning variations in procedures is very weak proof of intentional discrimination.

In Jourdain, the defendant sought to cross-examine police and state officials to prove that while others arrested for narcotic violations were offered immunity if they became informers, immunity had not been offered to him. The court ruled that this testimony would not prove the use of an unjustifiable standard because law enforcement officers might have legitimate reasons for offering immunity to some offenders and not to others. In Ahmad, the defendants sought to question the Director of Federal Prisons concerning its policy against using prisoners as informants, since the government had used a prisoner-informant against them. The court held that the evidence was not relevant to prove discriminatory prosecution. Because this kind of evidence has little probative value and a large potential for consuming court time, the Jourdain and Ahmad courts were justified in rejecting its use.

The defendant in Falk sought to elicit the third type of testimonial evidence: testimony concerning a prosecutor's prior admission of bad faith. The defendant alleged that an assistant United States Attorney had told defense counsel that he was aware that the defendant was a draft counselor, that he believed the defendant was causing the Selective Service trouble, and that the defendant's draft counseling was one of the reasons the government had brought the case.\(^\text{77}\) The court ruled that this evidence was relevant to the government's purpose in prosecuting the defendant.\(^\text{78}\) The ruling might be criticized on the ground that the defendant's indictment may have been reviewed by others in the Justice Department, who possibly had legitimate reasons for approving it. Nevertheless, the court's ruling seems correct, since the evidence indicated that the admission reflected government policy. Even when the admission is relevant, however, it should not be considered binding on the government.\(^\text{79}\) The government should remain free to introduce proof that those who finally approved the prosecution had legitimate reasons for doing so.

\(^\text{74}\) 461 F.2d at 1151.
\(^\text{75}\) 225 La. 1030, 1034-35, 74 So. 2d 203, 204-05 (1954).
\(^\text{76}\) 347 F. Supp. at 929.
\(^\text{77}\) Brief for Defendant-Appellant at 9, United States v. Falk, 472 F.2d 1101 (7th Cir. 1972).
\(^\text{78}\) 479 F.2d at 623 n.6.
\(^\text{79}\) See id. at 633-34 (Cummings, J., dissenting). Cf. United States v. Santos, 372 F.2d 177, 180 (2d Cir. 1967). The reason for this rule is that the prosecutor, as an agent of the United States, is no different than any other witness. The prosecution is in the name of the United States, not the law enforcement officer,
The fourth type of testimonial evidence is testimony by a prosecutor about his motives in bringing the case. Although such testimony has a direct bearing on the issue of discriminatory prosecution, most courts probably would be reluctant to admit it. With the possible exception of state prosecutions in rural areas, decisions to prosecute are generally not made by individuals acting alone. An individual prosecutor is likely to testify only about his own motives, which may not be the same as the motives of others involved in the prosecutorial decision. Furthermore, a prosecutor is unlikely to admit in court that he used an unjustifiable standard, and his testimony is difficult to verify through the testimony of others. For these reasons, the court in Falk indicated that although the defendant could question the assistant United States Attorney about his admissions to defense counsel, he could not question the prosecutor about his motives for bringing the case.

Whether specific evidence of prosecutorial policy statements, memoranda on cases, or testimony is sufficient to establish a showing of intentional discrimination is an issue the court must consider in each particular case. Evidence that can be substantiated, that reflects general prosecutorial policy, and that corroborates a statistical pattern of enforcement has the greatest sufficiency. Examples of this type of evidence are governmental policy statements, testimony as to prosecutorial policy, and memoranda on specific cases expressing these policies. On the other hand, evidence relating to a single official's motives which cannot be easily verified is generally not considered sufficient to establish bad faith.

Although some types of direct evidence in the prosecutor's control are sufficient to establish intentional discrimination, most courts have refused to allow defendants access to this evidence until they have proved a "colorable entitlement" to the defense of discriminatory prosecution. A showing of selective enforcement is not sufficient; before the defendant can obtain the desired testimonial or documentary evidence, he must lay a foundation by presenting "evidence from which at least an inference of the use of improper standards can be drawn." The courts give two reasons, both rooted in the policy of judicial deference to prosecutorial decisions, for requiring this foundation. First, they assert that the executive branch is privileged not "to disclose intra-governmental documents reflecting advisory opinion, recommendations, and deliberations comprising part of a process by which governmental decisions are formulated." Executive privilege encourages frank, open discussions by the prosecutor's staff, whereas frequent judicial examination of internal discussions might discourage the free exchange of opinion in the prosecutor's office. Second, courts contend that the separation of powers doctrine precludes extensive judicial inquiry into the purposes behind a prosecution. As Judge Cummings stated in Falk, chaos would reign if courts always summoned prosecutors to testify about their motives.

80. 479 F.2d at 631 (Cummings, J., dissenting).
81. But see Judge Fairchild's concurring opinion in Falk, where he states that prosecutorial motives should be reviewed by the court because the case dealt with "an exceptional area of national life where conscientious opposition to government policy has been intertwined with violations of the laws which implement the policy." 479 F.2d at 624-25.
85. 472 F.2d at 1108. See generally Newman v. United States, 382 F.2d 479, 482 (D.C. Cir. 1967).
As a result of their deference to prosecutorial decisions, courts have placed an impossible burden on defendants. The defendant must establish a showing of intentional discrimination before the burden of going forward shifts to the state. Because many courts refuse to infer intentional discrimination from a statistical pattern of enforcement, the defendant must introduce direct evidence of prosecutorial intent if he is to establish this showing. This direct evidence is usually, however, in the “consciences and files” of the prosecutor. 86 To obtain the evidence the defendant must first present evidence of discriminatory enforcement. As a result, very few claims of discriminatory enforcement are sustained. 87

Judicial deference to prosecutorial decisions, however, is not the policy a court should consider in regard to claims of discriminatory prosecution. Since Yick Wo courts have also recognized the policy of judicial control of prosecutorial abuse. These opposing policies must be appropriately balanced in each particular case. A similar balancing test was adopted by the court in United States v. Proctor & Gamble Co. 88 Although Proctor & Gamble was not a case of discriminatory prosecution, it involved the issue of defense access to evidence in the government’s control to prove an unconstitutional governmental purpose. The defendant alleged that the government was using a grand jury to obtain evidence for civil purposes. The company demanded that the government produce material documents; the government claimed executive privilege. The court acknowledged the value of free and open discussion in the executive branch. Nevertheless, it recognized that executive privilege is not absolute and may be claimed only when “appropriate.” The court indicated that documents representing merely the individual views of government agents in regard to the use of the grand jury for civil purposes were privileged. On the other hand, the claim of executive privilege was not appropriate for those documents that had a “direct bearing” on a decision of the Department of Justice to use the grand jury for civil purposes. The court then listed the kinds of evidence that would have a bearing on the subversion of the grand jury:

Such subversion might be shown . . . by a decision of the Attorney General to use the Grand Jury for a solely civil purpose. It might be shown by the intent of the subordinates in actual charge of the Grand Jury to do this, if that intent was not countermanded by higher authority, plus the lack of such countermand. It might be shown by an established policy of the Department of Justice to follow this course as to a certain category of antitrust cases, and the recognition by the Department that the present case fell within that category and the policy was applied to this case. 89

The court held that it would examine the documents in camera to determine whether particular evidence was privileged.

The same analysis could be applied in cases of alleged discriminatory prosecution. The defendant would first have to show selective enforcement. If he could not obtain statistics on enforcement, the court would require the

86. People v. Gray, 254 Cal. App. 2d 256, 266, 63 Cal. Rptr. 211, 217-18 (1967). See also Givelber, supra note 62, at 112. Professor Givelber wrote: “Why someone was chosen for prosecution is a fact peculiarly within the knowledge of the administrator . . . .”
87. F. MILLER, supra note 66, at 336.
89. Id. at 491.
prosecution to provide them. These statistics are not privileged because they do not represent intradepartmental discussions. Then, if the court found selective enforcement, it would examine *in camera* documents in the prosecutor's files relating to the particular case, to other nonprosecuted cases for the same offense, and to policy statements in regard to the offense. As in *Proctor & Gamble*, the court would then determine if any of the documents had a direct bearing on the claim of intentional discrimination by an unjustifiable standard. Any documents showing discrimination would be handed over to the defendant. If the court found no documents showing discrimination or if the documents did not establish a prima facie case of intentional discrimination, it might, in its discretion, allow testimony from government officials. The extent of the examination would depend on the probative value of the evidence sought. Thus, courts should allow the defense to question the prosecutor about general policy toward similar offenders, but not about the particular procedures used in the case.

Two courts have recently allowed defense access to government information which other courts would have considered privileged. In *United States v. Barrios*, the court of appeals ruled that a trial judge did not abuse his discretion in ordering production of a memorandum from the prosecutor to his superiors seeking approval for the prosecution, even though the defendant had made only a weak showing of intentional discrimination. The case was remanded so that the trial judge could examine the document *in camera* and communicate the relevant portions to defense counsel. Similarly, in *Falk*, the court held that the defendant could question the prosecutor in regard to his admission to defense counsel concerning the reasons for the prosecution.

*Falk* and *Barrios* represent a significant advance in the judicial treatment of defense access to proof of discriminatory prosecution. The courts in *Barrios* and *Falk* recognized that if courts are to afford relief to victims of discriminatory prosecution, they must balance the policy of judicial deference to prosecutorial decisions against the need to control prosecutorial abuse. Other courts have not only placed a heavy burden of proof on the defendant, but have also limited his access to direct evidence of intentional discrimination. These courts require that the defendant establish a prima facie case of the prosecutor's bad faith before the burden of going forward

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90. This procedure was followed in *Ahmad*, 347 F. Supp. at 926.
91. — F.2d — (2d Cir. 1974). The defendant alleged that he was indicted under 29 U.S.C. § 504 (1970) for serving as an officer of a union within 5 years of a conviction for arson, because he supported Senator McGovern in the 1972 election, and because he attempted to unionize the Marriott Restaurant chain, an enterprise with close ties to former President Nixon. The district court dismissed the case when the government refused to submit to the defendants a memorandum on the prosecution, "redacted only to the extent necessary to protect against disclosure of any confidential grand jury testimony." *Id.* at —. The Second Circuit remanded the case, holding that the district court's order was too broad. The court ruled that the district court should examine the memorandum *in camera* and should disclose to the defense only evidence relevant to the defense of discriminatory prosecution. The government, however, was entitled to withhold all material not relating to this defense.
92. 479 F.2d at 623. The defendant in *Falk* argued that the prosecutor had waived his executive privilege when he made a voluntary disclosure to the defense counsel. *Petition of Defendant-Appellant for Rehearing en Banc* at 7, *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973).
shifts to the state. But the evidence needed to make a prima facie case is often in the prosecutor's hands. Consequently, to effectively control prosecutorial abuse, the courts must allow the defendant reasonable access to the evidence establishing his claim of discrimination.

Stefan H. Krieger

FROM NET TO SWORD: ORGANIZATIONAL REPRESENTATIVES LITIGATING THEIR MEMBERS’ CLAIMS

In Sierra Club v. Morton, the Supreme Court said that “[i]t is clear that an organization whose members are injured may represent those members in a proceeding for judicial review.” Initially, the court might seem to have merely stated the obvious, since unions, civil rights groups, and other organizations routinely represent their members’ interests in nonlegal matters; nevertheless, carrying organizational representation into the courtroom has met judicial resistance. Even after the Supreme Court’s seemingly unqualified acceptance of organizational representations in Sierra Club, a lower court remarked that “[w]e had not imagined the issue to be so clear.”

Nor is organizational representation as simple and unqualified as a casual reading of Sierra Club might suggest. A host of difficult issues lies beneath the surface of organizational representation standing. For example, does the right of an organization to represent its injured members in court give the Teamsters Union the right to litigate a member's personal injury claim from an on-the-job accident? An off-the-job accident? A divorce claim? If the NAACP loses a suit seeking to stop discriminatory terminations of black teachers in school consolidations, is a terminated black teacher barred by res judicata principles from seeking damages if he is an NAACP member? This comment will discuss these issues, after first exploring the conceptual basis of the organizational action and distinguishing it from other actions involving organizations.

In an organizational representation suit, unlike other suits involving organizations, the organization represents its members and stands in their shoes in the courtroom. The organization litigates and finally adjudicates its members' claims, just as a guardian ad litem or a class representative finally adjudicates the claims of the represented youth or class member.

1. 405 U.S. 727, 739 (1972).
3. Conceptually, the organizational representation suit can rest on either an aggregation-of-individuals or an authorized representation theory. In the aggregation theory, the organizational plaintiff is seen as a collection of individuals; through this artificial personage, the injured members themselves are brought before the court. The idea that an individual is wholly before the court through incorporated or unincorporated organizational representation is at odds with the reality of the relationship between organizations and their members and the tendency of the law to treat associations as entities. The authorized representation theory assumes a separation between the individual and the organization. The organization is seen as a separate entity which is authorized to represent its members in legal actions. Courts have generally adopted this theory. E.g., National Motor Freight Traffic Ass’n v. United States, 372 U.S. 246 (1963); Interna-