Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal

Donald G. Gifford*

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* Assistant Professor and Director, Criminal Law Practice Program, University of Toledo College of Law; B.A. 1973, College of Wooster; J.D. 1976, Harvard University. The author would like to thank Stephen Afendoulis, a student at the University of Toledo College of Law, for his research and editorial assistance. The author also expresses his special appreciation to those of his colleagues who reviewed earlier drafts of this article and offered valuable suggestions.

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I. Introduction

The prosecutor's decision to file criminal charges against a suspect is one of the most important decisions within the criminal justice system. Yet it is a decision that affords the prosecutor a great deal of discretion and that courts have been reluctant to review. Although the Supreme Court during the last two decades has interpreted the due process and equal protection clauses of the fourteenth amendment to mandate a comprehensive reform of the criminal justice system, the prosecutor's freedom in charging remains virtually immune from judicial scrutiny in regard to constitutional issues.[1]

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1. The Warren Court's dramatic expansion of federally protected constitutional rights in criminal proceedings is described in C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 1-3 (1980), and in Pye, *The Warren Court and Criminal Procedure,* 67 MICH. L. REV. 249 (1968).

The Warren Court regulated almost all aspects of the criminal process, from the arrest, *see, e.g.,* Miranda v. Arizona, 384 U.S. 436 (1966), through the trial itself, *see, e.g.,* Duncan v. Louisiana, 391 U.S. 145 (1968). The Court asserted that the due process clause of the fourteenth amendment extends to the states the constitutional protections afforded criminal defendants under the Bill of Rights. According to the Warren Court, the equal protection clause also mandates that states take affirmative steps to ensure that indigent defendants are not denied their constitutional rights. *See, e.g.,* Douglas v. California, 372 U.S. 353, 354-58 (1963).

In Oyler v. Boles, 368 U.S. 448, 454 (1962), and Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 589 (1961), the Warren Court considered the application of the equal protection clause to the charging decision. The *Oyler* Court held that the petitioner failed to establish an equal protection violation by merely proving that he had been charged under a habitual offender statute, while others eligible for prosecution had not. The Court suggested, however, that petitioner could have supported a finding of a denial of equal protection by showing that "the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." 368 U.S. at 456.

The Burger Court was the first to hold that the prosecutor's charging decision vio-

The criminal justice system does not require the prosecution to file criminal charges whenever there is sufficient evidence of guilt.[2] Rather, the prosecutor must make an independent judgment that under all of the circumstances, it is in the public interest to invoke criminal sanctions. The decision is often hidden from the public, and is unreviewable by the courts except in rare and extreme circumstances.[3] The lack of judicial review of the charging decision cannot be justified on the ground that the consequences of the prosecutor's decision are insignificant. The suspect charged by the prosecutor with a serious crime will suffer greatly, even if ultimately acquitted.[4] Conversely, both victims of crime and the general public have a right to expect that prosecution of a known violator of the law will not be avoided on constitutionally impermissible grounds, such as favoritism, bias, or prejudice. The importance of decisions made by the prosecutor, and the freedom traditionally afforded that official, led former Supreme Court Justice Robert Jackson, himself once a prosecutor, to comment: "The prosecutor has more control over life, liberty and reputation than any other person in America."[5]

Despite the key role played by the prosecutor, the courts have narrowly interpreted the equal protection clause as it applies to the filing of criminal charges. The Supreme Court has expressly approved selective enforcement of laws.[6] The rule articulated by most federal

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lated the due process clause when the filing of charges appeared to be in retaliation for the defendant's exercise of constitutional or statutory rights. Blackledge v. Perry, 417 U.S. 21, 28-29 (1973); *see* notes 147-64 *infra* and accompanying text.

2. 1 ABA STANDARDS FOR CRIMINAL JUSTICE ch. 3, § 3.9(b) (2d ed. 1980), specifically provides that "[t]he prosecutor is not obliged to present all charges which evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence exists which would support a conviction." *Id.* For a discussion of factors that a prosecutor legitimately may take into account to determine the public interest, see notes 21-22, 29-31 *infra* and accompanying text.

The role of the public prosecutor developed at common law to supplement prosecutions initiated and conducted by private citizens. *See* Langbein, *Controlling Prosecutorial Discretion in Germany,* 41 U. CHI. L. REV. 439, 443-46 (1974). The decision to prosecute remained in the hands of the victim or other complaining witness. In 1704, Connecticut passed the first statute designating the duties of the prosecutor. Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making,* 13 AM. CRIM. L. REV. 473, 476 (1976). Gradually the public prosecutor acquired a monopoly over the initiation of prosecutions. By transforming the prosecutor into an elected official, American populism buttressed the prosecutor's discretionary authority. Langbein, *supra*, at 445. As an elected official, the prosecutor acquired the authority to conduct the affairs of the office in a manner designed to win electoral approval.

3. Courts will review the prosecutor's determination that the filing of charges is in the public interest only when the defendant can present a prima facie case that the prosecution is unconstitutional. The prosecution violates the Constitution if motivated by invidious discrimination or if begun in retaliation for the suspect's exercise of a constitutional right. *See* notes 75-78, 147-64 *infra* and accompanying text.

4. *See* notes 45-48 *infra* and accompanying text.

5. Jackson, *The Federal Prosecutor,* 24 AM. JUD. SOC'Y J. 18, 18 (1940).

6. Oyler v. Boles, 368 U.S. 448, 456 (1962). The Supreme Court most recently affirmed the limited applicability of the equal protection clause to the charging decision

and state courts is that the prosecution violates the defendant's equal protection rights, thereby entitling the defendant to a dismissal of charges, only when "the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights."[7]

Although existing law purports to prohibit prosecutions based on invidious or discriminatory motives, the courts afford little protection in practice even to those defendants who allege discrimination based on race, religion or the desire to prevent the exercise of constitutional rights.[8] The trial courts have engaged in uncharitable and perhaps biased fact-finding, consistently deciding that the defendant has not established the facts necessary for the defense of discriminatory prosecution. For example, in *State v. Flynt*,[9] the prosecutor testified to having previously informed a television interviewer that criminal obscenity charges had been brought against the defendant's adult magazine, *Hustler*, and its publisher because of a political cartoon.[10] The prosecutor also admitted that even though other adult magazines sold in his jurisdiction were more sexually explicit, they had not been prosecuted.[11] The defendants contended that they had been selected for prosecution in retaliation for the political cartoon, an exercise of first amendment rights. Nevertheless, the Ohio Supreme Court held that the prosecution was not motivated by a desire to prevent the defendants' exercise of their right of free expression.[12] The *Flynt* case is not unique; indeed, among the millions of charging decisions made by prosecutors, the courts have found only a handful of equal protection violations.[13]

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in United States v. Batchelder, 442 U.S. 114, 123-25 (1979). The Court held that neither the equal protection clause nor the due process clause was violated when the prosecutor elected to charge the defendant under one of two potentially applicable provisions of the Omnibus Crime Control and Safe Streets Act of 1968, even though the chosen section carried a greater maximum sentence.

7. United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974).

8. *See* notes 98-101 *infra* and accompanying text.

9. 63 Ohio St. 2d 132, 407 N.E.2d 15, *cert. granted*, 449 U.S. 1033 (1980), *cert. dismissed*, 101 S. Ct. 1958 (1981).

10. 63 Ohio St. 2d at 136, 407 N.E.2d at 18 (Brown, J., dissenting). The cartoon depicted President Ford, Vice-President Rockefeller, and Secretary of State Kissinger engaged in various sexual activities with the Statue of Liberty, apparently without her consent.

11. *Id.* at 135, 407 N.E.2d at 18.

12. The United States Supreme Court granted certiorari, *sub nom.* Flynt v. Ohio, 449 U.S. 1033 (1980), but subsequently dismissed the writ for want of jurisdiction. 101 S. Ct. 1958 (1981). The Supreme Court held that the decision of the Ohio Supreme Court was not a final judgment because there was no finding of guilt and no sentence was imposed. Four justices dissented, arguing that a refusal to immediately review the Ohio Supreme Court's decision would seriously erode federal policy. 101 S. Ct. at 1961. According to the dissenting justices, therefore, the case fell within recognized exceptions for treating state court judgments as final for jurisdictional purposes even when further proceedings have to take place in the state court. Justice Stewart, in a dissenting opinion joined by Justices Brennan and Marshall, concluded that the trial court had acted correctly in dismissing the indictment. *Id.* (Stewart, J., dissenting). Justice Stevens, also dissenting, identified the issue before the court as "the standards that a court must apply in determining whether an exercise of prosecutorial discretion has been based on an impermissible criterion such as race, religion, or the exercise of first amendment rights." *Id.* (Stevens, J., dissenting).

13. *See* United States v. Falk, 479 F.2d 616, 623-24 (7th Cir. 1973); United States v.

Both the courts' narrow statement of the types of selectivity that violate the equal protection clause, and their virtually absolute unwillingness to find equal protection violations in the charging process result from the perception that judicial review of the prosecutor's decision is neither appropriate nor feasible. Review is considered inappropriate out of traditional deference to the prosecutor's freedom in charging and because of constitutionally significant separation of powers considerations. It is deemed unfeasible because courts are not equipped to determine whether an unconstitutional motive played a role in the charging decision.

Neither concern should prevent scrutiny of the prosecutor's charging decision on equal protection grounds. During the past decade, the courts have not allowed deference to prosecutors or the separation of powers doctrine to impede review of prosecutors' charging decisions when they have been challenged on other constitutional grounds.[14] Similarly, courts now regularly attempt to determine whether members of the executive branch comparable to prosecutors have allowed racial prejudice or other constitutionally impermissible factors to play a role in their decisions.[15]

This article suggests how courts may realistically apply the existing prohibition against prosecutions based upon invidious or bad faith motives, and how judicial review may be appropriate in other instances in which the courts have not previously considered equal protection claims on their merits. It describes the evidence and methods of proof which the courts may examine to determine whether the prosecutor's charging decision was based upon a constitutionally impermissible motive. Following the discussion of how the prima facie case of discrimination may be proved, the article discusses the procedure that a trial court should follow to decide the appropriate consequences when a constitutionally impermissible motive plays a role in the prosecutor's charging decision. Recent court opinions in other equal protection areas outline procedures for determining the proper remedy when the government considers a constitutionally impermissible motive.[16] Similar procedures should

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Steele, 461 F.2d 1148, 1152 (9th Cir. 1972); United States v. Crowthers, 456 F.2d 1074, 1080-81 (4th Cir. 1972); Dixon v. District of Columbia, 394 F.2d 966, 968 (D.C. Cir. 1968); United States v. Robinson, 311 F. Supp. 1063, 1064-65 (W.D. Mo. 1969); Associated Indus. of Ala., Inc. v. State, 55 Ala. App. 277, 289, 314 So. 2d 879, 890 (Crim. App.), *cert. denied,* 294 Ala. 281, 314 So. 2d 901 (1975); City of Ashland v. Hecks, Inc., 407 S.W.2d 421, 424-25 (Ky. 1966); State v. Vadnais, 295 Minn. 17, 19-21, 202 N.W.2d 657, 659-60 (1972); People v. Acme Mkts., Inc., 37 N.Y.2d 326, 328-30, 334 N.E.2d 555, 558, 372 N.Y.S.2d 590, 594 (1975); People v. Walker, 14 N.Y.2d 901, 902, 200 N.E.2d 779, 779, 252 N.Y.S.2d 96, 97 (1964). *Cf.* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (discrimination by licensing board leading to criminal prosecution).

14. *See* notes 147-64 *infra* and accompanying text.

15. *See* notes 165-76 *infra* and accompanying text.

16. *See, e.g.,* Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286-87 (1977). *See also* notes 217-43 *infra* and accompanying text.

be adopted by the courts in discriminatory prosecution cases and in suits seeking to compel prosecution.

Next, the article contends that judicial scrutiny of the charging decision on equal protection grounds is both feasible and appropriate in cases in which courts have previously refused to review the charging decision. Defendants who do not allege discrimination on the basis of race or religion or the desire to prevent the exercise of constitutional rights may nonetheless have a viable equal protection defense if the prosecutor violates written guidelines adopted to govern discretion in charging.

Finally, realistic treatment of the discriminatory prosecution defense may cause courts to reevaluate the current doctrine that precludes victims of crimes, and others aggrieved by the prosecutor's failure to file criminal charges, from seeking judicial review of that decision. To an extent, standing and other judicial barriers to such suits are flexible constraints erected by courts to avoid deciding cases they do not believe themselves competent to handle.[17] As courts develop expertise in discriminatory prosecution cases, they may be more willing to decide similar issues in suits seeking to compel prosecution.

II. The Exercise of Discretion in the Charging Decision

A. The Discretionary Nature of the Prosecutor's Function

The prosecutor's freedom to decline to bring criminal charges even when there is sufficient evidence to convict is widely acknowledged, if not universally admired.[18] The decision to prosecute really consists of two separate judgments.[19] First, the prosecutor must determine if a sufficient possibility of guilt exists to justify subjecting the suspect to trial.[20] Second, the prosecutor must decide whether the filing of criminal charges is in the public interest.[21] Proper resolution of this question may depend upon a variety of circumstances related to the nature of the alleged offense, the characteristics of the suspect,

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17. *See* Baker v. Carr, 369 U.S. 186, 210-17 (1962). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-21, at 93 (1978); Comment, *The Supreme Court 1975 Term,* 90 HARV. L. REV. 56, 212 (1976).

18. *See* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 191-95 (1969). Critics of the wide latitude given prosecutors in deciding whether to prosecute have called for fuller enforcement, or even mandatory enforcement, as one means of combatting the injustices which they perceive to result from selective enforcement. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 227-39 (2d ed. 1979); Noll, *Controlling a Prosecutor's Screening Discretion Through Fuller Enforcement,* 29 SYRACUSE L. REV. 697, 707-12 (1978).

19. *See* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 4 (1969).

20. 1 ABA STANDARDS FOR CRIMINAL JUSTICE ch. 3, § 3.9(b) (2d ed. 1980), specifically provides that "[i]n addressing himself to the decision whether to charge, the prosecutor should first determine whether there is evidence which would support a conviction." *Id.* This determination includes consideration of the likelihood that the jury will acquit because of reasons unrelated to the strength of the government's case.

21. Alternatively, the prosecutor might conclude that avenues outside the criminal process, such as counseling, are preferable. Finally, he might decide that society should take no action in regard to the suspect.

and limitations on the prosecutor's resources.[22]

For the most part, courts have deferred to the prosecutor's discretion in charging and have refused to review the determination that prosecution is in the public interest. In the celebrated case of *United States v. Nixon*,[23] the Supreme Court broadly proclaimed that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."[24] In calmer times, the Supreme Court has recognized that some charging decisions might violate the equal protection clause, but that the conscious exercise of selectivity is usually permissible.[25] This judicial deference is based in part upon the recognition that "[t]raditionally and at common law, public prosecutions were within the exclusive control of the district attorney."[26] Indeed, "the existence of very broad discretion in the prosecution has long been taken for granted."[27] Although a system in which the prosecutor must charge a crime whenever there is sufficient evidence is possible, the courts have consistently recognized that the American system does not give such a role to the prosecutor.[28]

The decision not to prosecute is often based on the judgment that

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22. 1 ABA STANDARDS FOR CRIMINAL JUSTICE ch. 3, § 3.9(b) (2d ed. 1980), lists the following factors as illustrative of those the prosecutor may consider in a charging decision:

> (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
> (ii) the extent of the harm caused by the offense;
> (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
> (iv) possible improper motives of a complainant;
> (v) prolonged non-enforcement of a statute, with community acquiescence;
> (vi) reluctance of the victim to testify;
> (vii) cooperation of the accused in the apprehension or conviction of others;
> (viii) availability and likelihood of prosecution by another jurisdiction.

Id.

23. 418 U.S. 683 (1974).

24. *Id.* at 693.

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

26. United States v. Cowan, 524 F.2d 504, 505 (5th Cir. 1975).

27. Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967); *see* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1977); Powell v. Katzenbach, 359 F.2d 234, 234 (D.C. Cir. 1965), *cert. denied,* 384 U.S. 906 (1966). The Supreme Court acknowledged the prosecutor's freedom from judicial control in Imbler v. Pachtman, 424 U.S. 409 (1976). The Court ruled that the prosecutor is absolutely immune from a suit for damages that alleges a civil rights violation under 28 U.S.C. § 1983. *Id.* at 431.

28. State v. Johnson, 74 Wis. 2d 169, 172, 246 N.W.2d 503, 506 (1976); *see* Pugach v. Klein, 193 F. Supp. 630, 634-35 (S.D.N.Y. 1961); United States v. Brokaw, 60 F. Supp. 100, 101 (S.D. Ill. 1945); State *ex rel.* Kurkierewicz v. Cannon, 42 Wis. 2d 368, 373, 166 N.W.2d 255, 260 (1969). The American system of selective enforcement contrasts with prosecution in other countries, such as West Germany, where "[w]henever the evidence that the defendant has committed a serious crime is reasonably clear and the law is not in doubt, the . . . prosecutor . . . is without discretionary power to withhold prosecution. This means that selective enforcement, a major feature of the American system, is almost wholly absent from the German system." K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 194 (1969) (emphasis omitted). *See* Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany,* 18 AM. J. COMP. L. 508, 508 (1974); Langbein, *Controlling Prosecutorial Discretion in Germany,* 41 U. CHI. L. REV. 439, 451 (1974).

even though the suspect's conduct is proscribed by the letter of the law, full enforcement of the law was not intended.[29] State criminal codes typically serve as symbolic statements of public morality (real or imagined), without regard to enforceability and changing social values. Outmoded statutes may remain on the books long after the moral fervor that motivated their enactment has died. Other statutes may be written broadly to assure that the intended target does not escape through a loophole. Unfortunately, activity not considered by the legislature may also be encompassed by the criminal dragnet. In addition, public tolerance of some criminal conduct often discourages vigorous enforcement. For example, selective enforcement of laws against victimless crimes is common.

The specific circumstances surrounding a crime and the individual characteristics of a suspect may also lead to a decision that prosecution is not in the public interest.[30] Even when evidence of guilt is strong, the prosecutor may refrain from filing criminal charges if the consequences to the suspect of prosecution and conviction would be disproportionate to the harm caused by the crime. Individualized decisions not to charge also result from a variety of other considerations, including the victim's desire not to prosecute and the availability of alternative noncriminal sanctions. Finally, severe limitations on prosecutorial resources affect the charging decision.[31] Minor crimes often go unprosecuted, as do crimes for which convictions can be obtained only through substantial investigation and trial preparation.

Available empirical data supports the general proposition that the exercise of prosecutorial discretion has an important impact on the criminal justice system. Decisions to forego prosecution on policy grounds are obviously less frequent in cases of violent felonies, such as murder or armed robbery.[32] Even in felony cases, however, studies show that state prosecutors decline to file in 45% to 54% of all cases, and that federal prosecutors decline to file in 75% to 80% of all felony cases.[33] Certainly, many of these decisions result from the

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29. *See* Friedman, *Some Jurisprudential Considerations in Developing an Administrative Law for the Criminal Pre-Trial Process,* 51 J. URBAN L. 433, 441-44 (1974); LaFave, *The Prosecutor's Discretion in the United States,* 18 AM. J. COMP. L. 532, 533-35 (1970).

30. *See generally* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 173-280 (1969); LaFave, *supra* note 29, at 534-35 (1970); Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion,* 24 STAN. L. REV. 1036, 1052-61 (1972).

31. *See* Rabin, *supra* note 30, at 1047-56.

32. *See* Neubauer, *After the Arrest: The Charging Decision in Prairie City,* 8 LAW & SOC'Y REV. 495, 503-04 (1974). The discretion that exists in charging major crimes is largely a factor of whether there is sufficient evidence to convict and whether existing evidence meets the sometimes nebulously defined elements of an offense. The prosecutor's biases and policies may affect even these determinations. In a battery case, for example, the circumstances of the alleged crime, the characteristics of the defendant, and the relationship between the defendant and the victim will have an impact on the prosecutor's determination whether the victim's injuries are serious enough to warrant a felony charge instead of a misdemeanor charge. *Id.* at 504.

33. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion,* 47 U. CHI. L. REV. 246, 251 (1980).

prosecutor's independent determination that the evidence is not sufficient to convict. Nevertheless, a recent survey of federal prosecutions in Chicago showed that 18% of all decisions to forego prosecution were based solely on the determination that criminal sanctions were inappropriate even though the prosecutor probably could have proved a criminal violation.[34]

Prosecutors decline to proceed with a much higher proportion of misdemeanor complaints. Misdemeanors typically are brought to the attention of the prosecutor either by law enforcement officers or by civilians who have been victims of crimes.[35] A 1972 study of the prosecutor's office in Miami, Florida showed that even though the prosecutor reviewed approximately one hundred citizen complaints a day, he accepted only five or six for prosecution.[36] A survey in another jurisdiction showed that in more than one-third of the cases in which police arrested and booked a defendant, the prosecutor either filed no charge or filed a less serious one than the police requested.[37]

In most instances, prosecutors appear to exercise their discretion in the charging decision in good faith. Although they often act in an inconsistent manner, prosecutors generally appear to be guided by legitimate considerations of law enforcement. Nevertheless, the mere existence of discretion that is largely unchecked, unstructured, and hidden from public view suggests that some charging decisions result from impermissible considerations, such as racial prejudice, political favoritism, or personal animosity.[38] To argue that all prosecutorial discretion is exercised in good faith and that controls are therefore unnecessary is to deny reality. As Kenneth Culp Davis

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34. *Id.* at 279. Forty-five percent of the total number of decisions not to prosecute were based in whole or in part on evidentiary or legal obstacles to prosecution. Of those prosecutions refused on policy grounds, approximately 37% of the total sample, the largest number were declined because of the availability of an alternative to federal prosecution, usually state prosecution.

35. The prosecutor's role in the misdemeanor charging decision varies considerably from one jurisdiction to another depending upon state statutes and local practices. *See* Neubauer, *After The Arrest: The Charging Decision in Prairie City,* 8 LAW & SOC'Y REV. 495, 497-502 (1974). In many communities the police either actually file most charges or dominate the charging decision, even though the prosecutor retains formal authority. In some jurisdictions, citizens may file criminal complaints. Generally, however, the prosecutor retains at least nominal control over misdemeanor charging.

36. *See* J. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 129 (1980).

37. *See* Neubauer, *After the Arrest: The Charging Decision in Prairie City,* 8 LAW & SOC'Y REV. 495, 506 (1974). Statistics from other jurisdictions comparing the number of police arrests with the number of decisions to decline prosecution show that prosecutors decline to charge in as many as 43.6% of the cases in New Orleans and in as few as 4.2% of the cases in Brooklyn. *See* Mellon, Jacoby & Brewer, *The Prosecutor Constrained By His Environment: A New Look At Discretionary Justice in The United States,* 72 J. CRIM. L. & CRIMINOLOGY 52, 79 (1981).

38. *See, e.g.,* United States v. Torquato, 602 F.2d 564, 568 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979) (political considerations); United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974) (same); People v. Lewis, 73 Ill. App. 3d 361, 364-65, 386 N.E.2d 910, 914 (1979) (racial prejudice); State v. Bird Head, 204 Neb. 807, 811, 285 N.W.2d 698, 702 (1979) (same). In each case, the courts found that the alleged invidious motive was not determinative in the charging decision.

stated in his seminal work, *Discretionary Justice: A Preliminary Inquiry:*

> Theoretically possible is a system of enforcement in only a fraction of the cases in which enforcement would be appropriate, with discretionary selections made in such a way that all the cases prosecuted are more deserving of prosecution than any of the cases not prosecuted.
>
> The degree of probability of such an achievement is, I think, the same as the degree of probability that all public administrators will act with 100 percent integrity, will never be influenced by political considerations, will never tend to favor their friends, will never take into account their own advantage or disadvantage in exercising discretionary power, will always eschew ethically doubtful positions, will always subordinate their own social values to those adopted by the legislative body, and will make every decision on a strictly rational basis.[39]

Not surprisingly, little data is available on the number of decisions not to prosecute that are based upon impermissible considerations.[40]

The same statutes that allow prosecutors a wide latitude of discretion may become tools for abuse when the prosecution is motivated by racial prejudice, political favoritism or personal animosity.[41] Laws prohibiting victimless crimes such as gambling, drug or sex offenses, and vaguely defined offenses such as vagrancy, disorderly conduct, and breach of the peace are susceptible to prosecutorial abuse.[42]

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39. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 167 (1969).

40. The impact of "special-interests influence" on federal prosecutions is described, but not quantified, in Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion,* 24 STAN. L. REV. 1036, 1065-67 (1972). In a study of the charging decision conducted for the American Bar Foundation, Frank Miller shows the impact of race on charging in certain assault cases. Miller cites studies demonstrating that prosecution is declined in many cases concerning assaults by black offenders on black victims because of a belief among prosecutors that black victims will not cooperate in the prosecution of their assailants. F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 174-76 (1969).

41. In Dombrowski v. Pfister, 380 U.S. 479 (1965), a civil rights organization brought an action for injunctive and declaratory relief to avoid prosecution under Louisiana's Subversive Activities and Communist Control Law and Communist Propaganda Control Law. The organization contended, *inter alia,* that the prosecutor had used the statutes in bad faith, not to secure valid convictions, but to deter appellants' civil rights efforts. *Id.* at 482. The Court specifically stated that the Court's ultimate interpretation of the statutes "would not alter the impropriety of appellees' invoking the statute in bad faith to impose continuing harassment in order to discourage [the organization's] activities . . . ." *Id.* at 490. Similarly, in Shaw v. Garrison, 328 F. Supp. 390 (E.D. La. 1971), a former criminal defendant alleged that a state perjury prosecution had been instituted in bad faith. The defendant claimed to have suffered irreparable harm from continuing prosecutorial harassment. The prosecutor brought the perjury charge as a result of testimony given by the defendant in his own defense in a prior case. Apparently somewhat astounded by this turn of events, the court remarked: "No witness who testified . . . including Garrison, could give another instance in which a defendant who took the stand and was acquitted was subsequently charged by [the prosecution] with perjury." *Id.* at 400. The court stated that this alone did not evidence bad faith, but that it did call for an explanation. *Id. Cf.* Universal Amusement Co. v. Vance, 404 F. Supp. 33, 50 (S.D. Tex. 1975), *modified,* 445 U.S. 508 (1980) (invoking of statutes by county and city officials for the purpose of harassment); Beauregard v. Wingard, 230 F. Supp. 167, 183 (S.D. Cal. 1964) (harassment by police intended to deprive plantiff of civil rights); Bargainer v. Michal, 233 F. Supp. 270, 273 (N.D. Ohio 1964) (same).

42. *See, e.g.,* Rhinehart v. Rhay, 440 F.2d 718, 727 (9th Cir.), *cert. denied,* 404 U.S. 825 (1971) (sodomy); Book Center, Inc. v. Codd, 381 F. Supp. 1111, 1117 (S.D.N.Y. 1974) (obscenity); People v. Superior Court, 19 Cal. 3d 338, 341, 562 P.2d 1315, 1318, 138 Cal.

Substantial discretion is also exercised at the other end of the socio-economic spectrum, in the prosecution of white collar crimes like embezzlement, tax and securities fraud, and antitrust violations. The opportunity for abuse in these cases is especially great.[43]

B. The Inadequacy of Existing Checks on the Charging Decision

Existing controls on the prosecutor are inadequate to guard against abuses in the charging decision. No remedy is provided for those aggrieved by the prosecutor's decision not to file a criminal charge.[44] Nor do the protections afforded a criminal defendant during trial and pre-trial reduce the harm to the defendant resulting from the filing of a criminal charge. Existing procedural protections deal exclusively with questions of guilt and innocence; they do not address whether a prosecutor's decision to charge was made in a fair and impartial way.

Even the defendant who is ultimately acquitted may be harmed by the filing of criminal charges.[45] A suspect who cannot post bail may remain incarcerated until trial. Being charged with a crime jeopardizes employment, reputation, and social standing. Unless he is an indigent eligible for representation by appointed counsel, the suspect will need money to retain counsel. Most importantly, the original charging decision gives the prosecutor considerable control over the ultimate disposition of a case.[46] Most criminal cases are disposed of without trial by a plea bargaining agreement.[47] Flexibility in the charging decision allows the prosecutor to influence the plea bargain

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Rptr. 66, 69 (1977) (prostitution); People v. Rodrigues, 63 Cal. App. 3d 1, 2, 133 Cal. Rptr. 765, 766 (1976) (lewd behavior), *overruled on other grounds*, Pryor v. Municipal Court, 25 Cal. 3d 238, 599 P.2d 636, 158 Cal. Rptr. 341 (1978); City of Ashland v. Heck's, Inc., 407 S.W.2d 421, 424 (Ky. 1966) (Sunday closing laws). *See* Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion,* 19 U.C.L.A. L. REV. 1, 11 (1971); Cole, *The Decision to Prosecute,* 4 LAW & SOC'Y REV. 331, 334 (1970).

43. *See, e.g.,* People v. Davan Executive Serv., Inc., 91 Misc. 2d 1020, 1022, 399 N.Y.S.2d 368, 370 (Crim. Ct. N.Y.C. 1977) (licensing violation). *See generally* Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement,* 63 CORNELL L. REV. 405 (1978) (discussion of the role of discretion in deciding whether to seek criminal or civil remedies in antitrust cases); Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy,* 65 GEO. L.J. 1171 (1977).

44. *See* notes 270-308 *infra* and accompanying text.

45. *See* Neubauer, *After the Arrest: The Charging Decision in Prairie City,* 8 LAW & SOC'Y REV. 495, 495 (1974).

46. The prosecutor's discretion in handling a criminal case obviously does not end with the charging decision. The prosecutor may later decide to dismiss charges pursuant to a plea bargaining agreement or to divert the case from the criminal justice system. *See* Alschuler, *The Prosecutor's Role in Plea Bargaining,* 36 U. CHI. L. REV. 50, 52-61 (1968). The Supreme Court has approved the practice of plea bargaining and the prosecutor's role in the process, but has imposed certain constitutional safeguards. *See, e.g.,* Santobello v. New York, 404 U.S. 257, 261-62 (1971); Brady v. United States, 397 U.S. 742, 745-55 (1970). The prosecutor also exercises discretion in regard to recommendations for bail and sentencing, though the ultimate decisions remain in the court's hands.

47. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

by filing the greatest number of charges for the most serious offenses possible.[48]

Preliminary examinations and grand juries generally do not serve as effective screening mechanisms to protect a suspect.[49] In theory, the prosecutor must demonstrate at the preliminary hearing that there is probable cause to bind the case over to the grand jury and to retain the defendant in custody;[50] however, preliminary examinations are often waived by the defendant or circumvented by proceeding directly to the grand jury stage. In addition, the probable cause requirement is so minimal that it screens out only the weakest cases.[51] The grand jury is similarly ineffective in controlling the charging decision.[52] Indeed, it usually rubber-stamps whatever decision is made by the prosecutor.

Although the public, police, and judiciary affect the prosecutor's charging decision,[53] none of these groups adequately checks the potential for prosecutorial abuse. Most state and local prosecutors are popularly elected. In theory, they can be defeated for re-election if the public disapproves of abuses in the charging decision.[54] In reality, however, the prosecutor's decisions are not highly publicized, and voters' memories are short. The election of the prosecutor is not a referendum on charging policies. The relationship among prosecutors, police, and trial judges gives both of the latter groups some control over charging decisions. In most instances, however, neither appears to be in a position to prevent bad faith or discretionary prosecutions or to deter improper decisions not to file charges.[55]

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48. *See* Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making,* 13 AM. CRIM. L. REV. 473, 480-81 (1976).

49. *See generally* Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication,* 78 MICH. L. REV. 463, 481-87 (1980). To make the grand jury an effective mechanism for adjudicating the likelihood of guilt, Professor Arenella proposes reforms in grand jury procedures. *Id.* at 558-79.

50. For a complete description of the preliminary hearing role in several jurisdictions and the limitations which prevent it from being an effective check on the prosecutor's charging decision, see F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 64-136 (1969).

51. Surveys indicate that only about two percent of all cases are dismissed at the preliminary hearing stage. *Id.* at 83-94. *See* Neubauer, *After the Arrest: The Charging Decision in Prairie City,* 8 LAW & SOC'Y REV. 495, 512 (1974) (survey showing that in Prairie City, Illinois only 1.3% of cases are dismissed at the preliminary hearing stage).

52. *See* Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication,* 78 MICH. L. REV. 463, 496-97 (1980); Neubauer, *After the Arrest: The Charging Decision in Prairie City,* 8 LAW & SOC'Y REV. 495, 512-13 (1974); Noll, *Controlling A Prosecutor's Screening Discretion Through Fuller Enforcement,* 29 SYRACUSE L. REV. 697, 703 (1978).

53. Police discretion may be as important in the charging decision as prosecutorial discretion. Not only will the police actually make charging decisions in many instances, but in most cases crimes will not come to the attention of the prosecutor unless the police have arrested an individual or at least investigated the crime. *See* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 80-96 (1969); K. DAVIS, POLICE DISCRETION 1-51 (1975); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice,* 69 YALE L.J. 543, 552-54 (1960).

54. *See generally* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 342-44 (1969); Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making,* 13 AM. CRIM. L. REV. 473, 488 (1976); Cates, *Can We Ignore Laws? — Discretion Not to Prosecute,* 14 ALA. L. REV. 1 (1961).

55. *See* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A

In some jurisdictions, statutes or the common law may allow the victims of crimes to compel prosecutors to proceed with a criminal charge under certain very limited circumstances.[56] Trial courts have occasionally appointed private attorneys as substitute prosecutors to handle a particular case when the public prosecutor has declined to proceed.[57] A few other courts have allowed victims to prosecute using private attorneys.[58] Private citizens have also sought, with little success, to compel prosecution through mandamus.[59] The use of mandamus today, however, like the appointment of substitute and private prosecutors, is an infrequent and ineffective check on the prosecutor's decision not to file criminal charges.

C. Proposals for Reform

Over the last twenty years an increased awareness of the potential for prosecutorial abuse has produced a number of proposals for reform. Led by Professor Kenneth Culp Davis, commentators have urged the adoption of internal controls over the prosecutor and an increase in administrative and judicial review of the charging decision.[60] The most commonly advocated internal controls include lim-

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CRIME 338-41 (1969); Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making,* 13 AM. CRIM. L. REV. 473, 489 (1976).

56. In egregious cases some statutes provide legal remedies which could ultimately result in the prosecutor's removal from office. *See* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 298-304 (1969). These remedies include criminal prosecution for nonfeasance, misfeasance, or malfeasance in office, or an ouster suit or *quo warranto* action. Corrupt or unethical conduct may also lead to disbarment. These remedies, however, are seldom employed. Miller writes: "In short, unless lawlessness is rampant, enforcement at a low level and public indignation at a high one, the prosecutor is relatively immune from sanctions that might influence routine decision-making . . . . [T]he efficacy of these indirect sanctions as controls over prosecutor discretion becomes highly attenuated." *Id.* at 305-06.

The prosecutor is also immune from civil suits for damages arising out of the decision to charge. *See, e.g.,* Imbler v. Pachtman, 424 U.S. 409, 422-24 (1976); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).

57. *See generally* Spaulding v. State, 61 Neb. 287, 85 N.W. 80 (1901); State *ex rel.* Clyde v. Lauder, 11 N.D. 136, 90 N.W. 564 (1902). For a comprehensive discussion of the use of substitute prosecutors, see Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction,* 65 YALE L.J. 209, 215-18 (1955). *See also* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 318-21 (1969).

58. *See, e.g.,* Foley v. Ham, 102 Kan. 66, 169 P. 183 (1917); People v. Habbrach, 373 Mich. 94, 128 N.W.2d 484 (1964); State v. Peterson, 195 Wis. 351, 218 N.W. 367 (1928). *See* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 326-31 (1969); Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction,* 65 YALE L. J. 209, 218-24 (1955).

59. *See, e.g.,* Ackerman v. Houston, 45 Ariz. 293, 43 P.2d 194 (1935); Brack v. Wells, 184 Md. 86, 40 A.2d 319 (1944). *See generally* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 331-37 (1969); Note, *The Use of Mandamus to Control Prosecutorial Discretion,* 13 AM. CRIM. L. REV. 563 (1976).

The use of mandamus to compel prosecution when the failure to prosecute allegedly violates the equal protection clause is discussed at notes 270-308 *infra* and accompanying text.

60. *See, e.g.,* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 278-80 (2d ed. 1978); Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making,* 13 AM. CRIM. L. REV. 473, 495-505 (1976); Noll, *Controlling A Prosecutor's*

iting discretion by fuller enforcement of the law, establishing written charging guidelines, forcing prosecutors to explain their charging decisions, and centralizing control over the charging process.

According to Davis, the first step in reducing the abuses that result from wide prosecutorial discretion is elimination of unnecessary discretion.[61] Discretion can be narrowed by bringing the criminal law into step with existing enforcement practices.[62] In other words, outmoded and unenforced statutes can be repealed, and overly broad statutes can be drawn more narrowly.

The enactment and enforcement of carefully-drawn statutes will not totally eliminate discretion in the charging decision. To limit discretion further, or at least to provide guidance in the charging process, the prosecutor's office might adopt rules or guidelines.[63] These could take a number of forms. They might be "mandatory rules" that bind the prosecutor, "presumptive rules" that should be binding absent unusual circumstances, or merely "factors" or "guidelines" that suggest a certain result.[64] Those advocating the adoption of rules and guidelines believe they would minimize the influence of nonobjective factors, help train new prosecutors, facilitate internal review of charging decisions, inform the public of charging policies, and give substance to administrative and judicial review.[65] Written guidelines, albeit very general ones, have been adopted or recommended in several jurisdictions.[66]

Screening Discretion Through Fuller Enforcement, 29 SYRACUSE L. REV. 697, 707-12 (1978); Thomas & Fitch, *Prosecutorial Decision Making,* 13 AM. CRIM. L. REV. 507, 518-22 (1976). *See also* Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion,* 19 U.C.L.A. L. REV. 1 (1971).

61. *See* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 51, 188-214 (1969).

62. *See* K. DAVIS, *supra* note 61, at 91; LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 536-37 (1970). *See also* Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion,* 47 U. CHI. L. REV. 246, 290-91 (1980).

63. *See* Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making,* 13 AM. CRIM. L. REV. 473, 496-99 (1976); Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion,* 47 U. CHI. L. REV. 246, 296-99 (1980).

64. This tripartite classification of rules or guidelines is favored by Frase, *supra* note 33, at 246, 298. Although Davis apparently calls for binding rules in some instances, most commentators advocate only presumptive rules or guidelines. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 278-80 (2d ed. 1978); K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 195-203 (1969).

65. *See* Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making,* 13 AM. CRIM. L. REV. 473, 497-98 (1976); Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion,* 47 U. CHI. L. REV. 246, 296-97 (1980). Numerous objections to the use of guidelines have been raised. These include: (1) their possible ineffectiveness because of improper pigeonholing of facts by prosecutors who seek to reach a desired charging decision, *see* Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion,* 24 STAN. L. REV. 1036, 1077 (1972); (2) their likely adverse effect on the deterrent impact of the law when conduct does not fit within the guidelines; *see* Frase, *supra*, at 297; and (3) the imposition of substantial transaction costs on the prosecutor, *see* Rabin, *supra*, at 1075-77. For a more detailed discussion of the disadvantages of guidelines, see notes 261-63 *infra* and accompanying text.

66. UNITED STATES DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION (July 1980), *reprinted in* 27 CRIM. L. REP. (BNA) 3277-92 (1980); CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, UNIFORM CRIME CHARGING STANDARDS (1974); J. HOLMES, JR., THE PROSECUTOR, THE DECISION MAKING PROCESS, AND SUPERVISORY CONTROLS (Harris County, Tex. 1980); WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS, CHARGING

Another proposal for structuring prosecutorial decision-making is to require the prosecutor to prepare written reasons for declining to proceed with a particular criminal charge.[67] This approach might produce greater consistency in charging decisions by encouraging prosecutors to consider cases carefully. Especially if coupled with the use of written guidelines, an explanatory statement by the prosecutor would facilitate review. In addition, if the reasons for prosecution were made public, greater political accountability for the charging decision could result.

The final reform proposed is to allow review of the charging decision, either by the prosecutor's superior or by a court. Centralized review by state or federal attorneys general would result in greater uniformity among charging decisions.[68] The most radical approach toward control over the prosecutor's charging decision is to extend judicial review.[69] This reform has been advanced by the National Advisory Committee on Criminal Justice Standards and Goals, among others. In its 1973 report, the Committee recommended that victims of crime and complaining witnesses be granted standing to challenge a decision not to prosecute and that courts be permitted to order prosecution in cases involving "abuse of discretion."[70]

Despite scholarly attention to the issue of prosecutorial discretion, prosecutors today make the decision whether to charge in a manner that closely resembles the process followed by their predecessors of twenty years. Only a handful of prosecutors' offices have taken steps, such as the adoption of written guidelines, to reform the decision-making process.[71]

AND DISPOSITION POLICIES (1980). Copies of each are on file with the author. The use of written guidelines to determine whether a charging decision violates the equal protection clause is discussed at notes 244-69 *infra* and accompanying text.

67. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 279 (2d ed. 1978); K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 188-89, 205-07 (1969); Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion,* 47 U. CHI. L. REV. 246, 292 (1980); Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion,* 24 STAN. L. REV. 1036, 1036-85 (1972); Thomas & Fitch, *Prosecutorial Decision Making,* 13 AM. CRIM. L. REV. 507, 522-23 (1976). Similarly, Noll proposes that the prosecutor be required to explain before a magistrate his refusal to prosecute. The magistrate would then determine the rationality of the explanation. Noll, *Controlling A Prosecutor's Screening Discretion Through Fuller Enforcement,* 29 SYRACUSE L. REV. 697, 708-09 (1978).

68. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 279 (2d ed. 1978); K. DAVIS, DISCRETIONARY JUSTICE; A PRELIMINARY INQUIRY 143-44 (1969); Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making,* 13 AM. CRIM. L. REV. 473, 502-03 (1976).

69. *See* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 151-55 (1969); Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making,* 13 AM. CRIM. L. REV. 473, 503-05 (1976); Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion,* 47 U. CHI. L. REV. 246, 299-301 (1980).

70. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, STANDARD 1.2, at 24 (1973).

71. The prosecutor's office in Houston, Texas, for example, has promulgated writ-

The purpose of this article is neither to design yet another internal mechanism for controlling the discretionary power of prosecutors nor to elaborate on the injustices caused by unstructured and unchecked discretion. Federal and state courts already serve as appropriate forums for control of many abuses of discretion in charging. The equal protection clause already acts as a "guideline" by prohibiting many instances of unequal treatment of accused criminals and their victims. This article will focus on how courts can begin to enforce that constitutional promise in a realistic manner.

III. Discriminatory Prosecution as a Defense: The Impact of Enforcement Problems on Substantive Doctrine

In theory, the equal protection clause applies to acts of executive and administrative officials, including prosecutors, as well as those of legislators.[72] Although one could argue that no crime should go unprosecuted,[73] the Supreme Court has indicated that even those defendants guilty of crimes may assert as a defense that they have been singled out for prosecution on an impermissible basis.[74]

A. Discrimination on the Basis of "Strict Scrutiny" Classifications

The courts have narrowly defined the circumstances in which an accused may raise the defense of discriminatory prosecution.[75] Most courts require the defendant to prove that his prosecution resulted from "intentional and purposeful discrimination."[76] Under the test outlined by the Second Circuit in *United States v. Berrios*,[77] the de-

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ten guidelines. *See* J. HOLMES, JR., THE PROSECUTOR, THE DECISION MAKING PROCESS, AND SUPERVISORY CONTROLS (Harris County, Tex. 1980); note 68 *supra*.

72. *See, e.g.,* Scheuer v. Rhodes, 416 U.S. 232, 237-49 (1974); Hernandez v. Texas, 347 U.S. 475, 477-78 (1954); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Baker v. F. & F. Inv. Co., 489 F.2d 829, 832-34 (7th Cir. 1973). Although the equal protection clause of the fourteenth amendment is limited to action by states, U.S. CONST. amend. XIV, § 1, the Supreme Court has held that the due process clause of the fifth amendment makes the equal protection requirement binding on the federal government. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). As a result, there is no discernible difference between the equal protection restrictions on federal and state prosecutors.

73. *See* Comment, *The Right to Non-Discriminatory Enforcement of State Penal Laws,* 61 COLUM. L. REV. 1103, 1106-07 (1961).

74. Oyler v. Boles, 368 U.S. 448, 456 (1962); Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 588 (1961). A decision not to prosecute is analytically identical to the conferring of a government benefit. Such benefits must be conferred in a non-discriminatory manner. *See, e.g.,* United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 533-38 (1973); Yick Wo v. Hopkins, 118 U.S. 356, 367-68 (1886).

75. The application of the equal protection clause to the prosecutor's charging decision is analyzed in Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 UNIV. OF ILL. L.F. 88, 90-96. Existing case law on the defense of discriminatory prosecution is collected and catalogued in Annot., 95 A.L.R.3d 280 (1979); Annot., 45 A.L.R. Fed. 732 (1979).

76. United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974).

77. *Id.* For cases adopting the *Berrios* criteria, *see, e.g.*, United States v. Niemiec, 614 F.2d 1207, 1209 (7th Cir. 1980); United States v. Torquato, 602 F.2d 564, 568 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979); United States v. Hayes, 589 F.2d 811, 819 (5th Cir.), *cert. denied*, 444 U.S. 847 (1979); United States v. Ojala, 544 F.2d 940, 943 (8th Cir. 1976); United States v. Leggett & Platt, Inc., 542 F.2d 655, 658 (6th Cir. 1976), *cert. denied,* 430 U.S. 945 (1977); United States v. Bourque, 541 F.2d 290, 292-93 (1st Cir. 1976); United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975), *cert. denied,* 424 U.S. 955 (1976); State

fendant can establish discriminatory prosecution by showing both that he has been singled out for prosecution while others similarly situated remain unprosecuted and that his selection is invidious or in bad faith; *i.e.*, based upon constitutionally impermissible considerations such as race, religion, or a desire to prevent the exercise of constitutional rights. To prove that the prosecution is invidious or in bad faith, the defendant must demonstrate the following: (1) the prosecutor is prejudiced or predisposed against the defendant personally or against a group of which the defendant is a member; (2) the prejudice or predisposition is a factor in the selection of the defendant for prosecution;[78] and (3) the prejudice or predisposition is based on a constitutionally impermissible criterion. The first two items are issues of fact provable through the presentation of evidence and the argument of reasonable inferences, whereas the third is a matter of law.

Many considerations held to be impermissible in the selection of defendants for prosecution parallel those which in other contexts have generated strict scrutiny or other forms of stringent judicial review.[79] Obviously, race and ethnic origin are improper criteria.[80] Courts have also acknowledged the impermissibility of prosecutorial discrimination based on membership in a political party[81] or in retaliation for political or union activities.[82] At least one state court has asserted that selection for prosecution on the basis of sex is imper-

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v. Flynt, 63 Ohio St. 2d 132, 134, 407 N.E.2d 15, 17, *cert. granted,* 449 U.S. 1033 (1980), *cert. dismissed*, 101 S. Ct. 1958 (1981); State v. Bird Head, 204 Neb. 807, 810, 285 N.W.2d 698, 701 (1979); Commonwealth v. Franklin, 78 Mass. Adv. Sh. 3181, 3189-90, 385 N.E.2d 227, 233-34 (1978).

78. This element is essentially one of causation, linking the prosecutor's bias or prejudice to selection of the defendant for prosecution. Because there are usually multiple motives for the filing of criminal charges, the questions of what must be proved to show "causation" and what procedure should be used to determine causation are difficult ones. These issues will be discussed at notes 217-43 *infra* and accompanying text.

79. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1000 (1978). Strict scrutiny describes the close judicial analysis of legislative choices that burden certain fundamental rights or that discriminate against racial or other minorities. To survive strict scrutiny, "a statutory classification must bear a necessary relation to a compelling government interest, with no less burdensome alternative." *Id.* Without invoking strict scrutiny, the Supreme Court in recent years has subjected certain statutory classifications, such as those based upon sex, to stringent constitutional review. *See, e.g.,* Reed v. Reed, 404 U.S. 71, 76 (1971); *see* notes 107-11 *infra* and accompanying text.

80. *See, e.g.,* United States v. Cammisano, 546 F.2d 238, 241 (8th Cir. 1976) (Italian defendant); United States v. Alleyne, 454 F. Supp. 1164, 1174 (S.D.N.Y. 1978) (black defendant); State v. Bird Head, 204 Neb. 807, 814, 285 N.W.2d 698, 701 (1979) (Native American defendant). *Cf.* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (discrimination against oriental by licensing board leading to criminal prosecution).

81. United States v. Torquato, 602 F.2d 564, 568 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979); Associated Indus. of Ala., Inc. v. State, 55 Ala. App. 277, 289, 314 So. 2d 879, 889 (Crim. App.), *cert. denied,* 294 Ala. 281, 314 So. 2d 901 (1975).

82. United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974) (political activity); United States v. Berrigan, 482 F.2d 171, 173 (3d Cir. 1973) (same); People v. Serna, 71 Cal. App. 3d 229, 231, 139 Cal. Rptr. 426, 429 (1977) (same); Murguia v. Municipal Court, 15 Cal. 3d 286, 301, 540 P.2d 44, 54, 124 Cal. Rptr. 204, 214 (1975) (union activity).

missible.[83] The same court also has implied that discrimination against the poor is impermissible.[84]

Legislation that impairs the exercise of fundamental rights is subject to strict judicial scrutiny;[85] in a similar vein, a charging decision made in retaliation for the defendant's exercise of fundamental rights is impermissible.[86] In fact, defendants who have alleged that they were prosecuted in retaliation for the exercise of first amendment rights have been among the few to raise successfully the defense of discriminatory prosecution.[87] In the leading case of *United States v. Falk*,[88] the defendant was prosecuted for refusal to submit to induction into the armed forces and for failure to possess a draft card. As an active draft resister, Jeffrey Falk advised others on how to legally avoid military service and protested American involvement in Vietnam. He alleged that the government indicted him to "chill" his exercise of first amendment rights. Falk's attorney offered to prove that the prosecutor had admitted that Falk's draft counseling was one reason for the prosecution. Falk also was prepared to demonstrate that the government generally did not prosecute people in his position and that high-level officials were involved in the decision to prosecute.[89] The court of appeals held that Falk had established a prima facie defense of discriminatory prosecution, thus shifting to the government the burden of presenting compelling evidence of lack of discrimination.[90]

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83. *See* State v. Johnson, 74 Wis. 2d 169, 173, 246 N.W.2d 503, 506 (1976). The defendant alleged that she had been discriminated against because the state prosecuted females for prostitution, but consistently did not prosecute male patrons. The Wisconsin Supreme Court remanded the case to the trial court for an evidentiary hearing to determine whether there existed a pattern of discriminatory enforcement and whether there were valid prosecutorial reasons for charging the defendant but not her patron. *Id.* at 175, 246 N.W.2d at 507. The Wisconsin Supreme Court articulated the requirements of the discriminatory enforcement defense somewhat differently than the Second Circuit did in *Berrios*: "If the defendant can establish a persistent and intentional discrimination in the enforcement of a statute in the absence of a valid exercise of prosecutorial discretion this may be interpreted as a violation of equal protection and a defense to the charge." Locklear v. State, 86 Wis. 2d 603, 610, 273 N.W.2d 334, 337 (1979). The Wisconsin variation, unlike the *Berrios* test, apparently requires the prosecutor to provide a "valid" explanation for the exercise of charging discretion in all cases.

84. Locklear v. State, 86 Wis. 2d 603, 611, 273 N.W.2d 334, 337 (1979). The court found, however, rational and permissible justifications for the prosecutor's decision to charge. *Id.* at 612, 273 N.W.2d at 338.

85. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §16.6-16.11, at 1000-11 (1978).

86. *See, e.g.,* United States v. Ojala, 544 F.2d 940, 943 (8th Cir. 1976); United States v. Peskin, 527 F.2d 71, 86 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976); United States v. Falk, 479 F.2d 616, 620 (7th Cir. 1973); United States v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972).

87. *See* United States v. Falk, 479 F.2d 616, 623-24 (7th Cir. 1973); United States v. Steele, 461 F.2d 1148, 1152 (9th Cir. 1972); United States v. Crowthers, 456 F.2d 1074, 1079 (4th Cir. 1972). *But see* United States v. Catlett, 584 F.2d 864, 868 (8th Cir. 1978); United States v. Kahl, 583 F.2d 1351, 1353-54 (5th Cir. 1978); United States v. Johnson, 577 F.2d 1304, 1307-09 (5th Cir. 1978); United States v. Gillings, 568 F.2d 1307, 1309 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978); United States v. Ojala, 544 F.2d 940, 943-45 (8th Cir. 1976); United States v. Peskin, 527 F.2d 71, 85-86 (7th Cir. 1975); United States v. Oaks, 527 F.2d 937, 940 (9th Cir. 1975), *cert. denied*, 426 U.S. 952 (1976).

88. 479 F.2d 616 (7th Cir. 1973).

89. *Id.* at 618-23.

90. *Id.* at 624. In explaining its decision, the court stated: "just as discrimination on the basis of religion or race is forbidden by the constitution, so is discrimination on

Except when defendants have alleged racial discrimination or the government's desire to chill the exercise of first amendment rights, claims of invidious or bad faith prosecution have been unsuccessful.[91] The courts have not indicated what other prosecutorial motives may constitute bad faith. Presumably, however, if a prosecutor's personal hatred for a defendant accounted for a prosecution under a little-used statute, bad faith would be demonstrated. This example is not intended to suggest that a prosecutor would ever admit to such a reason for prosecution, but rather to illustrate that "bad faith" may encompass a greater range of motives than the courts have identified.

In seeking a more comprehensive definition of the "bad faith" element of the discriminatory prosecution defense, courts may be aided by a review of how the term has been employed in the analogous context of federal injunctions to stop state criminal proceedings. Under *Younger v. Harris*[92] and its progeny, federal courts may enjoin pending state criminal proceedings if the defendant can show irreparable injury and either *bad faith* or harassment on the government's part.[93] These cases establish that bad faith is a question of fact.[94] Some factors relevant to a finding of bad faith in the *Younger* context, such as the significance of the alleged criminal activity,[95] are also relevant in the context of discriminatory prosecution. Others, such as whether a prosecution is undertaken with no hope of a valid conviction, are less relevant.[96] A prosecution commenced primarily out of the prosecutor's desire for fame and fortune would appear to be in bad faith in

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the basis of the exercise of protected First Amendment activities, whether done as an individual, or as in this case, as a member of a group unpopular with the government." *Id.* at 620. Similarly, in United States v. Steele, 461 F.2d 1148 (9th Cir. 1972), the Ninth Circuit reversed the conviction of a leader of the "census resistance" movement who had been prosecuted for refusing to answer questions on census forms while less vocal citizens went unprosecuted. *Id.* at 1152. In another case of selective enforcement, the Fourth Circuit refused to uphold the government's use of a regulation which forbade disturbances, to break up a prayer meeting attended by opponents of the Vietnam war. *See* United States v. Crowthers, 456 F.2d 1074, 1079 (4th Cir. 1972). Finally, the District of Columbia Circuit reversed a conviction because city officials reinstated criminal charges for traffic violations after the defendant filed an official complaint charging police misconduct. *See* Dixon v. District of Columbia, 394 F.2d 966, 968 (D.C. Cir. 1968).

91. *See, e.g.,* United States v. Niemiec, 611 F.2d 1207, 1209 (7th Cir. 1980); United States v. Hayes, 589 F.2d 811, 819 (5th Cir.), *cert. denied*, 444 U.S. 847 (1979); United States v. Kelly, 556 F.2d 257, 264 (5th Cir. 1977); United States v. Abrahams, 2 COMM. FUT. L. REP. (CCH) ¶ 21,007, at 23,930 (S.D.N.Y. 1980); State v. Mitchell, 164 N.J. Super. 198, 201, 395 A.2d 1257, 1258 (Super. Ct. App. Div. 1978).

92. 401 U.S. 37 (1971).

93. *See, e.g.,* Wilson v. Thompson, 593 F.2d 1375, 1380-83 (5th Cir. 1979); Shaw v. Garrison, 467 F.2d 113, 119-21 (5th Cir.), *cert. denied,* 409 U.S. 1024 (1972). *But see* Timmerman v. Brown, 528 F.2d 811, 815 (4th Cir. 1975); Eagle Books, Inc. v. Reinhard, 418 F. Supp. 345, 351 (N.D. Ill. 1976).

94. Wilson v. Thompson, 593 F.2d 1375, 1388 (5th Cir. 1979); Shaw v. Garrison, 467 F.2d 113, 122 (5th Cir.), *cert. denied,* 409 U.S. 1024 (1972).

95. *See* Duncan v. Perez, 445 F.2d 557, 560 (5th Cir.), *cert. denied,* 404 U.S. 940 (1971).

96. *See* Timmerman v. Brown, 528 F.2d 811, 815 (4th Cir. 1975); Eagle Books, Inc. v. Reinhard, 418 F. Supp. 345, 351 (N.D. Ill. 1976).

either context.[97]

Even when defendants allege that their prosecutions are motivated by racial or religious discrimination or a desire to prevent the exercise of constitutional rights, courts often make questionable findings that these improper factors have not influenced the prosecutors. The judiciary tends to defer to the good faith of a coordinate branch of the government and effectively demands that the defendant meet a higher burden of persuasion to prove the prosecutor's impermissible motive. This barrier is difficult, if not impossible, to overcome. The suggestion that trial courts have systematically favored the government's explanations in discriminatory prosecution cases is difficult to support merely by review of appellate court opinions. The most convincing substantiation for an allegation of judicial bias is simply the infrequency with which courts find that defendants have established a prima facie case of discriminatory prosecution.[98] Despite what often appears to be convincing evidence of prosecutorial discrimination, courts on numerous occasions have found that defendants have not established prima facie cases. In addition to *State v. Flynt,*[99] discussed earlier, consider *United States v. Berrios*.[100] Berrios alleged that there had been only two other prosecutions under the statute in five years. The defendant was one of a handful of Teamsters' Union officials who outspokenly supported Senator McGovern in his presidential campaign against President Nixon. Berrios also helped organize a drive to unionize the Marriott restaurant chain, which had close ties with President Nixon and his family. In reviewing a district court order that required the government to turn over documents to the defendant, the Second Circuit observed that the defendant's evidence did not appear to constitute a prima facie showing of discriminatory enforcement.[101]

B. The Absence of Review of the Charging Decision Except for "Strict Scrutiny" Classifications

The mere fact that a defendant is selected for prosecution while

97. The widely publicized case of Shaw v. Garrison, 467 F.2d 113 (5th Cir.), *cert. denied,* 409 U.S. 1024 (1972), involved a bad faith prosecution unrelated to racial discrimination or retaliation for the exercise of constitutional rights. Following Prosecutor Jim Garrison's unsuccessful attempt to prosecute businessman Clay Shaw for conspiracy to assassinate President John F. Kennedy, Garrison charged Shaw with perjury for testimony Shaw gave in his own defense. The district court enjoined the perjury prosecution on the ground that it had been brought in bad faith, for the purpose of harassment. 328 F. Supp. 390, 393-94 (D. La. 1971). The Fifth Circuit upheld the injunction, identifying the following as indicia of Garrison's bad faith: the significant publicity and financial reward that Garrison received as a result of Shaw's continued prosecution, 467 F.2d at 117-18, Garrison's disagreement with the Warren Commission's conclusions regarding the assassination, *id.* at 116, and the well-orchestrated display of publicity surrounding Shaw's arrest. *Id.* at 118.

98. *See* note 13 *supra* and accompanying text.

99. 63 Ohio St. 2d 132, 407 N.E.2d 15, *cert. granted*, 449 U.S. 1033 (1980), *cert. dismissed*, 101 S. Ct. 1958 (1981); notes 9-12 *supra* and accompanying text.

100. 501 F.2d 1207 (2d Cir. 1974).

101. *See id.* at 1211-12. Other cases in which courts have upheld prosecutions despite seemingly convincing evidence of a constitutionally impermissible motive include United States v. Torquato, 602 F.2d 564 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979); State v. Bird Head, 204 Neb. 807, 285 N.W.2d 698 (1979).

others remain unprosecuted does not amount to an equal protection violation; nor does it require the prosecutor to offer any explanation for his charging decision. Similarly, no equal protection violation occurs just because the statute under which the defendant is prosecuted is rarely enforced,[102] even though there may be a published policy against enforcement under circumstances like the defendant's.[103] In such cases, the prosecution is not even required to offer a rational explanation for the differential treatment.[104]

The practice of restricting judicial review of the charging decision on equal protection grounds to those cases involving race, religion, or a retaliation for the exercise of constitutional rights contrasts with the review of legislative enactments. Statutory classifications must have a "rational" basis. Rationality is determined by "whether the classifications drawn in the statute are reasonable in light of its purpose."[105] In the past, statutory classifications not involving suspect classes or the exercise of fundamental rights received "minimal scrutiny in theory and virtually none in fact."[106] These statutes were rarely found unconstitutional on equal protection grounds. Recently, however, the Burger Court has put teeth into judicial review of many legislative classifications attacked on equal protection grounds, without applying "strict scrutiny."[107] The Court has required that legisla-

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102. *See* United States v. Abrahams, 2 COMM. FUT. L. REP. (CCH) ¶ 21,007, at 23,930 (S.D.N.Y. 1980); State v. Flynt, 63 Ohio St. 2d 132, 135, 407 N.E.2d 15, 18, *cert. granted,* 449 U.S. 1033 (1980), *cert. dismissed*, 101 S. Ct. 1958 (1981); State v. Mitchell, 164 N.J. Super. 198, 202, 395 A.2d 1257, 1258-59 (Super. Ct. at App. Div. 1978); State v. Lujan, 79 N.M. 525, 526-27, 445 P.2d 749, 751 (Ct. App. 1968); People v. Utica Daw's Drug Co., 16 A.D.2d 12, 15, 225 N.Y.S.2d 128, 131 (1962); *cf.* Moog Indus., Inc. v. FTC, 355 U.S. 411, 413-14 (1958) (operation of cease and desist order need not be postponed until similar orders have been entered against competitors); MacKay Tel. & Cable Co. v. Little Rock, 250 U.S. 94, 100 (1919) (inconsistent enforcement of franchise ordinance did not constitute intentionally unfair discrimination in administration of ordinance). In United States v. Niemiec, 611 F.2d 1207 (7th Cir. 1980), the court rejected the defense of discriminatory prosecution even after the defendant alleged that the government failed to prosecute an equally culpable wrongdoer who testified for the government against the defendant. *Id.* at 1209.

103. *See, e.g.,* United States v. Hayes, 589 F.2d 811, 818 (5th Cir.), *cert. denied*, 444 U.S. 847 (1979).

104. *See, e.g.,* United States v. Torquato, 602 F.2d 564, 569-70 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979); United States v. Hayes, 589 F.2d 811, 819 (5th Cir.), *cert. denied*, 444 U.S. 847 (1979); United States v. Abrahams, 2 COMM. FUT. L. REP. (CCH) ¶ 21,007, at 23,930 (S.D.N.Y. 1980).

105. *See* Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966); McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

106. Gunther, *Foreward: In Search of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972). Under the so-called "minimum rationality" standard, the courts showed great deference to legislative classifications and generally presumed statutes to be constitutional. *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §16.2, at 994-96 (1978); Gunther, *supra*, at 19-20 (1972). Statutory classifications were upheld if based upon any conceivable set of facts that made the laws appear rational. *See* Allied Stores v. Bowers, 358 U.S. 522, 529-30 (1959); Kitch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 555 (1947).

107. The Court uses this so-called "intermediate" level of review whenever important, but not "fundamental," interests are at stake. *See, e.g.*, Hampton v. Mow Sun

tive classifications serve "important" interests[108] and closely fit the purpose of the legislation.[109] Further, the Court has refused to uphold statutory classifications solely because they have a conceivably rational basis. Instead it has either required the government to articulate during litigation the reasons for the classification[110] or has itself sought to ascertain the original purpose for the classification.[111]

In the case of constitutional challenge to the prosecutor's charging decision, there does not appear to be even a "minimum rationality" requirement when no suspect classification or fundamental right is involved. A defendant claiming an equal protection violation is not entitled to any judicial review unless he also alleges invidious or bad faith discrimination.[112] Judicial unwillingness to apply a minimum rationality test to the charging decision is consistent with the Supreme Court's holding in *Snowden v. Hughes*[113] that in cases of differential treatment by administrators, as opposed to legislators, a violation of the equal protection clause is present only when there is "purposeful and intentional discrimination."[114]

C. Current Procedure in Discriminatory Prosecution Cases

The Second Circuit in *United States v. Berrios* appropriately described the requirement that the defendant establish a prima facie case of "intentional and purposeful discrimination" as a "heavy duty."[115] To prove the first prong of the *Berrios* test, the defendant must show that he has been singled out for prosecution, while others

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Wong, 426 U.S. 88, 102-03 (1976) (civil service employment); Turner v. Department of Employment Security, 423 U.S. 44, 46 (1975) (unemployment benefits). This intermediate standard is also invoked to review sensitive, though not suspect, classifications. *See, e.g.,* Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) (gender); Hampton v. Mow Sun Wong, 426 U.S. 88, 104 (1976) (citizenship).

108. For example, in Reed v. Reed, 404 U.S. 71 (1971), the Court declared unconstitutional an Idaho law that granted men a "preference" over women in appointment as estate administrators on the grounds of administrative convenience and a desire to avoid family squabbling. *Id.* at 76-77. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16.30, at 1082-83 (1978).

109. Craig v. Boren, 429 U.S. 190 (1976), involved a statute that prohibited the sale of 3.2% beer to males under twenty-one and to females under eighteen in order to protect public health and safety. Two percent of the males and 0.18% of the females affected by the statute were arrested for driving while intoxicated. The Court held that this statistical variation between the sexes did not provide enough evidence to justify the classification. *Id.* at 201-02.

110. *See, e.g.,* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640 (1974).

111. *See, e.g.,* Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 653 (1974)

112. United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974); *see* note 77 *supra* and accompanying text.

113. 321 U.S. 1 (1944).

114. *Id.* at 8. In *Snowden,* an Illinois law provided that the two candidates receiving the highest number of votes in the Republican primary would be placed on the ballot in the general election. *Id.* at 3. Even though Snowden finished second in the primary, the state canvassing board refused to place his name on the general ballot. *Id.* at 4. The United States Supreme Court upheld the lower court's judgment that Snowden had no cause of action for a violation of his rights under the equal protection clause. *Id.* at 10. Furthermore, neither the trial nor the appellate court required the state canvassing board to explain its failure to enforce the statute. *Id.* at 5. *Snowden* is the source of the "purposeful and intentional" discrimination requirement used to evaluate prosecutorial conduct. *Snowden* is distinguishable from cases involving the discriminatory prosecution defense because it concerned a claim for damages. *Id.* at 8-9.

115. United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974).

similarly situated have generally not been prosecuted.[116] To establish this element, the defendant must rely on statistics showing lax enforcement of the relevant statute or on specific examples of nonenforcement.[117]

The second requirement of the discriminatory prosecution defense, that the government's selection of the defendant for prosecution is invidious or in bad faith, is more difficult to prove. The defendant must present evidence showing that the prosecutor is prejudiced against him and that the prejudice has played a role in the decision to prosecute. Most of the evidence supporting these propositions will be under the prosecutor's control. Before the defendant may be granted an evidentiary hearing or an opportunity to question the prosecutor and gain access to government files, he must make a threshold showing in support of the discriminatory prosecution defense. There is little agreement among the courts as to what constitutes a threshold showing. The defendant may be required to allege facts sufficient (1) to raise a reasonable doubt about the prosecutor's purpose,[118] (2) "to take the question past the frivolous stage,"[119] (3) to establish "a colorable" basis,[120] or even (4) to constitute "a prima

116. *Id.*

117. In United States v. Johnson, 577 F.2d 1304, 1309 (5th Cir. 1978), the defendant was convicted on two counts of wilfully failing to file a federal income tax return. On appeal, Johnson unsuccessfully raised the defense of discriminatory enforcement. The defendant failed to demonstrate to the court's satisfaction that whereas he had been prosecuted, others who had engaged in similar conduct generally had not been. In response to Johnson's defense, the Fifth Circuit simply stated that "the conduct for which he was prosecuted is not ordinarily ignored." *Id.* at 1309. Similarly, in United States v. Carson, 434 F. Supp. 806 (D. Conn. 1977), the defendant's selective prosecution defense to a charge of assaulting an FBI agent failed due to a lack of evidence demonstrating that other, similarly situated persons were not prosecuted. The court emphasized that within the previous year alone, sixteen people were indicted under the same statute. *Id.* at 809. Presumably, if Johnson and Carson had been able to produce evidence that conduct such as theirs traditionally had gone unprosecuted, they would have satisfied the first tier of the *Berrios* test. Statistical data is often helpful in showing disparate treatment. For example, in United States v. Ojala, 544 F.2d 940 (8th Cir. 1973), the defendant presented statistical data which revealed that there were approximately 51,000 tax delinquent investigations in Minnesota between 1969 and 1971. During this time some four thousand criminal tax violations were brought to the attention of the Internal Revenue Service (IRS). Of those, the IRS recommended prosecution in only nine cases. The Eighth Circuit held that this statistical evidence satisfied the first tier of the *Berrios* text. *Id.* at 943. In People v. Lewis, 73 Ill. App. 3d 361, 386 N.E.2d 910 (1979), the defendant appealed his conviction, which arose from an inmate disturbance, on the ground that he had been the victim of selective prosecution. Lewis met the first tier of *Berrios* by presenting statistical data which indicated that a number of inmates who participated in another disturbance had not been indicted. *Id.* at 365, 386 N.E.2d at 914. Both Ojala and Lewis, however, failed to establish that the prosecutorial selectivity had an invidious or arbitrary basis. *See* United States v. Ojala, 544 F.2d at 944-45; People v. Lewis, 73 Ill. App. 3d at 365, 386 N.E.2d at 914. *See also* United States v. Abrahams, 2 COMM. FUT. L. REP. (CCH) ¶ 21,007, at 23,930 (S.D.N.Y. 1980).

118. United States v. Hayes, 589 F.2d 811, 819 (5th Cir.), *cert. denied*, 444 U.S. 847 (1979); United States v. Falk, 479 F.2d 616, 620-21 (7th Cir. 1973).

119. United States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978); United States v. Oaks, 508 F.2d 1403, 1404 (9th Cir. 1974), *cert. denied*, 426 U.S. 952 (1976).

120. United States v. Torquato, 602 F.2d 564, 570 (3d Cir.), *cert. denied*, 444 U.S. 941

facie case."[121]

The evidentiary hearing gives the defendant a chance to prove the prima facie case of discriminatory prosecution. A prima facie showing does not necessarily require dismissal of the charges. Instead, it shifts the burden of production to the prosecutor, forcing him to present "compelling evidence" that selection of the defendant for prosecution rests on a basis other than the alleged invidious discrimination.[122] Because it compels the prosecutor to justify or explain the selection for prosecution, establishment of the prima facie case usually has the important collateral consequences of allowing defense counsel to cross-examine the prosecutor[123] and of granting defense counsel access through discovery to the prosecutor's internal memoranda and documents.[124]

D. Judicial Reluctance to Review the Charging Decision

Both the courts' failure to expand the list of impermissible criteria upon which the charging decision could be based and their apparent unwillingness to find equal protection violations result from the same related factors. Judicial reluctance to review the charging decision is based not only on the deference traditionally afforded the prosecutor,[125] but also on the doctrine of separation of powers and on practical difficulties posed by review. The constitutional grant of executive power,[126] which makes the President ultimately responsible for law enforcement, has led the courts to conclude "[t]he doctrine of separation of powers, inherent in our tripartite constitutional scheme of government, prohibits free judicial interference with the exercise of the discretionary powers of the attorneys of the United States over criminal prosecution."[127]

United States v. Cox[128] perhaps most starkly illustrates these separation of powers considerations. The grand jury requested the

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(1979); United States v. Kahl, 583 F.2d 1351, 1355 (5th Cir. 1978); United States v. Peskin, 527 F.2d 71, 86 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976); United States v. Berrigan, 482 F.2d 171, 181 (3d Cir. 1973); United States v. Abrahams, 2 COMM. FUT. L. REP. (CCH) ¶ 21,007, at 23,930 (S.D.N.Y. 1980).

121. United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978); United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975), *cert. denied,* 424 U.S. 955 (1976); People v. Lewis, 73 Ill. App. 3d 361, 365, 386 N.E.2d 910, 914 (1979).

122. *See, e.g.,* United States v. Falk, 479 F.2d 616, 624 (7th Cir. 1973); United States v. Steele, 461 F.2d 1148, 1152 (9th Cir. 1972). Shifting the burden of production to the prosecutor is sometimes justified on the ground that the prosecutor has easy access to the facts regarding the prosecution. *See, e.g.,* United States v. Crowthers, 456 F.2d 1074, 1078 (4th Cir. 1972); Commonwealth v. Franklin, 78 Mass. Adv. Sh. 3131, 3189-90, 385 N.E.2d 227, 234 (1978).

123. *See* United States v. Falk, 479 F.2d 616, 631 (7th Cir. 1973); Comment, *The Ramifications of* United States v. Falk *On Equal Protection From Prosecutorial Discrimination,* 65 J. CRIM. LAW & CRIMINOLOGY 62, 72 (1974).

124. United States v. Johnson, 577 F.2d 1304, 1309 (5th Cir. 1978); United States v. Berrios, 501 F.2d 1207, 1211-12 (2d Cir. 1974).

125. *See* notes 23-28 *supra* and accompanying text.

126. U. S. CONST. art. II, §§ 1, 3.

127. United States v. Johnson, 577 F.2d 1304, 1307 (5th Cir. 1978); *see* United States v. Torquato, 602 F.2d 564, 569 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979); United States v. Kelly, 556 F.2d 257, 264 (5th Cir. 1977), *cert. denied*, 434 U.S. 1017 (1978); Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied,* 381 U.S. 935 (1965).

128. 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

United States Attorney to prepare certain indictments. Acting under instructions from the Attorney General in Washington, the United States Attorney refused to do so on the ground that the indictments would hamper efforts to have Southern blacks register to vote. The district court ordered the United States Attorney to prepare and sign the indictments and held him in contempt when he refused to comply. The Fifth Circuit reversed the contempt citation, holding that the doctrine of separation of powers forbids the courts from interfering with the free exercise of discretion by an officer of the executive branch in his decision whether to prosecute.[129]

The practical difficulties in reviewing the prosecutor's decision and the degree of judicial intrusion into the prosecutor's function required by such oversight are inexorably linked with the separation of powers doctrine. There is no meaningful way that courts can review the decision to charge when "[m]yriad factors can enter into the prosecutor's decision"[130] and when there are no judicial standards for weighing these factors. As Chief Justice Burger stated while a member of the United States Court of Appeals for the District of Columbia:

> Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges. On the contrary, he is expected to exercise discretion and common sense to the end that if, for example, one is a young first offender and the other older, with a criminal record, or one played a lesser and the other a dominant role, one the instigator and the other a follower, the prosecutor can and should take such factors into account: no court has any jurisdiction to inquire into or review his decision.[131]

Other factors that courts have allowed prosecutors to consider include the most effective allocation of scarce resources,[132] attitudes of law enforcement agencies,[133] the climate of public opinion, and the degree of criminality.

Judicial reluctance to review the charging decision also stems from the difficulty in ascertaining the motives for prosecution and the substantial intrusion into the prosecutor's domain such oversight would entail. These practical difficulties are related to the theoretical concerns of the separation of powers doctrine. The Supreme Court has

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129. 342 F.2d at 171.

130. Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967). Echoing this thought, the Second Circuit has observed: "the manifold imponderables which enter into the prosecutor's decision to prosecute or not to prosecute make the choice not readily amenable to judicial supervision." Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973).

131. Newman v. United States, 382 F.2d 479, 481-82 (D.C. Cir. 1967).

132. United States v. Torquato, 602 F.2d 564, 569 (3d Cir.), *cert. denied,* 444 U.S. 941 (1979).

133. Pugach v. Klein, 193 F. Supp. 630, 634 (S.D.N.Y. 1961), *cert. denied,* 374 U.S. 838 (1963).

noted the importance of maintaining prosecutorial independence.[134] Indeed, courts generally are loathe to allow a criminal defendant to cross-examine a prosecutor concerning his reasons for charging in a given case or for not prosecuting in similar instances.[135] Similarly, courts refuse requests by defendants for discovery of internal government documents concerning a prosecution.[136] The feared "parade of horribles" is that the prosecutor will be cross-examined in every case and will be forced to disclose confidential law enforcement information concerning prosecutions.[137] This same concern for the confidentiality of information is one reason courts often deny citizens the opportunity to seek a judicial order compelling prosecution.[138]

The reasons for denying judicial review of the prosecutor's charging decision parallel the justifications for the concept of "justiciability" and, more specifically, for the "political question" doctrine. "Nonjusticiability" limits the exercise of federal judicial power when the subject matter is inappropriate for judicial consideration.[139] Nonjusticiability may result when an action concerns a "political question," an amorphous concept which originates in the separation of powers doctrine.[140] The factors that indicate a political question are strikingly similar to those factors which cause courts to decline review of prosecutors' charging decisions. As enunciated by the Supreme Court, these elements include:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; . . . a lack of judicially discoverable and manageable standards for resolving it; . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government. . . .[141]

Despite this similarity of factors, however, judicial reluctance to consider the discriminatory prosecution defense is not a matter of justiciability or a political question. The case is already before the court; the government is prosecuting the defendant. The court cannot refuse to hear a defense based on constitutional rights because of perceived limitations of judicial competence.[142] Instead, concerns

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134. In the context of prosecutorial immunity, the Court stated: "harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." Imbler v. Pachtman, 424 U.S. 409, 423 (1976).

135. *See* United States v. Kelly, 556 F.2d 257, 263 (5th Cir. 1977), *cert. denied,* 434 U.S. 1017 (1978). *But see* State v. Flynt, 63 Ohio St. 2d 132, 132-36, 407 N.E.2d 15, 18, *cert. granted,* 449 U.S. 1033 (1980), *cert. dismissed,* 101 S. Ct. 1958 (1981).

136. *See* United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974).

137. *See* United States v. Falk, 479 F.2d 616, 631 (7th Cir. 1973) (Cummings, C.J., dissenting).

138. *See* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973). For a discussion of the rights of citizens to seek a judicial order compelling prosecution, *see* notes 270-308 *infra* and accompanying text.

139. Baker v. Carr, 369 U.S. 186, 198 (1962).

140. *Id.* at 217.

141. *Id.*

142. In state criminal proceedings, the accused may assert that he has been adversely affected by the government's violation of the due process or equal protection

about judicial competence and the proper role of the judiciary, which in other contexts prevent courts from hearing cases, have apparently altered the substantive law in the case of the discriminatory prosecution defense. The "nonjusticiable" or "political" nature of the discriminatory prosecution defense has reduced the guarantee of equal protection of the laws to protection against easily proven instances of discrimination on the basis of race, or religion, or a desire to prevent the exercise of constitutional rights.

One need not be clairvoyant to suggest that the most significant reasons for denying judicial review of the prosecutor's charging decision generally remain unstated. One generally unspoken fear is that the discriminatory enforcement defense will lead to yet another hearing in most criminal cases. This hearing threatens to be wide-ranging, complex, and lengthy.[143] Further, a viable defense of discriminatory enforcement will be another means for defendants who are factually guilty to avoid conviction or to upset their conviction on appeal.

IV. Judicial Enforcement of the Equal Protection Clause: A Suggested Approach

Judicial enforcement of the equal protection clause currently provides little protection for the defendant or victim of crime who suffers unequal treatment at the hands of a prosecutor. This limited protection results both from the narrow circumstances in which courts find that the equal protection clause is violated by the charging decision and from the apparent judicial inability or unwillingness to find violations in particular cases. With regard to both considerations, courts reiterate their concerns about overseeing the exercise of prosecutorial discretion and ascertaining the prosecutor's subjective motives.

Avoidance of judicial review when a constitutional violation is alleged is no longer justified even on prudential grounds. Courts recently have scrutinized under the due process clause the prosecutor's motives for filing charges when the decision allegedly is made in retaliation for the defendant's exercise of procedural rights.[144] In other contexts, courts willingly inquire into the motives

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clauses, whether the violation takes place at the hands of the legislature, Griswold v. Connecticut, 381 U.S. 479, 485 (1965); the police, Mapp v. Ohio, 367 U.S. 643, 655 (1961); or the prosecutor, Griffin v. California, 380 U.S. 609, 613 (1965). Enforcement of these constitutional rights is not denied even though it may result in judicial supervision of police or prosecutors, Miranda v. Arizona, 384 U.S. 436, 467, 490 (1966), and may impose significant new burdens on public resources, Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

143. *See* United States v. Falk, 479 F.2d 616, 631 n.8 (7th Cir. 1973) (Cummings, C.J., dissenting). Courts apparently do not want to oversee a decision by the executive branch that previously has gone unchecked.

144. *See, e.g.,* United States v. Grande, 620 F.2d 1026, 1030-31 (4th Cir.), *cert. denied,*

of government officials to determine whether "purposeful" racial discrimination exists in violation of the equal protection clause.[145] One can no longer seriously contend that courts are unequipped to ascertain whether an invidious or discriminatory motive has played a role in the charging decision.[146]

This section outlines an appropriate judicial response when the defendant alleges invidious or bad faith discrimination. Initially, the court must review evidence presented by the defendant in his attempt to establish a prima facie case of discriminatory prosecution. Next, the court must decide what role the constitutionally impermissible motive played in the charging decision, and whether the effect of that motive warrants dismissal of charges against the defendant.

Courts also should review the charging decision on constitutional grounds in a wider variety of cases than has previously been considered feasible or appropriate. Even if the accused does not allege that his prosecution is motivated by race, religion, or a desire to prevent the exercise of constitutional rights, a court can scrutinize the charging decision on equal protection grounds if the prosecutor has adopted written guidelines.

A. Judicial Competence to Review the Charging Decision

1. Judicial Review of Prosecutions on Due Process Grounds

In recent years, courts have gained experience in making the kinds of factual inquiries necessary to determine whether an unconstitutional motive has played a part in the prosecutor's decision to charge a suspect. This increased exposure has largely come from due process challenges to the charging decision. Beginning with the Supreme Court in *Blackledge v. Perry*,[147], federal courts have held that the prosecutor may not file additional[148] or more serious[149] charges fol-

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101 S. Ct. 317 (1980); Jackson v. Walker, 585 F.2d 139, 145-46 (5th Cir. 1978); *see* notes 147-64 *infra* and accompanying text.

145. *See, e.g.,* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-70 (1977); Washington v. Davis, 426 U.S. 229, 239-48 (1976); *see* notes 165-76 *infra* and accompanying text.

146. For some years, commentators distinguished between "motive" and "purpose." *See, e.g.,* A. BICKEL, THE LEAST DANGEROUS BRANCH 209-10 (1962); Heyman, *The Chief Justice, Racial Segregation, and The Friendly Critics,* 49 CAL. L. REV. 104, 115-16 (1961). Bickel, for example, differentiated the subjective "motive" of legislators from "purpose," which is either the Court's objective assessment of the statutory effect or its own "independent judgment of the constitutionally allowable end that the legislature could have had in view." A. BICKEL, *supra,* at 209. More cynical observers noted that "[b]y and large the term 'purpose' has served as nothing more useful than a signal that the court is willing to look at motivation, 'motive' as a signal that it is not." Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 YALE L.J. 1205, 1217 (1970). The Supreme Court has never adopted the distinction and other commentators have rejected it. *See, e.g., id.* Any possible distinction appears to have no significance in the context of the prosecutor's charging decision, and "motive," "purpose," and "motivation" are used herein interchangeably.

147. 417 U.S. 21, 27 (1973).

148. *See, e.g.,* Jackson v. Walker, 585 F.2d 139, 148 (5th Cir. 1978); United States v. Groves, 571 F.2d 450, 453 (9th Cir. 1978); United States v. DeMarco, 550 F.2d 1224, 1227-78 (9th Cir. 1977), *cert. denied,* 434 U.S. 827 (1978); Hardwick v. Doolittle, 558 F.2d 292, 301-03 (5th Cir. 1977), *cert. denied,* 434 U.S. 1049 (1978). Other cases that recognize vindictive prosecution as a defense, but find no due process violation include: United States v. Thomas, 593 F.2d 615, 624 (5th Cir.), *aff'd in part and rev'd in part,* 604 F.2d 460 (5th

lowing the defendant's exercise of a constitutional or statutory right[150] when doing so would "pose a realistic likelihood of [prosecutorial] 'vindictiveness.' "[151] The possibility of vindictive retaliation may deter the defendant from exercising his rights and thus may violate the due process clause.[152]

The "vindictiveness" defense raised in due process cases is analytically similar to a discriminatory prosecution defense which alleges that the prosecutor discriminated against the defendant out of a desire to prevent the exercise of a constitutional right. The two defenses, however, are separate and distinct. The "vindictiveness" defense is grounded in the due process clause; it alleges prosecutorial retaliation for the exercise of a constitutional right related to the criminal process. In contrast, a discriminatory prosecution defense that alleges an attempt to prevent the exercise of constitutional rights is founded on the equal protection clause; it has been applied solely to protect first amendment rights of free speech, political association, and religion.[153]

The ill-defined nature of the talismanic term "realistic likelihood of prosecutorial vindictiveness" has sparked hot debate among the federal circuits[154] and even within some circuits.[155] The uncertainty

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Cir. 1979), *cert. denied,* 101 S. Ct. 120 (1980); United States v. Stacey, 571 F.2d 440, 443-44 (8th Cir. 1978); United States v. Nell, 570 F.2d 1251, 1254-55 (5th Cir. 1978); United States v. Preciado-Gomez, 529 F.2d 935, 940-41 (9th Cir.), *cert. denied,* 425 U.S. 953 (1976).

149. *See, e.g.,* Lovett v. Butterworth, 610 F.2d 1002, 1007 (1st Cir. 1979), *cert. denied,* 447 U.S. 935 (1980); Miracle v. Estelle, 592 F.2d 1269, 1276-77 (5th Cir. 1979); United States v. Johnson, 537 F.2d 1170, 1173 (4th Cir. 1976); United States v. Ruesga-Martinez, 534 F.2d 1367, 1369-70 (9th Cir. 1976). *But see* United States v. Ricard, 563 F.2d 45, 47-48 (2d Cir. 1977), *cert. denied,* 435 U.S. 916 (1978).

150. Rights protected from retaliatory prosecution include: the statutory right to trial de novo, Blackledge v. Perry, 417 U.S. 21, 28 (1974); the right to be sufficiently apprised of the nature of the charges, United States v. Thomas, 593 F.2d 615, 624 (5th Cir. 1979); the right to seek reduction in bail, United States v. Andrews, 633 F.2d 449, 455-56 (6th Cir. 1980) (en banc); the right to a direct appeal, United States v. Jackson, 585 F.2d 139, 148-49 (5th Cir. 1978); the right to enter a plea of insanity, Hardwick v. Doolittle, 558 F.2d 292, 301-03 (5th Cir. 1977), *cert. denied,* 434 U.S. 1049 (1978); the right to remove to a federal court, Hardwick v. Doolittle, 558 F.2d at 301-03; the right to seek a change in venue, United States v. DeMarco, 550 F.2d 1224, 1226-27 (9th Cir. 1977); the right to petition for a writ of habeas corpus, Colon v. Hendry, 408 F.2d 864, 865-66 (5th Cir. 1969). *But see* United States v. Stacey, 571 F.2d 440, 443-44 (8th Cir. 1978) (right to the return of impounded funds is not a right protected from prosecutorial vindictiveness).

151. 417 U.S. 21, 27 (1974).

152. *Id.* at 28.

153. *See* notes 77-78, 85-90 *supra*.

154. For example, the Ninth Circuit has ruled that when a prosecutor files more serious charges, he bears a "heavy burden" of dispelling both apparent and actual vindictiveness. United States v. Groves, 571 F.2d 450, 453 (9th Cir. 1978); United States v. Alvarado-Sandoval, 557 F.2d 645, 645-46 (9th Cir. 1977); United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.), *cert. denied,* 434 U.S. 827 (1977); United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976). In contrast, the Fifth Circuit has required under some circumstances a showing of "actual vindictiveness" to establish the vindictive prosecution defense. Jackson v. Walker, 585 F.2d 139, 148 (5th Cir. 1978); Hardwick v. Doolittle, 558 F.2d 292, 302 (5th Cir. 1977), *cert. denied,* 434 U.S. 1049 (1978).

155. For example, in United States v. Andrews, 633 F.2d 449 (6th Cir. 1980), *cert.*

concerns the conditions under which the filing of additional or more serious charges amounts to a due process violation. Must the defendant show that the prosecutor has "actual vindictiveness" toward him?[156] Or does the mere filing of additional charges necessarily create an "appearance" or "realistic likelihood" of vindictiveness sufficient to establish a due process violation or at least a strong presumption of prosecutorial misconduct?[157] Although there remains significant disagreement as to when a showing of realistic likelihood of vindictiveness is adequate and when a showing of actual vindictiveness is required, the emerging rule is that the defendant must prove actual vindictiveness when the prosecutor seeks to bring additional charges arising out of conduct unrelated to that originally charged.[158]

Like the requirement of invidious or bad faith discrimination in discriminatory prosecution cases, the actual vindictiveness standard focuses on the intent of the prosecutor. The requirement of actual vindictiveness does not mean that the prosecutor must bear any ill will or malice toward the defendant.[159] Instead, a prosecutor's motive is constitutionally impermissible if the prosecutor intends either to punish a particular defendant for appealing a prior conviction or to discourage future appeals by other defendants.[160]

In cases in which the charging decision apparently is motivated by prosecutorial vindictiveness, the courts are less reluctant to review and invalidate prosecutorial action than in discriminatory prosecution cases. Although deference to the prosecutor's interest in charging discretion usually precludes judicial review in discriminatory prosecution cases, no such bar to review is raised in cases presenting posssible due process violations. Indeed, judicial willingness to dis-

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denied, 101 S. Ct. 1382 (1981), the Sixth Circuit held that the defendant establishes the defense when he shows a "realistic likelihood of vindictiveness." 633 F.2d at 453. The opinion reversed the earlier holding of a three judge panel of the same court that required the defendant to show "actual vindictiveness." United States v. Andrews, 612 F.2d 235, 244 (6th Cir. 1979).

156. *See* Lovett v. Butterworth, 610 F.2d 1002, 1007 (1st Cir.), *cert. denied,* 447 U.S. 935 (1979); Miracle v. Estelle, 592 F.2d 1269, 1275 (1st Cir. 1979); United States v. Ricard, 563 F.2d 45, 48 (2d Cir.), *cert. denied,* 435 U.S. 916 (1977); United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.), *cert. denied,* 434 U.S. 827 (1977); United States v. Johnson, 537 F.2d 1170, 1173 (4th Cir. 1976); United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976); United States v. Jamison, 505 F.2d 407, 416 (D.C. Cir. 1974).

157. *See, e.g.,* Jackson v. Walker, 585 F.2d 139, 148 (5th Cir. 1978); Hardwick v. Doolittle, 558 F.2d 292, 300 (5th Cir. 1977), *cert. denied,* 434 U.S. 1049 (1978).

158. *See, e.g.,* United States v. Thomas, 593 F.2d 615, 624 (5th Cir.), *modified,* 604 F.2d 450 (5th Cir. 1979), *cert. denied,* 101 S. Ct. 120 (1980); Hardwick v. Doolittle, 558 F.2d 292, 302 (5th Cir. 1977); *cert. denied,* 434 U.S. 1049 (1978). The Fourth and Ninth Circuits have reached the opposite conclusion, holding that even in the case of new charges based on different and distinct conduct, it is the appearance of vindictiveness, rather than vindictiveness in fact, which controls. United States v. Groves, 571 F.2d 450, 453 (9th Cir. 1978). *See* United States v. Alvarado-Sandoval, 557 F.2d 645, 645 (9th Cir. 1977); United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.), *cert. denied,* 434 U.S. 827 (1977); United States v. Preciado-Gomez, 529 F.2d 935, 939 (9th Cir.), *cert. denied,* 425 U.S. 953 (1976); United States v. Johnson, 537 F.2d 1170, 1173 (4th Cir. 1976). The broad language of United States v. Jamison, 505 F.2d 407, 416 (D.C. Cir. 1974), indicates that the District of Columbia Circuit would probably reach the same result as the Fourth and Ninth Circuits.

159. *See, e.g.,* Blackledge v. Perry, 417 U.S. 21, 28 (1974); Jackson v. Walker, 585 F.2d 139, 142 (5th Cir. 1978).

160. North Carolina v. Pearce, 395 U.S. 711, 725 (1969).

miss charges on vindictiveness grounds serves as an obvious restriction on the prosecutor's charging discretion.

The objections to inquiring into prosecutorial motives repeated so frequently in the discriminatory prosecution context have not surfaced when the vindictiveness defense has been raised. When a showing of actual vindictiveness on the part of prosecutors has been required, the courts have accepted the tasks of determining the prosecutor's motive in filing additional charges and evaluating the prosecutor's justification for the additional charges. In most of these instances, the appellate courts have remanded the case to the trial court with instructions to ascertain the prosecutor's reasons for filing additional charges.[161] Trial courts then may require the prosecutor to submit affidavits[162] or to testify regarding the reasons for the new charges.[163] On occasion, defense counsel also has testified as to threats by the prosecutor to file additional charges.[164]

Cases presenting the vindictiveness defense demonstrate that courts do review the charging decision when constitutional violations are alleged. They do not disclaim their obligation to protect the constitutional rights of defendants, even though meeting this obligation requires "second-guessing" a coordinate branch of government and engaging in the difficult task of determining the prosecutor's motives.

2. *Judicial Experience With Determining Motive in Equal Protection Cases*

Contemporaneous with their initial efforts to determine the prosecutor's motives in vindictive prosecution cases, courts also have begun to ascertain whether the motives or purposes of government officials include discriminatory elements that violate the equal protection clause. In *Washington v. Davis*,[165] the Supreme Court stated that a statute or administrative action which is racially neutral on its face, but has a disproportionately negative impact on a racial or other minority, does not violate the equal protection clause unless it can "ultimately be traced to a racially discriminatory purpose."[166] As a result

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161. *See, e.g.,* United States v. Thomas, 617 F.2d 436, 437 (5th Cir. 1979), *cert. denied,* 101 S. Ct. 120 (1980); Hardwick v. Doolittle, 558 F.2d 292, 302 (5th Cir. 1977), *cert. denied,* 434 U.S. 1049 (1978). Instead of remanding, appellate courts may elect to determine themselves whether additional or more serious charges are justified on the basis of facts already in the record. *See* Miracle v. Estelle, 592 F.2d 1269, 1277 (5th Cir. 1979); Jackson v. Walker, 585 F.2d 139, 148 (5th Cir. 1978); United States v. Groves, 571 F.2d 450, 454 (9th Cir. 1978).

162. *See* United States v. Thurnhuber, 572 F.2d 1307, 1311 (9th Cir. 1977).

163. *See, e.g.,* United States v. Thomas, 617 F.2d 436, 437-38 (5th Cir. 1979), *cert. denied,* 101 S. Ct. 120 (1980); State v. Bouie, 565 S.W.2d 543, 546 (Tex. Crim. App. 1978).

164. *See* United States v. Lippi, 435 F. Supp. 808, 810 n.3 (D.N.J. 1977).

165. 426 U.S. 229 (1976).

166. *Id.* at 240. *Washington v. Davis* concerned a challenge by black applicants seeking jobs with the District of Columbia police force. The applicants claimed recruiting practices, including the use of a written personnel test, were racially dis-

of the Supreme Court's decision, courts must now determine whether legislative or executive action is motivated by invidious discrimination.[167] In recent years, discrimination cases brought under Title VII of the Civil Rights Act of 1964[168] and the Fair Housing Act[169] have given courts considerable experience in determining whether purposeful discrimination is at work.

Courts should be even more willing to undertake an inquiry into the mental process of administrative (or executive) decision makers than to review legislative purpose or motive.[170] Alexander Bickel in *The Least Dangerous Branch* explains:

> [S]trictures against attempting to diagnose motive do not have the same force when official action is concerned as they do with respect to legislation. . . . The short of it is that here as in other circumstances, and for obvious reasons, the Court accords to the responsible political institutions a degree of deference that it does not owe to officials. The traditional strictures against inquiries into motive subsume a certain difficulty of proof, which is in fact insuperable when legislative motive is in question but not necessarily when it comes to 'psychoanalyzing' administrative officials.[171]

The recognition that judicial inquiry into motive is not unique to cases challenging the prosecutor's charging decision does not mean that ascertaining motive is an easy matter. Justice Lewis Powell predicts that the difficulty in determining motives of government officials will inevitably result in inconsistent and subjective fact-finding.[172] Similarly, Professor Tribe believes that a test requiring

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criminatory because they excluded a disproportionately high number of black applicants and because they bore no relationship to job performance. The Supreme Court held that practices which have a racially disproportionate impact are not unconstitutional without a showing of discriminatory purpose. *Id.* at 239.

167. *See, e.g.,* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977); De La Cruz v. Tormey, 582 F.2d 45, 51 (9th Cir. 1978), *cert. denied,* 441 U.S. 965 (1979); Tyler v. Vichery, 517 F.2d 1089, 1100 (5th Cir. 1975), *cert. denied,* 426 U.S. 940 (1976). In *Arlington Heights* and *Feeney,* the Supreme Court reiterated the requirement of purposeful discrimination. Petitioner in *Arlington Heights* was a real estate developer who planned to build low and middle-income integrated housing. When local authorities refused to re-zone the land, petitioner claimed that the refusal was unconstitutional because of its racially discriminatory impact. 429 U.S. at 268. The Supreme Court again held that official action is not unconstitutional solely because of disproportionate impact; instead, a racially discriminatory purpose must be shown. *Id.* at 270. In *Feeney* the Court upheld a job preference for veterans even though it disadvantaged women. The Court reasoned that the job preference had been adopted without discriminatory purpose. 442 U.S. at 277-78.

168. 42 U.S.C. §§ 2000e *et seq.* (Supp. III 1979). *See generally* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); Dothard v. Rawlinson, 433 U.S. 321 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

169. 42 U.S.C. § 3601 (Supp III 1979). *See generally* Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979); United States v. City of Parma, 494 F. Supp. 1049 (N.D. Ohio 1980).

170. *See, e.g.,* Muhammed Ali v. Division of State Athletic Comm'n, 316 F. Supp. 1246, 1250-51 (S.D.N.Y. 1970). *But see* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

171. A. BICKEL, THE LEAST DANGEROUS BRANCH 214 (1962).

172. Keyes v. School Dist. No. 1, 413 U.S. 189, 233 (1972) (Powell J., concurring). Powell suggests that "wide and unpredictable differences of opinions among judges would be inevitable when dealing with an issue as slippery as 'intent' or 'purpose'. . . ." *Id.*

"demonstration of motive to establish an equal protection violation poses an obstacle which often will prove insurmountable."[173]

Admittedly, proving an unconstitutional motive for a governmental decision is difficult. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[174] however, the Supreme Court identified a number of evidentiary sources that reveal discriminatory intent[175] and mandated that courts undertake the "sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[176] Courts should undertake this inquiry in good faith when defendants assert that their equal protection rights have been violated in the charging process.

B. Enforcing the Existing Constitutional Prohibition Against Invidious Discrimination

This section will suggest how the courts may realistically enforce the existing ban on prosecutions motivated by race, religion, or a desire to prevent the exercise of constitutional rights. The types of evidence and methods of proof that indicate invidious or bad faith discrimination will be outlined. Many of these methods of proof have been applied in prior efforts to establish a prima facie case of discriminatory prosecution, but others originated either in equal protection challenges to nonprosecutorial activity or in employment discrimination cases.

Once a defendant proves a prima facie case of discriminatory prosecution, a court must consider what remedy is appropriate when a constitutionally impermissible motive has played a role in the prosecutor's charging decision. Courts seldom address this issue in discriminatory prosecution cases because of the infrequency with which they find a prima facie case of individious discrimination. Since *Washington v. Davis*,[177] however, courts have developed procedures in other equal protection areas for determining what the remedy should be when the government has a constitutionally impermissible motive.

1. Proving the Prima Facie Case

A review of cases challenging the prosecutor's charging decision on equal protection grounds reveals a number of different evidentiary

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173. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-18, at 1031 (1978).
174. 429 U.S. 252 (1977).
175. According to the Court, evidence of discriminatory intent may include: direct testimony, the impact of the official action, the historical background of the decision, departures from the normal procedural sequence, and discrepancies between the decision made and what one would reasonably expect from an unprejudiced consideration of the circumstances. *Id.* at 267-68.
176. *Id.* at 266.
177. 426 U.S. 229 (1976).

sources which tend to indicate that the prosecutor acted on the basis of an unconstitutional motive.[178] These include direct evidence, such as admissions by the prosecutor of an impermissible motive,[179] and circumstantial or indirect proof of motive, such as a disproportionate impact on an identifiable class,[180] a departure from ordinary guidelines or procedures,[181] a prior relationship between the government and the accused indicating ill will,[182] or a suspicious sequence of events.[183]

Direct testimony by the prosecutor showing invidious discrimination is clearly the most convincing and least ambiguous form of evidence. Obviously, however, prosecutors rarely volunteer that their charging decisions are motivated by racial prejudice, political considerations, or a personal dislike for the accused. Nonetheless, the defendant may be able to obtain direct evidence of prosecutorial bad faith. For example, if the defendant successfully establishes a prima facie case of discriminatory prosecution, the prosecutor may be required to testify, subject to cross-examination, concerning his reasons for prosecution.[184] In addition, the prosecutor may have to turn over to the defendant any internal memoranda regarding the prosecution.[185]

Even before a prosecutor is forced to testify regarding the reasons for a prosecution, other direct evidence of prosecutorial motive may be available in the form of broad policy statements or prior admissions by the prosecutor. In *United States v. Falk*,[186] for example, defense counsel alleged that the Assistant United States Attorney had admitted to him that Falk's draft counseling activity was one factor in the decision to prosecute.[187]

In most claims of invidious or bad faith prosecution, defendants, as members of minority or other disfavored groups, contend that they have been prosecuted for particular crimes whereas similarly situated nonmembers have not. They further allege that the discriminatory classification is unrelated to legitimate law enforcement goals. By revealing patterns of disproportionate enforcement against a par-

178. *See* Comment, *Defense Access to Evidence of Discriminatory Prosecution*, 1974 U. ILL. L.F. 648, 654-60.

179. *See, e.g.*, United States v. Catlett, 584 F.2d 864, 865-67 (8th Cir. 1978); United States v. Falk, 479 F.2d 616, 623 (7th Cir. 1973); United States v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972); State v. Flynt, 63 Ohio St. 2d 132, 133, 407 N.E.2d 15, 16, *cert. granted*, 449 U.S. 1033 (1980), *cert. dismissed*, 101 S. Ct. 1958 (1981).

180. Statistical data may be helpful in establishing a disproportionate impact. State v. Bird Head, 204 Neb. 807, 811, 285 N.W.2d 698, 702 (1979).

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

182. United States v. Berrios, 501 F.2d 1207, 1210 (2d Cir. 1974).

183. United States v. Falk, 479 F.2d 616, 622 (7th Cir. 1973).

184. *See* notes 122-24 *supra*. For example, in State v. Flynt, 63 Ohio St.2d 132, 134, 407 N.E.2d 15, 18, *cert. granted*, 449 U.S. 1033 (1980), *cert. dismissed*, 101 S. Ct. 1958 (1981), the prosecutor conceded at the evidentiary hearing on the discriminatory prosecution defense that magazines similar to defendant's were not prosecuted under the obscenity statute. The prosecutor also admitted that the investigation of defendant's magazine began only after public complaints about a political cartoon.

185. *See generally* United States v. Johnson, 537 F.2d 1170 (4th Cir. 1976); United States v. Ahmad, 347 F. Supp. 912 (M.D. Pa. 1972).

186. 479 F.2d 616 (7th Cir. 1973) (en banc).

187. *Id.* at 621.

ticular group, statistical evidence may strongly suggest that selective enforcement is purposeful and not merely coincidental or attributable to innocent factors. Nevertheless, statistics demonstrating a large number of prosecutions against members of a racial minority or against members of political organizations are insufficient in themselves to establish purposeful discrimination.[188] These statistics reveal nothing about the number of minority and majority group members who in fact have committed the particular crimes or about how many violations by each group are known to law enforcement authorities. The United States Supreme Court recognized the problems with statistical proof many years ago in the case of *Ah Sin v. Wittman*.[189] The defendant in that case claimed that a criminal statute had been applied exclusively against those of Chinese descent and that therefore his conviction violated the equal protection clause. The Supreme Court, however, found the defense insufficient because Ah Sin failed to allege that "the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced."[190] Similarly, evidence comparing the percentage of blacks in the population with the percentage of gambling prosecutions involving black defendants has been held insufficient to establish invidious discrimination.[191]

Statistical proof of purposeful discrimination is most convincing when the defendant shows that even though law enforcement officials are aware of criminal activity among both minority and majority groups, they prosecute members of the discriminated-against group disproportionately often.[192] Because there is a known number of criminal defendants who appear eligible for additional prosecution under a habitual offender statute, data is available to compare the treatment of minority offenders with other offenders.[193] For example,

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188. *See* Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law,* 1973 U. ILL. L.F. 88, 107, 109; Comment, *The Right to Non-Discriminatory Enforcement of State Penal Laws,* 61 COLUM. L. REV. 1103, 1124-31 (1961).

189. 198 U.S. 500 (1905).

190. *Id.* at 507-08.

191. People v. Winters, 171 Cal. App. 2d Supp. 876, 878, 342 P.2d 538, 540 (1959). In People v. Lewis, 73 Ill. App. 3d 361, 386 N.E.2d 910 (1979), the defendants alleged racial discrimination when ten of eleven defendants indicted following a prison riot were black. Most of the other inmates who joined in the riot received only disciplinary "tickets." Nonetheless, the court rejected the discriminatory prosecution claim, noting that "the great majority of prisoners participating in the disturbance were black." *Id.* at 365, 386 N.E.2d at 914.

192. *See* United States v. Crowthers, 456 F.2d 1074, 1078-79 (4th Cir. 1972); People v. Superior Court, 19 Cal. 3d 338, 348, 562 P.2d 1315, 1320, 138 Cal. Rptr. 66, 71 (1977); People v. Gray, 254 Cal. App. 2d 256, 258, 63 Cal. Rptr. 211, 213 (1967); Commonwealth v. Franklin, 78 Mass. Adv. Sh. 3181, 3189-90, 385 N.E.2d 227, 233-34 (1978); State v. Bird Head, 204 Neb. 807, 812, 285 N.W.2d 698, 703 (1979).

193. Most states have enacted habitual offender statutes. *See, e.g.*, CAL. PENAL CODE §§ 667.5, 667.6 (West Supp. 1981); TEX. PENAL CODE ANN. tit. 3, §§ 12.42, 12.43 (Vernon

in *State v. Bird Head*,[194] the defendant alleged that during a six year period, eighteen Native Americans and eight Caucasians were eligible for prosecution under the Nebraska habitual criminal act. Of this known group, 39% of the Native Americans were charged, compared with 12.5% of the Caucasians. Although the Nebraska Supreme Court ultimately rejected the defense of discriminatory prosecution, it appeared in principle to approve the use of statistical evidence to show selective enforcement. The court merely found the sample too small to establish a prima facie showing of invidious discrimination.[195]

Assuming that the defendant can convince the court that his sample provides meaningful data, a relatively small sample may be advantageous. When the number of individuals who have violated a statute and the number that have been prosecuted are fairly small, the defendant may be able to establish exactly how many times the statute has been violated and who has been prosecuted. *United States v. Crowthers*[196] provides an example. The defendants were prosecuted under a "disturbance" statute for conducting a "Mass for Peace" at the Pentagon. They showed that during the six-month period surrounding their arrest there were sixteen other religious, recreational, and awards assemblies, several of which were noisier, but none of which were politically distasteful to the government. Because no prosecutions resulted from these assemblies, the Fourth Circuit reversed defendants' convictions.[197]

In a far greater number of cases, defendants charging discriminatory prosecution simply allege that substantial numbers of a favored class have violated the particular statute but have not been prosecuted. The defendants claim they are members of a class discriminated against. The lack of precise enforcement statistics does not necessarily negate the persuasiveness of a comparison in extreme cases, such as when a political opponent is the only individual prosecuted under a statute even though hundreds of others have violated

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1974). These statutes typically mandate an increased term of incarceration for those previously convicted of specified crimes. Another type of penalty enhancement statute is illustrated by the Michigan Felony Firearm Statute, MICH. COMP. LAWS § 750.227(b) (MICH. STAT. ANN. § 28.424(2) (Callaghan 1981)). Anyone possessing a firearm at the time he commits a felony violates this statute and is sentenced to an additional term of incarceration.

194. 204 Neb. 807, 285 N.W.2d 698 (1979).

195. *Id.* at 812-14, 285 N.W.2d at 703-05. Similar statistical comparisons between known groups of violators were possible in Murgia v. Municipal Court, 15 Cal. 3d 286, 291-93, 540 P.2d 44, 46-48, 124 Cal. Rptr. 204, 207-08 (1975) and in People v. Lewis, 73 Ill. App. 3d 361, 365, 386 N.E.2d 910, 913-14 (1979). In *Murgia,* the defendants alleged that only members of the United Farm Workers were charged with criminal contempt under the California Penal Code for violating civil injunctions.

Rough comparisons are also possible in some cases in which women claim discrimination on the basis of sex in the enforcement of prostitution and solicitation statutes. People v. Superior Court, 19 Cal. 3d 338, 350, 562 P.2d 1315, 1320, 138 Cal. Rptr. 66, 71 (1977). In those jurisdictions in which both buying and selling sexual services are crimes, the number of males and females who violate the statutes should be roughly equal. This, of course, does not address whether there may be legitimate law enforcement reasons for prosecuting prostitutes, but not their customers.

196. 456 F.2d 1074 (4th Cir. 1972).

197. *Id.* at 1078-79.

the law,[198] when black youths are prosecuted as a result of a series of racial altercations but white youths involved are not,[199] or when those posting one type of political sign are prosecuted while others who illegally display signs are not.[200]

The usefulness of statistical data to prove disproportionate impact, and hence discriminatory motive, when the number of actual violations by both classes being compared is known, suggests that statistical proof may be used in a wider context. An obvious way to extend the use of statistical proof is to compare the number of cases in which the prosecutor seeks indictment or otherwise charges a crime with the number of incidents of that crime reported by law enforcement officers or through civilian complainants. Statistics showing the number of original complaints and the number of subsequent indictments or charges by the prosecutor should be readily available. Statistics showing that a disproportionate percentage of minority group members were charged would be strong evidence of purposeful discrimination, absent proof of legitimate law enforcement goals that account for the disparity.

The development of sophisticated statistical analysis for use in proving discriminatory purpose has proceeded much further in other types of discrimination cases than in cases of discriminatory prosecution.[201] For example, the Supreme Court has examined statistical evidence of racial and sexual discrimination in considering challenges to jury selection,[202] school segregation,[203] housing patterns,[204] and employment practices.[205] These cases should prove useful to defendants who claim their prosecutions are discriminatory.

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198. United States v. Berrios, 501 F.2d 1207, 1210 (2d Cir. 1974).

199. Commonwealth v. Franklin, 78 Mass. Adv. Sh. 3181, 3189-90, 385 N.E.2d 227, 234 (1978).

200. People v. Gray, 254 Cal. App. 2d 256, 260, 63 Cal. Rptr. 211, 219 (1967).

201. There is an extensive body of literature describing the use of statistics to prove discrimination in employment situations. Comprehensive texts include D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980); W. CONNOLLY & D. PETERSON, USE OF STATISTICS IN EQUAL EMPLOYMENT OPPORTUNITIES LITIGATION (1980); F. MORRIS, JR., CURRENT TRENDS IN THE USE (AND MISUSE) OF STATISTICS IN EMPLOYMENT DISCRIMINATION LITIGATION (1978). The numerous articles on this subject include Bogen & Falcon, *The Use of Racial Statistics in Fair Housing Cases,* 34 MD. L. REV. 59 (1974); Hallock, *The Numbers Game — The Use and Misuse of Statistics in Civil Rights Litigation,* 23 VILL. L. REV. 5 (1977); Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII,* 91 HARV. L. REV. 793 (1978); Sperlich & Jaspovice, *Statistical Decision Theory and Selection of Grand Jurors: Testing for Discrimination in a Single Panel*, 2 HASTINGS CONST. L.Q. 75 (1975).

202. *See, e.g.,* Castaneda v. Partida, 430 U.S. 482, 487 (1977); Alexander v. Louisiana, 405 U.S. 625, 627-32 (1972); Turner v. Fouche, 396 U.S. 346, 347 (1970).

203. *See, e.g.,* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 539-40 (1979); Cannon v. University of Chicago, 441 U.S. 677, 681 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 276-78 (1978); Milliken v. Bradley, 433 U.S. 267, 271-72 (1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-25 (1970).

204. *See, e.g.,* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268-71 (1977); Hills v. Gautreaux, 425 U.S. 284, 287-88 (1976).

205. *See, e.g.,* New York City Transit Auth. v. Beazer, 440 U.S. 568, 579, 585 (1979); Hazelwood School Dist. v. United States, 433 U.S. 299, 303-05 (1977); International Bhd.

The use of statistical analysis in cases of alleged discrimination first arose in the context of challenges to jury selection.[206] Statistical evidence is much simpler to use in jury cases than in cases of discriminatory prosecution because courts have held that the racial composition of jury lists should be comparable to that of the population at large. This presumption is not possible in discriminatory prosecution cases. Because the incidence of criminal activity among an identifiable segment of population may differ significantly from that of the population at large, eligibility for prosecution may vary widely.[207]

The use of statistics in employment discrimination cases brought under Title VII of the Civil Rights Act of 1964 provides a better model for the use of statistical evidence to prove discriminatory prosecution.[208] The Supreme Court has stated that a statistical disparity between the racial composition of the defendant's work force and the population at large "is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the commmunity from which employees are hired."[209]

This expectation is not valid, however, in cases of alleged employment discrimination in promotion or hiring for a professional or skilled position. In these cases, in which proof of discrimination most closely resembles proof of discriminatory motive in criminal prosecutions, the Supreme Court has noted that "comparisons to the general population (rather than to the smaller groups of individuals who possess the necessary qualifications) may have little probative value."[210] In such cases, courts consistently require the percentage of minority group members hired by an employer to be only roughly comparable to the percentage of minority group members in the "relevant labor market," *i.e.* those with the requisite qualifications for and an expressed interest in the position in question.[211]

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of Teamsters v. United States, 431 U.S. 324, 337-38 (1977); Washington v. Davis, 426 U.S. 229, 235-37 (1976).

206. *See, e.g.,* Alexander v. Louisiana, 405 U.S. 625, 629-30 (1972); Turner v. Fouche, 396 U.S. 346, 346-49, 358-60 (1970).

207. Even in jury selection cases, neutral selection procedures based on voter registration or literacy that allow exemption from jury duty in "hardship" cases may result in under-representation of minorities and women. *See* Foster v. Sparks, 506 F.2d 805, 830 (5th Cir. 1975). In *Foster,* the Fifth Circuit acknowledged this problem, but refused to require a litigant to produce "full and accurate figures for jury eligibles" because such a requirement would produce "an insuperable burden." *Id.* at 833. Instead, the court attempted to compensate for the problem by requiring the litigant to produce evidence of greater statistical disparity between the racial composition of the jury and that of the population at large than would ordinarily be necessary. *Id.*

208. The Supreme Court has held that the ultimate factual issues in Title VII cases are whether there is a pattern or practice of disparate treatment and, if so, whether the differences are racially premised. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 n.18 (1973). This two-pronged requirement parallels almost exactly the *Berrios* requirement of "intentional and purposeful" discrimination in discriminatory prosecution cases. *See* notes 76-78 *supra* and accompanying text.

209. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).

210. Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n.13 (1977).

211. *See, e.g.,* Hazelwood School Dist. v. United States, 433 U.S. 299, 310 (1977); EEOC v. Radiator Specialty Co., 610 F.2d 178, 185 (4th Cir. 1979); Roman v. E.S.B., Inc.,

Similarly, the percentage of those prosecuted who are members of a particular race or other minority group should not necessarily reflect the racial composition of society as a whole. Instead, the proper comparison is between the percentage of those belonging to an identifiable group who commit a crime, and are therefore eligible for prosecution, and those actually prosecuted.

The statistical data necessary for this comparison requires expert testimony concerning criminal activity limited to the relevant geographic area, time frame, and type of offense. If the testimony reveals a statistically significant discrepancy between the relative rate of criminal activity and prosecution for minority groups compared with the population at large, it will help prove a prima facie case of discriminatory prosecution. Unfortunately, other than records of prosecuted cases, statistics concerning criminal activity are seldom available and are rarely accurate and focused enough to be useful.[212] These statistics are probably more difficult to obtain than those measuring the percentage of minorities in the relevant labor market. Further, the expense of obtaining such information probably limits its use to Title VII class actions or perhaps to lawsuits seeking injunctive relief to cure systematic prosecutorial discretion. This evidence probably is too general and too expensive for use by a single defendant claiming discriminatory prosecution.

Because direct evidence of invidious intent is often unavailable and statistical evidence of discriminatory enforcement is by itself generally insufficient to establish a prima facie case, the defendant must often rely on other types of proof. Certainly, evidence of ill will

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550 F.2d 1343, 1354 (4th Cir. 1976). *Hazelwood* concerned a challenge under Title VII to the racial composition of a school district's faculty. For the purpose of determining whether a prima facie case of discrimination is established, the Supreme Court held that the percentage of black teachers should be compared with the percentage of black teachers in the relevant labor market, that is, the local metropolitan area, rather than with the percentage of black students in the school system. 433 U.S. at 305, 308, 313. In *Radiator Specialty*, the Fourth Circuit found that the use of general population statistics is inappropriate to establish a prima facie case of racial discrimination when the positions require qualifications not possessed by the general population. 610 F.2d at 185, 186. Similarly, in *Roman,* the Fourth Circuit held that plaintiffs failed to show discriminatory hiring and promotion. The court pointed to the skilled nature of the jobs, the lack of qualified black applicants who sought the positions, and the scarcity of qualified persons in the general community. 550 F.2d at 1354.

212. A few statistical surveys are available. For example, the Uniform Crime Reporting Program (UCR), administered by the Federal Bureau of Investigation, collects and publishes statistics on the number and types of crimes that come to the attention of law enforcement agencies each year. *See, e.g.,* UNITED STATES DEP'T OF JUSTICE, FBI UNIFORM CRIME REPORTS FOR THE UNITED STATES (1979). The offenses are listed by locality and type of crime. Beginning with the 1980 data collection, information regarding the race and ethnic origin of persons arrested has been included. *Id.* at 4. During the 1970's, the Law Enforcement Assistance Administration of the Department of Justice conducted national surveys designed to assess the character and extent of selected forms of criminal victimization. *See, e.g.,* NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES (1975).

between the prosecutor and the defendant or evidence that prosecution may benefit the prosecutor constitutes circumstantial proof of invidious or bad faith discrimination.[213]

The sequence of events prior to charging may be evidence of an impermissible prosecutorial motive.[214] In *United States v. Falk*, for example, the Seventh Circuit found that the three-year delay between the time Falk violated the statute and his prosecution indicated that Falk's draft counseling activities during the hiatus played an improper role in the decision to prosecute.[215]

Finally, a prosecution which is contrary to prior practice or which violates the prosecutor's written guidelines may indicate that an invidious motive is at work.[216] Because written guidelines may play an increasingly important role in determining whether the prosecutor's charging decision violates the equal protection clause, they are considered more fully in the next section.

All the evidence discussed above may be used in appropriate cases to prove purposeful discrimination on the basis of a particular classification, such as race or membership in a political organization. Direct proof of unconstitutional motive, as well as nonstatistical evidence, may also be used when the prosecutor's impermissible motive is directed against a particular defendant rather than against a minority group.

2. *The Effect of a Discriminatory Motive on the Charging Decision*

The courts have not formulated a workable test of causation to distinguish a charging decision that results from a constitutional violation from one that does not. The often-used *Berrios* criteria nebulously require that the selection for prosecution not be "based upon . . . impermissible considerations."[217] Discriminatory prosecution cases do not indicate clearly whether a prima facie case is established when

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213. *See* United States v. Berrios, 501 F.2d 1207, 1209-10 (2d Cir. 1974); notes 100-01 *supra* and accompanying text. In *Berrios*, the defendant was allegedly prosecuted because of his participation in political and labor-organizing activity in opposition to those closely identified with the Attorney General and the President. 501 F.2d at 1209-10.

214. *See, e.g.,* United States v. Falk, 479 F.2d 616, 622 (7th Cir. 1973). This is, after all, the whole basis for those cases in which prosecutorial vindictiveness following the exercise of a constitutional or statutory right is a defense under the due process clause. The sequence of events when the prosecutor files more serious or additional charges may evidence, or may even establish, a prima facie case of improper prosecutorial motive. *See* notes 147-64 *supra* and accompanying text.

215. United States v. Falk, 479 F.2d 616, 622 (7th Cir. 1973).

216. *See, e.g.,* United States v. Hayes, 589 F.2d 811, 818 (5th Cir.), *cert. denied*, 444 U.S. 847 (1979); United States v. Ojala, 544 F.2d 940, 943 (8th Cir. 1976); United States v. Falk, 479 F.2d 616, 621 (7th Cir. 1973); United States v. Shober, 489 F. Supp. 393, 405 (E.D. Pa. 1979). As evidence of discriminatory prosecution, the defendant in *Ojala* noted that his tax fraud prosecution had been initiated by the Intelligence Division of the IRS, rather than by the Audit or Collection Division as was the normal practice. 544 F.2d at 943. In *Falk*, the defendant's prosecution contravened policy statements that had been publicly released by the government. The court considered this break with usual practice to be evidence of discriminatory prosecution. 479 F.2d at 621. *Cf.* NLRB v. Laborers' Int'l Union, 613 F.2d 203, 208 (9th Cir. 1980) (union's dismissal of a member who opposed the union leadership was discriminatory because the stated reason for the dismissal was a hiring hall rule that had previously never been enforced).

217. United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974).

the defendant shows that an impermissible motive played any role at all in the charging decision, or whether the invidious or bad faith factor must be the "sole" or "dominant" motive.

A separate and distinct analytical question, but one that may ultimately be procedurally related, is what the prosecution must do to rebut a prima facie showing of discriminatory prosecution. Few cases provide guidance regarding the procedure to be followed after the prima facie case is established. In some cases, a defendant's showing of impermissible motive has resulted in a dismissal of charges.[218] In *United States v. Falk,*[219] the Seventh Circuit indicated that after the defendant establishes a prima facie case of invidious discrimination, the burden of going forward with proof of nondiscrimination is on the government. To meet its burden under *Falk*, the government is required to "present compelling evidence" to show that the defendant has not been prosecuted to prevent his exercise of constitutional rights.[220]

Multiple motives are present in most charging decisions. In addition to the prosecutor's desire to enforce the law, many other factors may affect whether charging a suspect is in the public interest. To require the defendant to show that a constitutionally impermissible motive is the sole or dominant motive for a charging decision would create an insurmountable barrier to those alleging equal protection violations. Similarly, to allow the prosecutor to justify the charging decision merely by relating it to any permissible government goal is to eviscerate the defense of discriminatory prosecution.[221]

In other equal protection areas, the Supreme Court has held that a discriminatory motive need not be the sole or dominant reason behind an administrative or legislative decision for the decision to be unconstitutional. If the impermissible motive has "played a substantial part" in the official decision, the burden shifts to the government to justify its action.[222] Although the Supreme Court at one time implied that if an official's motives are relevant to an equal protection violation, a court is obligated to determine whether the improper motive is the sole or dominant impetus to charging,[223] it subsequently

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218. *See, e.g.,* United States v. Crowthers, 456 F.2d 1074, 1078 (4th Cir. 1972).
219. 479 F.2d 616 (7th Cir. 1973).
220. *Id.* at 624.
221. Nonetheless, Professor John Hart Ely has suggested that the government need offer only a legitimate reason for ad hoc decisions, such as the filing of criminal charges. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 YALE L.J. 1205, 1208 (1970). *See also* note 231 *infra.*
222. Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 n.21 (1977).
223. Palmer v. Thompson, 403 U.S. 217, 225 (1971). In *Palmer,* the Supreme Court held that even though public swimming pools were closed at least in part to avoid integration, the presence of a discriminatory motive did not turn the closings into equal protection violations. The *Palmer* Court's refusal to consider the invidious mo-

repudiated this suggestion in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*[224] and in *Mount Healthy City School District Board of Education v. Doyle*.[225] In *Arlington Heights*, the Court stated:

> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality . . . . When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.[226]

Similarly, the Supreme Court in *Mount Healthy* considered the import of the invidious motive of retaliation for the exercise of first amendment rights of free speech. The district court had found that an untenured school teacher's exercise of his first amendment rights had played a "substantial part" in the decision not to renew his contract. Even though the district court's record also reflected other reasons for the refusal to hire that on the surface appeared legitimate, the Supreme Court did not require the teacher to prove that retaliation for protected speech had been the dominant motive behind his dismissal.[227]

Under these two Supreme Court decisions, a prima facie showing that an unconstitutional motive has played a "substantial part" in or has been a "motivating factor" behind an official's decision does not necessarily establish an equal protection violation; nor does it automatically invalidate the official action. The government may overcome the defendant's prima facie showing in either of two ways. First, the government may deny and rebut the elements of the defendant's prima facie showing.[228] The government can present proof that the prosecutor is not prejudiced or predisposed against the defendant, or that such prejudice or predisposition has not played a substantial role in the selection for prosecution. In addition, the government can assert that the allegedly improper motive is not unconstitutional.[229]

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tive of the officials was, in effect, overruled in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), and Washington v. Davis, 426 U.S. 229 (1976). The Supreme Court rejected motivation analysis in *Palmer* in part because it considered "[i]t . . . difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators." 403 U.S. at 225.

224. 429 U.S. 252, 265-66 (1977).

225. 429 U.S. 274, 287 (1977).

226. 429 U.S. 252, 265-66 (1977) (discussing Washington v. Davis, 426 U.S. 229 (1976)).

227. 429 U.S. 274, 285 (1977).

228. *See* notes 77-78 *supra* and accompanying text.

229. For example, courts have been inconsistent in determining whether the government may intentionally choose for prosecution those who openly and vigorously encourage others to violate the law. Some courts find such a prosecution unconstitutional because it retaliates for the exercise of first amendment rights. *See, e.g.,* United States v. Falk, 479 F.2d 616, 619-20 (7th Cir. 1973); United States v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972). In contrast, other courts consider it only logical to prosecute those

The second method of proof available to the government is provided by *Mount Healthy.* Under this approach, even if an invidious motive plays a substantial part in an official's decision, the decision is still constitutionally valid if the government can prove that the same decision would have been reached absent the impermissible purpose.[230] The Supreme Court may have intended merely to provide an opportunity for the government to rebut the allegation that an unconstitutional motive has played a substantial part in the decision. That the government has both the burdens of production and persuasion on this issue, however, suggests instead that the *Mount Healthy* approach is an "affirmative defense" to an allegation of discriminatory prosecution.[231]

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whose violations are the most flagrant. *See, e.g.,* United States v. Ojala, 544 F.2d 940, 945 (8th Cir. 1976); United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975).

230. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 n.21 (1977). *See* Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980); Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 416 (1979); Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977); Ledford v. Delancey, 612 F.2d 883, 885-86 (4th Cir. 1980); Kingsville Independent School Dist. v. Cooper, 611 F.2d 1109, 1113 (5th Cir. 1980); Brule v. Southworth, 611 F.2d 406, 410-11 (1st Cir. 1979).

231. 429 U.S. 274, 287 (1977). The commonly used term "burden of proof" really encompasses two separate burdens. *See* McCORMICK ON EVIDENCE 783-85 (2d ed. 1972) (hereinafter cited as "McCORMICK"). First, the party whose failure to present evidence on a particular issue will result in an adverse ruling has the "burden of production." Because knowledge and evidence regarding an official decisionmaker's motives are peculiarly within the possession of the government, it makes sense to place the burden of production on the government. *See* note 122 *supra* and accompanying text.

The second burden, the burden of persuasion, rests on the party against whom the trier of fact will rule if both sides present equally compelling evidence. The reason for requiring the government to persuade the court that the same decision would have resulted even if the impermissible purpose were not considered is less clear. One logically would expect that because the defendant initially has the burden of persuasion on the discretionary prosecution issue, the burden would not shift to the prosecution on the closely related question of whether the same decision would have resulted absent an impermissible motive. *See* McCORMICK 788-89.

Indeed, the Supreme Court recently adopted this reasoning in Texas Dep't of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981), to govern the closely analogous situation presented by employment discrimination cases brought under Title VII of the Civil Rights Act of 1964. An earlier Supreme Court opinion, McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), held that the complainant in an employment discrimination case must carry the initial burden of establishing a prima facie case of racial discrimination under Title VII. *Id.* at 802. The burden of production then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the failure to hire or promote the complainant. In *Burdine,* the court stated that the employer "need not persuade the court that it was actually motivated by the proffered reasons," but only that the "evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." 101 S. Ct. at 1094. The burden of persuasion remains with the Title VII plaintiff, who then has "the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision." *Id.* at 1095.

The Supreme Court's allocation of burdens of persuasion in equal protection cases and in Title VII employment discrimination cases appears to be inconsistent. Although the Supreme Court has not explained the differing approaches, the disparity may be due to the constitutional nature of the challenge in *Mount Healthy* compared with the statutory challenge in *Burdine.*

Some commentators argue that allocation of the burden of persuasion has no practical significance, at least when the court is deciding a factual issue. *See, e.g.,* McCORMICK 784-85. Because of the difficulties in ascertaining and proving the prosecutor's

In *Arlington Heights*, the Supreme Court acknowledged that the analytical foundations for its approach to equal protection challenges is provided by Professor Paul Brest.[232] Brest argues that certain government decisions are constitutionally invalid not because they establish invidious discrimination on their face, but rather because a constitutionally impermissible motive has played an operative role in the decision-making process.[233] Ordinarily, the judiciary has no proper role in reviewing the utility and fairness of decisions by a political decisionmaker, but the presumption of legitimacy disappears when the government considers a constitutionally illicit factor.[234] The Constitution prohibits the government from pursuing certain objectives, such as disadvantaging a racial group or suppression of speech. Proof that a government official considered such a factor in making a decision suggests that the factor may have determined the outcome. Therefore, Brest concludes that "the court should place on the decisionmaker a heavy burden of proving that his illicit objective was not determinative of the outcome."[235]

Assuming the government must prove by a preponderance of evidence that its decision would have been the same even if the constitutionally impermissible motive were not present, the types of nondiscriminatory justifications offered by the government and the evidence supporting those justifications will vary from case to case.[236] The nature and the strength of the evidence necessary to rebut the allegation of impermissibly motivated government action will

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state of mind, however, and because multiple factors usually operate in the charging decision, allocation of the risk of non-persuasion in equal protection challenges to the prosecutor's charging decision may be determinative.

232. 429 U.S. 252, 266 n.12 (1977). *See* Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive,* 1971 SUP. CT. REV. 95. The Brest article was, in part, a response to Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 YALE L.J. 1205 (1970). Professor Ely's article articulated for the first time a theory for determining the unconstitutionality of government action in which the role of administrative or legislative motive is critical. Ely published his article at a time when the Supreme Court was denying the relevance of motive. *See* Palmer v. Thompson, 403 U.S. 217, 224 (1971); United States v. O'Brien, 391 U.S. 367, 383 (1968). Although Ely recognized the importance of motive, he contended that prima facie proof of an unconstitutional motive should only "create a burden of legitimate defense," *i.e.,* force the government to justify its action by relating it to a permissible government goal. 79 YALE L.J. at 1208.

Academic debate on the proper role of motive in equal protection cases was advanced by a series of stimulating articles in 15 SAN DIEGO L. REV. 925-1183 (1978). *See* Alexander, *Introduction: Motivation and Constitutionality, id.* at 925-51; Bice, *Motivational Analysis as a Complete Explanation of the Justification Process, id.* at 1131-40; Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law, id.* at 953-1039; Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Bar Against Racial Discrimination, id.* at 1041-1130.

233. Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 115.

234. *Id.* at 116-18.

235. *Id.* at 118. In some cases, the decisionmaker's motive may not be constitutionally impermissible on its face, but may be "suspect." *Id.* For example, the decisionmaker may not intend to classify by race, but his actions may foreseeably result in racial discrimination. In such a case, even if the decisionmaker cannot prove that the suspect motive has not played a substantial role in the decision, he can still justify the decision by showing a compelling state interest.

236. *See* Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination,* 15 SAN DIEGO L. REV. 1041, 1067 (1978).

depend upon the strength of the evidence presented by the individual challenging the government action, the type of governmental decision reviewed, and the reasonableness and importance of the government's supposedly innocent goals.[237] As with proof of the prima facie case of discrimination, the important questions at the justification stage "*are all evidentiary.*."[238]

The courts have not yet applied the procedure outlined in *Arlington Heights* and *Mount Healthy* to claims of discriminatory prosecution. Nonetheless, the justification process outlined by the Supreme Court seems appropriate at least in those cases in which the alleged discrimination is based on invidious considerations such as race, religion, or a desire to prevent the exercise of constitutional rights.

Application of the *Mount Healthy* justification process probably would result in dismissal of significantly more criminal charges on the basis of discriminatory prosecution than in the past. For example, in *State v. Flynt,*[239] the prosecutor admitted that complaints about a political cartoon in *Hustler* magazine at least partly motivated the state's investigation of the defendants. The Ohio Supreme Court held, however, that there were legitimate reasons for selecting defendants' magazine for prosecution, including the state's desire for a "test case" and the amenability of *Hustler* officers to service of process.[240] In accepting these justifications for the prosecution, the court appeared either to seek the sole or dominant motive behind the prosecution[241] or to require only that the state offer a legitimate defense or rational explanation for the prosecution.[242] The Ohio Supreme Court clearly did not require the state to demonstrate that the same charging decision would have been made absent public furor over the political cartoon. In all likelihood, without the outcry the defendants would not have been charged. Under *Mount Healthy*, therefore, the charges should have been dismissed. Similar dismissals for discriminatory prosecution also would have occurred in several other cases in which multiple motives, including an unconstitutional one, were behind the charging decision.[243]

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237. *Id.* at 1067-68, 1069.

238. *Id.* at 1130 (emphasis in the original).

239. 63 Ohio St. 2d 132, 407 N.E.2d 15, *cert. granted*, 449 U.S. 1033 (1980), *cert. dismissed*, 101 S.Ct. 1958 (1981).

240. *Id.* at 135, 407 N.E.2d at 17, 18.

241. *See* notes 222-26 *supra* and accompanying text.

242. *See* note 221 *supra.*

243. For example, in United States v. Torquato, 602 F.2d 564 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979), the defendant alleged that he was prosecuted for bribery by a Republican administration because he was a Democratic Party official. He introduced substantial evidence that comparable officials of both parties in the same county solicited bribes and violated the law, but that Republican officials were not prosecuted. Despite the showing, the court found that the especially egregious nature of the defendant's conduct justified selective prosecution. 602 F.2d at 570. The defendant's party affiliation, however, seems to have been a "substantial" factor in the charging

C. *Review of the Charging Decision and the Prosecutor's Guidelines*

Under current law, the equal protection clause requires nothing of the prosecutor except that selection for prosecution not be based upon invidious considerations or made in bad faith. As previously noted, the prosecution of one defendant while others go unprosecuted neither constitutes an equal protection violation nor forces the prosecutor to explain rationally the differential treatment. Generally speaking, judicial refusal to review the prosecutor's charging decision except in cases of invidious or bad faith discrimination appears to be inevitable, or at least of no consequence. As in the case of judicial review of legislation, review of the charging decision would yield the conclusion that the decision regarding prosecution is in most instances rationally related to a legitimate law enforcement goal.

Judicial review of the charging decision when no invidious or bad faith discrimination is alleged is possible, however, if written guidelines are adopted that outline the factors to be considered by the prosecutor. If the guidelines are sufficiently specific, a court should regard any deviation as establishing a prima facie case of an equal protection violation.[244] The burden of production would then shift, requiring the prosecutor to offer a rational explanation for the difference between the charging decision in defendant's case and the result expected under the guidelines. If the prosecutor met his burden, the defendant would have the opportunity to prove that the proffered explanation is either a pretext or not rational.

The judicial use of written guidelines to control abuses in prosecutorial discretion would require changes in the nature of most written guidelines as well as a reversal of existing law stating that such guidelines are not binding on the prosecutor. To date, no court has dismissed an indictment or other criminal charge for failure to comply with written guidelines.

Although written guidelines are becoming more common, the utility of existing guidelines to establish enforceable rights for defendants is limited. Indeed, existing guidelines are so general that a reviewing court could not readily find that a charging decision deviated from the guidelines. The most important current guidelines are the "Principles of Federal Prosecution" promulgated by the United States Department of Justice in July 1980.[245] According to then Attorney General Benjamin R. Civiletti, the Principles are designed to

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decision. The government may have been unable to show that the same charging decision would have been reached without consideration of the defendant's politics.

Similarly, in United States v. Borque, 541 F.2d 290 (1st Cir. 1976), the decision to recommend prosecution of the defendant for a federal income tax violation was made by an official who had been embroiled in a personal dispute with the defendant that had culminated in civil litigation. Most other known violators were not charged for similar offenses. Although the court rejected the claim of discriminatory prosecution, *id.* at 293, the defendant probably could have established the defense under the *Mount Healthy* requirements.

244. *But see, e.g.,* United States v. Shober, 489 F. Supp. 393, 405 (E.D. Pa. 1979).

245. UNITED STATES DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION (July 1980), *reprinted in* 27 CRIM. L. REP. (BNA) 3277-92 (1980).

achieve greater consistency in the exercise of prosecutorial responsibility and to promote public confidence that important prosecutorial decisions will be made rationally and objectively. The guidelines' lack of specificity is demonstrated by the following excerpt:

> In determining whether prosecution should be declined because no substantial federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including: (a) federal law enforcement priorities; (b) the nature and seriousness of the offense; (c) the deterrent effect of prosecution; (d) the person's culpability in connection with the offense; (e) the person's history with respect to criminal activity; (f) the person's willingness to cooperate in the investigation or prosecution of others; and (g) the probable sentence or other consequences if the person is convicted.[246]

Further, the Principles provide that a United States Attorney may depart from the guidelines when "necessary in the interests of fair and effective law enforcement. . . ."[247] Finally, the guidelines are intended for internal office use only and "are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party at litigation with the United States."[248]

Several other jurisdictions have adopted written guidelines[249] that contain a number of highly generalized provisions, similar to those in the federal Principles.[250] Like the federal Principles, these provisions are of little use in determining whether a prosecutor has violated the equal protection or due process clauses. The guidelines include other more specific provisions, however, that may be useful to defendants claiming invidious discrimination. For example, the Uniform Crime Charging Standards of the California District Attorneys Association make the following specific recommendations for the exercise of prosecutorial discretion in consumer fraud cases:

> In a case involving defrauding of consumers by merchants, the prosecutor or the appropriate law enforcement agency may accept volun-

246. *Id.* at 3279.

247. *Id.* at 3278.

248. *Id.*

249. *See, e.g.,* CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, UNIFORM CRIME CHARGING AND DISPOSITION POLICIES (1980); J. HOLMES, JR., THE PROSECUTOR, THE DECISION MAKING PROCESS, AND SUPERVISORY CONTROLS (Harris County, Tex. 1980); WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS, CHARGING AND DISPOSITION POLICIES (1980). Copies of each are on file with the author.

250. For example, the WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS, CHARGING AND DISPOSITION POLICIES (1980) provide that a prosecutor "may decline to prosecute . . . in situations where the prosecution would serve no public purpose. . . ." *Id.* at 10. In deciding whether to prosecute, the Washington guidelines suggest that a prosecutor consider general factors such as legislative intent, the ambiguity of the statute, the seriousness of the violation, the cost of prosecution, improper motives of the complainant, and other charges pending against the accused.

tary compliance, rather than file criminal charges or proceed civilly, if the following factors are all present in the case:

(1) The incident in question is the first offense by the merchant involving this type of conduct; (2) The violation was not deliberate; (3) The incident appears to be isolated and not part of a conspiracy; and (4) Complete restitution is made to all known victims.[251]

The California guidelines also specifically address a number of other crimes and situations,[252] as do guidelines in other jurisdictions. A 1973 report by the National Advisory Commission on Criminal Justice Standards and Goals also recognized the need for specificity by advocating the adoption of a "detailed" statement of policies to guide the prosecutor's charging discretion.[253]

In the past, courts have been unwilling to use even specific written guidelines as a standard for review of prosecutorial discretion. For example, in 1959 the Attorney General formally outlined a government policy against federal prosecution in most cases in which there is a state prosecution.[254] This so-called "Petite Policy" was described in memoranda to all United States Attorneys and was released to the press and public.[255] Federal courts, however, have consistently refused to dismiss federal indictments when defendants allege violations of the "Petite Policy" if the government opposes the dismissal.[256] In other cases, federal courts have refused to dismiss indictments that are inconsistent with written instructions to United States Attorneys regarding prosecution for mailing of obscene private correspondence.[257]

Decisions that prosecutors need not comply with their own written guidelines and prior practices seem inconsistent with the Supreme Court's repeated declaration that "where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."[258] One reason for the Supreme Court's position is that an

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251. CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, UNIFORM CRIME CHARGING STANDARDS 50-51 (1974).

252. The CALIFORNIA DISTRICT ATTORNEYS' ASSOCIATION, UNIFORM CRIME CHARGING STANDARDS (1974) provide specific guidelines for charging in cases of neighborhood disputes, *id.* at 49-50; child support cases, *id.* at 50; environmental law cases, *id.* at 51; administrative violations, *id.*; and business license violations, *id.* at 52. They also include specific guidelines for determining whether a felony or a misdemeanor should be charged. *Id.* at 33-40.

253. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, STANDARD 1.2, at 24 (1973).

254. *See* Petite v. United States, 361 U.S. 529, 531 (1960).

255. *Id.*

256. *See* Delay v. United States, 602 F.2d 173, 178 (8th Cir. 1979); United States v. McInnis, 601 F.2d 1319, 1328 (5th Cir. 1979); United States v. Hayes, 589 F.2d 811, 818 (5th Cir.), *cert. denied*, 444 U.S. 847 (1979); United States v. Thompson, 579 F.2d 1184, 1188 (10th Cir. 1978); United States v. Wallace, 578 F.2d 735, 740 (8th Cir. 1978); United States v. Hayles, 492 F.2d 125, 126 (5th Cir. 1974). *See generally* Note, *The Petite Policy: An Example of Enlightened Prosecutorial Directory,* 66 GEO. L.J. 1137 (1978). Conversely, the courts have consistently dismissed indictments brought in violation of the "Petite Policy" when the government acknowledges its error and seeks dismissal. *See, e.g.*, Rinaldi v. United States, 434 U.S. 22, 23 (1977); Petite v. United States, 361 U.S. 529, 530-31 (1960); Orlando v. United States, 387 F.2d 348, 349 (9th Cir. 1967).

257. *See, e.g.,* Redmond v. United States, 384 U.S. 264, 264-65 (1966); Spillman v. United States, 413 F.2d 527, 530 (9th Cir. 1969); Heath v. United States, 375 F.2d 521, 523 (8th Cir. 1967); Cox v. United States, 370 F.2d 563, 564 (9th Cir. 1967).

258. Morton v. Ruiz, 415 U.S. 199, 235 (1974); *see* Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959); Service v. Dulles, 354 U.S. 363, 387-88 (1957); United States *ex rel.* Accardi v.

agency's general guidelines are designed to produce uniformity in official conduct and to prevent arbitrary deviation from accepted practices.[259] This same factor suggests that a prosecutor's noncompliance with written regulations should constitute an equal protection violation.[260]

There may be significant disadvantages from a policy standpoint, however, in permitting judicial consideration of written guidelines. Most importantly, the courts' willingness to find equal protection violations when prosecutors deviate from guidelines would discourage the adoption of written guidelines. Indeed, it might dampen the trend toward internal control over arbitrary charging decisions.[261] Judicial consideration of guidelines also would encourage prosecutors who adopt guidelines to draft nonspecific provisions and to include open-ended exceptions that would make the finding of a violation less likely. Prosecutors could circumvent guidelines by

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Shaughnessy, 347 U.S. 260, 265-68 (1954); *cf.* Yellin v. United States, 374 U.S. 109, 116 (1963) (congressional committee must follow own rule when rights of individuals are affected). Without always citing the Supreme Court decisions, a few courts of appeals have required agencies to follow their own procedures. United States v. Leahey, 434 F.2d 7, 10-11 (1st Cir. 1970); United States v. Heffner, 420 F.2d 809, 811-12 (4th Cir. 1969). *But see* United States v. Caceres, 440 U.S. 741, 749-51 (1979); Garrett v. Mathews, 625 F.2d 658, 660 (5th Cir. 1980); United States v. Choate, 619 F.2d 21, 23 (9th Cir.), *cert. denied*, 101 S. Ct. 354 (1980); United States v. Meier, 607 F.2d 214, 217-18 (8th Cir. 1979), *cert. denied*, 101 S. Ct. 1658 (1980); United States v. Espinoza-Soto, 476 F. Supp. 364, 365 (E.D.N.Y. 1979), *aff'd*, 633 F.2d 207 (2d Cir. 1980). The Supreme Court recently limited and perhaps questioned the validity of its earlier decisions when it held in *Caceres* that an IRS agent's failure to follow IRS electronic surveillance regulations before recording a taxpayer's conversations constituted neither a denial of equal protection nor of due process. The Court reasoned that the defendant could not show that he relied on the regulations or that the breach affected his conduct. 440 U.S. at 753. The Court, however, cited with approval its earlier decisions in *Morton, Vitarelli, Dulles, and Shaughnessy.* The situation in *Caceres* is distinguishable from cases of written guidelines that provide specific criteria for the charging decision. In *Caceres,* the regulation violated by the prosecutor required him to obtain prior Justice Department approval before monitoring taxpayers' conversations. *Id.* at 752. In disposing of the equal protection claim, the Court stated:

> No claim is, or reasonably could be, made that if the IRS had more promptly addressed this request to the Department of Justice, it would have been denied. As a result, any inconsistency of which respondent might complain is purely one of form, with no discernible effect in this case on the action taken by the agency and its treatment of the respondent.

Id. Obviously, the prosecutor's violation of a substantive guideline will have more than a "discernible effect" on the treatment of the accused.

259. Morton v. Ruiz, 415 U.S. 199, 236 (1974).

260. The Supreme Court in United States v. Nixon, 418 U.S. 683 (1974), confirmed the binding effect of regulations upon the executive's power to enforce the law and to prosecute suspects. By regulation, the Attorney General had granted certain powers to an appointed Special Prosecutor, including "plenary authority" to conduct investigations and litigation related to the Watergate offenses. The regulation specifically gave the Special Prosecutor authority to seek evidence and to contest claims of executive privilege. The Supreme Court held that even though the Attorney General could theoretically amend or revoke the regulation, as long as it remained in force "the Executive Branch is bound by it." *Id.* at 696.

261. *See* Note, *The Petite Policy: An Example of Enlightened Prosecutorial Discretion,* 66 GEO. L.J. 1137, 1150 (1978) (discussion of these disadvantages as they apply to Justice Department internal policies).

"falsely pigeonholing" a case to justify a predetermined charging decision.[262] Perhaps even more troubling, publication of written guidelines might reduce the deterrent impact of the criminal law by indicating to potential violators that certain offenses would not be prosecuted.[263]

Even though most guidelines state that they are not binding on the prosecutor, they may still be used in two ways by defendants claiming discriminatory prosecution. First, when a defendant who the guidelines indicate should not have been prosecuted produces evidence of invidious discrimination or of bad faith, the prosecutor's failure to grant the leniency recommended by the standards should establish a prima facie case of unconstitutional discrimination. Second, even if the defendant is unable to prove invidious or bad faith discrimination, the prosecutor should still have the burden of coming forward with a legitimate reason for deviation from the written guidelines.

When the defendant shows that the prosecutor has ignored guidelines, but does not establish prima facie proof of an invidious or bad faith motive, there is apparently no constitutional basis for requiring anything more of the prosecutor than a rational explanation for the charging decision.[264] Arguably, the court may determine whether the prosecutor's explanation is real or merely an after-the-fact rationalization and also whether the justification is reasonably based upon factors that legitimately may be considered by a prosecutor in the exercise of his charging discretion.[265] In recent equal protection challenges to legislation, some Supreme Court Justices have indicated that the government should not be able to defend a classification on the basis of an after-the-fact rationalization, but instead should be limited to the original purpose of the legislation.[266] This approach may be helpful when discriminatory prosecution is claimed

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262. *See* Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion,* 24 STAN. L. REV. 1036, 1076-77 (1972).

263. *See id.*

264. *See* Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law,* 1973 U. ILL. L.F. 88, 106. Professor Givelber argues that the burden should shift to the prosecutor to offer a rational explanation for prosecution whenever the defendant shows that only a few of the known violators have been prosecuted. *Id.* at 106. This approach would eliminate the need for a prima facie showing of invidious or bad faith selection.

265. *See e.g.,* Muhammed Ali v. Division of State Athletic Comm'n, 316 F. Supp. 1246 (S.D.N.Y. 1970). The court held that New York violated Muhammed Ali's equal protection rights by denying him a boxing license. Although Ali had been convicted for refusing to serve in the armed forces, other convicted felons had been granted licenses. The Commissioner argued that the denial was justified because Ali's conviction was recent and had "not yet spent its full force," so that Ali was not yet rehabilitated. *Id.* at 1251. The court rejected the state's after-the-fact rationalization for the special treatment of Ali and instead looked to the original motives.

Due process cases also support the proposition that courts should consider only those purposes behind a challenged governmental action that the government articulates during the course of litigation. *See, e.g.,* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641 n.9 (1974); Griswold v. Connecticut, 381 U.S. 479, 505 (1964) (White, J., concurring). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §16.30, at 1085-88 (1978).

266. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 653 (Powell, J., concurring); Eisenstadt v. Baird, 405 U.S. 438, 448-49 (1972). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16.30, at 1085-88 (1978).

because courts can more easily determine the original motives behind actions of prosecutors and other administrators than behind those of legislators.[267]

A requirement that prosecutors state their reasons for selecting one defendant for prosecution while allowing others to go unprosecuted would also have desirable policy effects.[268] The prosecutor's reasons for prosecuting or declining prosecution generally are not made public. Disclosure of these reasons as a part of the justification process would make prosecutors more politically accountable for their charging decisions.

Ultimately, whether the judiciary will be able to use written guidelines to enforce effectively the equal protection clause as it applies to the charging decision will depend upon the cooperation of prosecutors and legislatures.[269] If the only guidelines adopted are vague and general, they will be of little help. If courts are to apply the equal protection clause to prosecutors in cases other than those concerning class-based discrimination or extreme bad faith, legislatures and prosecutors must make a policy decision that the benefits of reducing prosecutorial arbitrariness outweigh the costs.

V. Judicial Barriers to Suits to Compel Prosecution: A Postscript

Decisions not to prosecute that are motivated by unconstitutional considerations might form the basis for citizens' suits to compel the filing of criminal charges. Arguably, all citizens have an interest in the enforcement of the criminal law.[270] Despite the stake that all citizens, and particularly victims of crime, have in prosecution, federal

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267. *See* note 171 *supra* and accompanying text; Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law,* 1973 U. ILL. L.F. 88, 120 n.126.

268. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 228 (2d ed. 1979); Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making,* 13 AM. CRIM. L. REV. 473, 505 (1976); Noll, *Controlling a Prosecutor's Screening Discretion Through Fuller Enforcement,* 29 SYRACUSE L. REV. 697, 708 n.66 (1978).

269. One can argue that due process requires the prosecutor to promulgate written guidelines. Various federal courts have held that the due process clause requires parole boards and administrative agencies dispensing federal grants to adopt written standards. *See, e.g.,* Franklin v. Shields, 569 F.2d 784, 792-93 (4th Cir. 1977) (parole board), *cert. denied,* 435 U.S. 1003 (1978); White v. Roughton, 530 F.2d 750, 753-54 (7th Cir. 1976) (administrative agency); Holmes v. New York City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968) (same); Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1140 (D.N.H. 1976) (same). *See generally* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 128-40 (2d ed. 1979).

270. *See* Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1669, 1739 (1975). Professor Stewart identifies both "material" and "ideological" interests that a citizen has in the enforcement of laws. The material interest is the "social security that underlies cooperative productivity and individual tranquility." The ideological interest is "the principle that the law is to be obeyed for its own sake." *Id. See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220-21 (1974); United States v. Richardson, 418 U.S. 166, 179-80 (1974).

and state courts almost universally have rejected attempts to compel prosecutors to file criminal charges[271] or even to investigate alleged crimes.[272] Regardless of whether the relief requested has been a writ of mandamus,[273] an injunction,[274] or the substitution of a new prosecutor,[275] actions brought by individuals or groups[276] disgruntled by the failure to prosecute have been unsuccessful. Judicial review has been denied when the failure to prosecute has entailed a specific offense,[277] a systematic pattern of discriminatory nonenforcement,[278] or a total lack of enforcement of a statute.[279]

The refusal of courts to entertain actions to compel the filing of charges is based on the judicial barrier of standing[280] and on the re-

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271. *See, e.g.,* Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973); United States v. Cowan, 524 F.2d 504, 514 (5th Cir. 1975); Powell v. Katzenbach, 359 F.2d 234, 234 (D.C. Cir. 1965), *cert. denied,* 384 U.S. 906 (1966); United States v. Cox, 342 F.2d 167, 171-72 (5th Cir.), *cert. denied,* 381 U.S. 935 (1965); Ackerman v. Houston, 45 Ariz. 293, 296-97, 43 P.2d 194, 195 (1935); Brack v. Wells, 184 Md. 86, 90, 40 A.2d 319, 321 (1944); Manning v. Municipal Court, 372 Mass. 315, 317, 361 N.E.2d 1274, 1276 (1977). *But see Ex parte* Hayter, 16 Cal. App. 219, 225, 116 P. 370, 376 (1911); Commonwealth *ex rel.* Attorney General v. Hipple, 69 Pa. 9, 15 (1871).

Both the *Hayter* and *Hipple* cases presented highly unusual circumstances. In *Hayter,* the appellate court interpreted a state statute to allow a trial court to compel the prosecutor to proceed with new criminal charges after the trial court sustains the defendant's demurrer to the original charge. 16 Cal. App. at 225, 116 P. at 376. The court in *Hipple* granted the state attorney general a writ of mandamus to compel the county prosecutor to bring criminal actions in courts recently organized by the state legislature. 69 Pa. at 16. Neither case suggests that victims of crimes or other disgruntled citizens have a right to compel prosecution.

272. *See, e.g.,* Nader v. Saxbe, 497 F.2d 676, 680 (D.C. Cir. 1974); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 382 (2d Cir. 1973); Peek v. Mitchell, 419 F.2d 575, 578-79 (6th Cir. 1970). *But see* NAACP v. Levi, 418 F. Supp. 1109, 1116-17 (D.D.C. 1976).

273. *See, e.g.,* Powell v. Katzenbach, 359 F.2d 234, 234 (D.C. Cir. 1965), *cert. denied,* 384 U.S. 906 (1966); Hourigan v. Carter, 478 F. Supp. 16, 17 (N.D. Ill. 1979); NAACP v. Levi, 418 F. Supp. 1109, 1112 (D.D.C. 1976); Moses v. Kennedy, 219 F. Supp. 762, 763 (D.D.C. 1963); State *ex rel.* Kurkierewicz v. Cannon, 42 Wis. 2d 368, 384-85, 166 N.W.2d 255, 263 (1969).

274. Linda R.S. v. Richard D., 410 U.S. 614, 614-15 (1973); Nader v. Saxbe, 497 F.2d 676, 677 (D.C. Cir. 1974).

275. *See, e.g.,* Inmates of Attica Correctional Facility v. Rockefeller, 447 F.2d 375, 382 (2d Cir. 1973); State *ex rel.* Spencer v. Criminal Court, 214 Ind. 551, 557, 15 N.E.2d 1020, 1023 (1938). Further cases of unsuccessful attempts to obtain the appointment of a special prosecutor are cited in Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction,* 65 YALE L.J. 209, 212 n.14, 215-16 nn.32-34 (1955). Because courts are unlikely to appoint a special prosecutor when faced with claims of discriminatory non-enforcement, this procedure is not discussed in detail in this article.

276. *See, e.g.,* O'Shea v. Littleton, 414 U.S. 488, 490-91 (1974); Nader v. Saxbe, 497 F.2d 676, 677 (D.C. Cir. 1974); NAACP v. Levi, 418 F. Supp. 1109, 1111 (D.D.C. 1976).

277. *See, e.g.,* Linda R.S. v. Richard D., 410 U.S. 614, 615 (1973); United States v. Stagman, 446 F.2d 489, 494 (6th Cir. 1971); United States v. Cox, 342 F.2d 167, 172 (5th Cir.), *cert. denied,* 381 U.S. 935 (1965); Manning v. Municipal Court, 372 Mass. 315, 317, 361 N.E.2d 1274, 1276 (1977).

278. *See* Peek v. Mitchell, 419 F.2d 575, 577 (6th Cir. 1970).

279. *See, e.g.*, Nader v. Saxbe, 497 F.2d 676, 681-82 (D.C. Cir. 1974); Hourigan v. Carter, 478 F. Supp. 16, 16-17 (N.D. Ill. 1979).

280. *See, e.g.*, Linda R.S. v. Richard D., 410 U.S. 614, 616-17 (1973); Moses v. Kennedy, 219 F. Supp. 762, 766 (D.D.C. 1963); Pugach v. Klein, 193 F. Supp. 630, 635 (S.D.N.Y. 1961); United States v. Brokaw, 60 F. Supp. 100, 101 (S.D. Ill. 1945); Manning v. Municipal Court, 372 Mass. 315, 317-18, 361 N.E.2d 1274, 1276 (1977). In a few unique circumstances, the existence of standing to compel prosecution may not be seriously debatable. For example, in United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965), the members of a grand jury that had returned an indictment sought an order compelling the United States Attorney to prosecute the case. The issue of standing was never raised. Had it been, the grand jury members presumably would have been able to allege injury to their legal rights, even though the court stated that the

strictions imposed by mandamus actions.[281] Both obstacles to judicial review rest upon a mixture of practical considerations and separation of powers concerns similar to those that make courts reluctant to accept the discriminatory enforcement defense.[282] Unlike discriminatory prosecution cases, however, decisions denying standing to those seeking to compel the filing of criminal charges seem consistent with recent Supreme Court pronouncements.

A. Standing

In suits to compel prosecution, as in other litigation, a party has standing if he has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult . . . questions."[283] In recent years the Supreme Court has used a two-pronged test for standing. First, the plaintiff must allege "that the challenged action has caused him injury in fact, economic or otherwise," and second, "the interest sought to be protected by the complainant [must be] arguably within the zone of interests . . . protected or regulated by the statute or constitutional guarantee in question."[284] As part of the "injury in fact" requirement, the injury sustained by the litigant must result from the defendant's actions and the court must be able to redress the alleged

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constitutional requirement of indictment was "not to be read as conferring on or preserving to the grand jury, as such, any rights or prerogatives." *Id.* at 170. Obviously, the importance of *Cox* as a source of standing to challenge discriminatory non-enforcement of laws is extremely limited.

281. *See, e.g.,* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973); Moses v. Kennedy, 219 F. Supp. 762, 765 (D.D.C. 1963); Pugach v. Klein, 193 F. Supp. 630, 634 (S.D.N.Y. 1961); United States v. Brokaw, 60 F. Supp. 100, 101 (S.D. Ill. 1945). *But see* NAACP v. Levi, 418 F. Supp. 1109, 1115-17 (D.D.C. 1976).

282. *See* notes 125-43 *supra* and accompanying text. In Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973), the court of appeals expressed its practical fears concerning the grant of standing to citizens challenging decisions not to charge: "Any person, merely by filing a complaint containing allegations in general terms of unlawful failure to prosecute, could gain access to the prosecutor's file and the grand jury's minutes, notwithstanding the secrecy normally attached to the latter by law." *Id.* at 380.

The reasons courts refuse to issue writs of mandamus to compel prosecution include: the traditional deference afforded the prosecutor in charging, *see, e.g., id.* at 379; United States v. Brokaw, 60 F. Supp. 100, 101 (S.D. Ill. 1945); State *ex rel.* Kurkierewicz v. Cannon, 42 Wis. 2d 268, 283-84, 166 N.W.2d 255, 260-61 (1969); the separation of powers doctrine, *see, e.g.*, Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d at 379-80; Moses v. Kennedy, 219 F. Supp. 762, 764-65 (D.D.C. 1963); Pugach v. Klein, 193 F. Supp. 630, 634-35 (S.D.N.Y. 1961); the multiplicity of factors that may influence the charging decision, *see, e.g.,* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d at 380; Moses v . Kennedy, 219 F. Supp. at 765; Pugach v. Klein, 193 F. Supp. at 634-35; and the problems inherent in supervising prosecutorial discretion, *see, e.g.,* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d at 380; Moses v. Kennedy, 219 F. Supp. at 765.

283. Baker v. Carr, 369 U.S. 186, 204 (1962).

284. Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 153 (1970).

injuries through the exercise of its remedial powers.[285] This interpretation appears fatal to those challenging decisions not to prosecute because even victims of crimes cannot show that enforcement of the law would prevent their future victimization.

The Supreme Court held in *Linda R.S. v. Richard D.*[286] that individuals do not have standing to challenge the failure to prosecute another party. The plaintiff in that case was an unwed mother who received no child support payments from the putative father. The state of Texas refused to prosecute the father under a criminal statute requiring parents to support their children, because state courts had interpreted the statute to apply only to parents of legitimate children and to impose no duty on parents of illegitimate children. Contending that this interpretation of the statute deprived her of equal protection of the law, the unwed mother sought an injunction forbidding the prosecutor from declining prosecution. The Court held that the unwed mother lacked standing because she could not show a "sufficient nexus" between her failure to receive child support payments and the failure to prosecute the father. In broad language, the majority opinion stated that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[287]

The Court's holding in *Linda R.S.* is questionable. As Justice White wrote in his dissenting opinion, "our civilization has assumed that the threat of penal sanctions had something more than a 'speculative' effect on a person's conduct."[288] Indeed, the very enactment of the support statute reflected an assumption "that criminal sanctions are useful in coercing fathers to fulfill their support obligations. . . ."[289]

The causal link between the injury to the plaintiff and the lack of prosecution was stronger in *Linda R.S.* than it is likely to be when a victim of a "one-shot" crime or a citizen generally concerned with law enforcement seeks standing. Because the failure to provide child support to an unwed mother is by its nature a continuing crime, enforcement of the statute at any point would have likely deterred the putative father from continued non-support. Despite the seemingly broad holding in *Linda R.S.,* lower federal courts have not interpreted the Supreme Court's decision as totally foreclosing the possibility that citizens may have standing to challenge a failure to prosecute.[290] The Supreme Court, however, has not spoken on the

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285. Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 74 (1978); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976).

286. 410 U.S. 614 (1973).

287. *Id.* at 619.

288. *Id.* at 621 (White, J., dissenting).

289. *Id.*

290. For example, in Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973), the court, before finding it unnecessary to "resolve troublesome questions" of standing, went to great lengths to distinguish factually the link between non-enforcement and the injury to plaintiffs from that in *Linda R.S.*. *Id.* at 378. The plaintiffs were inmates who sought to have prison officials prosecuted. They not only had "suffered direct physical injury at the hands of those they [sought] to have prosecuted" but would have continued to be injured absent judicial intervention. *Id.*. The

issue since *Linda R.S.* Considering that the causal link between the injury and non-prosecution appears to have been stronger in *Linda R.S.* than in the subsequent cases, one wonders whether the Supreme Court agrees with the lower courts' assessment of its decision.

If suits to compel prosecution are to provide remedies for unconstitutional discrimination in the charging decision, there must be fundamental changes in the Supreme Court's standing requirements. The nexus or causal link that the Supreme Court found lacking in *Linda R.S.* has been criticized as a "manipulative concept" which provides "few effective checks on a court's discretion . . . to decline to adjudicate difficult cases."[291] The denial of standing to those seeking to compel prosecution may reflect either judicial unwillingness to resolve the difficult issues raised by challenges to the exercise of prosecutorial discretion, or the courts' "unprincipled effort to screen

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court found this to be a distinguishing fact. "Where a successful prosecution, however, would serve to deter the accused from harming the complainant rather than merely supply a penal inducement to perform a duty to provide assistance, the complaining person does show a more direct nexus between his personal interest in protection from harm and prosecution." *Id.*

Similarly, in Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974), the court denied plaintiffs standing because the statute the plaintiffs wished to have enforced had been repealed since the filing of the case. The court did state, however, that "we do not read *Linda R.S.* to preclude standing in all such suits." *Id.* at 681. In a footnote, the court prophesized that in another case the Supreme Court might find standing:

> In finding 'only speculative' the possibility that a particular person once jailed will pay child support after his release, the [*Linda R.S.*] Court did not necessarily classify as speculative the possibility that improved enforcement of a statute would increase compliance by the generality of those subject to it. Thus one injured by a general non-compliance, rather than by the non-compliance of a particular individual, might still have standing to challenge the deficient enforcement policy responsible for the non-compliance.

Id. at 681 n.27.

Finally, one federal court has granted a group of individuals standing to challenge the alleged non-enforcement of federal laws. In NAACP v. Levi, 417 F. Supp. 1109 (D.D.C. 1976), the district court granted standing to the National Association for the Advancement of Colored People and to the widows and minor children of a black man shot to death while in the custody of Arkansas law enforcement officers. The plaintiffs sought a court order compelling federal authorities to investigate the incident fully. In finding an "injury in fact," the court noted that plaintiffs had "an interest in free access to and an even-handed application of the legal and criminal justice procedures of the federal government." The plaintiffs were injured by the government's failure to undertake a meaningful investigation. *Id.* at 1114. Further, the court held that the "nexus" requirement for standing was satisfied.

> Since the N.A.A.C.P. has long been committed to the civil rights struggle and because the [deceased's family members] have an obvious desire to vindicate the rights of the deceased husband and father, the 'logical nexus' between the plaintiffs' status and the government action from which they seek relief is also present.

Id. at 1115. The district court reached this conclusion even though the crime in *Levi*, unlike that in *Linda R.S.*, did not continue after the trial. The causal link between failure to prosecute and injury to the victim of a crime appears to be much stronger in a case such as *Linda R.S.* in which the victim continues to suffer injury from the alleged violation of the law.

291. Comment, *The Supreme Court 1975 Term*, 90 HARV. L. REV. 56, 212 (1976).

from their dockets claims they substantively disfavor."[292] Insofar as the standing requirement calls for a personal stake to assure concrete adverseness,[293] however, at least victims of crimes seem to have a sufficient adversarial interest.[294] If courts would stop viewing constitutional challenges to the prosecutor's discretion as overwhelmingly difficult and would no longer "substantively disfavor" such claims, standing could be conferred upon those seeking to compel prosecution.

B. Requirements for Mandamus or Injunction

Even if a party is granted standing to seek a judicial order compelling prosecution, he still has to satisfy the stringent requirements for mandamus or mandatory injunction.[295] Under common law and by statute, mandamus is available only to compel an executive officer to perform a mandatory or ministerial duty.[296] Courts will not grant writs of mandamus to compel performance of discretionary acts.[297] Federal and state courts traditionally have refused to issue writs of mandamus to compel prosecution because the decision whether to prosecute is discretionary.[298]

Parties seeking orders compelling prosecution have advanced a wide variety of legal theories to circumvent the rule that mandamus will issue only in the case of a clear legal duty. Plaintiffs who have argued that the language of a particular criminal statute makes prosecution mandatory have been unsuccessful.[299] In other cases, plaintiffs have sought to compel prosecutors "to exercise their discretion to initiate prosecution,"[300] or to "compel a prudent investigation."[301]

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292. L. TRIBE, AMERICAN CONSTITUTIONAL LAW §3.21, at 93 (1978).

293. Baker v. Carr, 369 U.S. 186, 204 (1962).

294. When the crime is homicide, the close relatives of the victim should have standing. In addition, one court has indicated its willingness to extend standing further. In NAACP v. Levi, 417 F. Supp. 1109 (D.D.C. 1976), the court granted standing to a civil rights organization to challenge a failure to investigate the alleged homicide of a black citizen and to commence a prosecution. *See* note 290 *supra*. The court's extension of standing appears to have been reasonable.

295. In some claims against state officials under the 1964 Civil Rights Act, both writs of mandamus and injunctions are proper remedies. 42 U.S.C. §§ 1981, 1983 (1976). *See, e.g.,* Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969); Lankford v. Gelston, 364 F.2d 197, 201 (4th Cir. 1966); NAACP v. Thompson, 357 F.2d 831, 833 (5th Cir. 1966). Mandamus is available against federal officials under 28 U.S.C. § 1361 as well. 28 U.S.C. § 1361 (Supp. III 1979); *see* NAACP v. Levi, 418 F. Supp. 1109, 1117 (D.D.C. 1976).

296. *See, e.g.,* Miguel v. McCarl, 291 U.S. 442, 451-52 (1934); United States v. Walker, 409 F.2d 477, 481 (9th Cir. 1969); Apfel v. Mellon, 33 F.2d 805, 808 (D.C. Cir.), *cert. denied*, 280 U.S. 585 (1929); Haslam v. Morrison, 113 Utah 14, 21, 190 P.2d 520, 524 (1948).

297. This is primarily because of the court's definition of ministerial. Several courts have stated that a duty to act is ministerial only if the duty is devoid of the exercise of judgment or discretion. *See, e.g.*, ICC v. New York, N.H. & H.R.R., 287 U.S. 178, 204 (1932); United States v. Walker, 409 F.2d 477, 481 (9th Cir. 1969); Clackamus County v. McKay, 219 F.2d 479, 489 (9th Cir. 1954); Nixon v. Hampton, 400 F. Supp. 881, 885 (E.D. Pa. 1975).

298. *See* note 281 *supra*.

299. *See* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 381 (2d Cir. 1973).

300. Nader v. Saxbe, 497 F.2d 676, 679 (D.C. Cir. 1974). Although the District of Columbia Circuit ultimately denied standing, the court indicated greater willingness to review fixed standards of prosecutorial enforcement than failures to charge in specific cases. *Id.* at 677; *accord*, Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973); Littleton v. Berbling, 468 F.2d 389, 411-12 (7th Cir. 1972), *rev'd on*

When plaintiffs have alleged an abuse of discretion or a systematic pattern of blatant and arbitrary discrimination by the prosecutor, federal courts occasionally have ordered the prosecutor to investigate the possibility of filing criminal charges. For example, in *NAACP v. Levi,*[302] the district court held that the laggard and cursory investigation in progress constituted an abuse of discretion. The court ordered law enforcement officials to investigate thoroughly a civil rights violation.[303]

A few federal courts have indicated that if standing problems are overcome, they will consider a writ of mandamus or an injunction an appropriate remedy to compel the prosecutor to enforce the laws when lack of enforcement constitutes systematic discrimination on a constitutionally impermissible basis.[304] Once again, the narrow cir-

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other grounds sub nom. O'Shea v. Littleton, 414 U.S. 488 (1974). In *Nader,* plaintiffs challenged the Justice Department's policy of prosecuting under the Federal Corrupt Practices Act only those individuals referred to the Department by the clerk of the House of Representatives or by the Secretary of the Senate. The court of appeals expressed its willingness to review the policy:

> The instant complaint does not ask the court to assume the essentially Executive Function of deciding whether a particular alleged violator should be prosecuted. Rather, the complaint seeks a conventionally judicial determination of whether certain fixed policies allegedly followed by the Justice Department and the United States Attorney's office lie outside the constitutional and statutory limits of prosecutorial discretion.

Id. at 679.

In a footnote, the court suggested that the prosecutor's discretion in declining to enforce a statute is reviewable by the courts.

> It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review. The law has long recognized the distinction between judicial usurpation of discretionary authority and judicial review of the statutory and constitutional limits to that authority.

Id. at 679-80 n.19 (citations omitted).

The apparent willingness of some courts to review fixed prosecution standards becomes increasingly important with the recent promulgation by the Department of Justice of standards governing the discretionary acts of federal prosecutors. UNITED STATES DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION (July 1980), *reprinted in* 27 CRIM. L. REP. (BNA) 3277-92 (1980).

301. NAACP v. Levi, 418 F. Supp. 1109, 1115 (D.D.C. 1976).

302. 418 F. Supp. 1109 (D.D.C. 1976).

303. *Id.* at 1117. The district court stated:

> When it is claimed that federal officials are acting contrary to law, abusing their discretion and acting outside the limits of their permissible discretion, and when officials' conduct extends beyond any rational exercise of discretion, even though it is within the letter of the authority granted, mandamus affords the appropriate judicial relief.

Id.

The writ of mandamus that issued, however, did not compel prosecution, but instead mandated a prudent investigation. *Id.* at 1115.

304. *See, e.g.,* Nader v. Saxbe, 497 F.2d 676, 679 (D.C. Cir. 1974); Littleton v. Berbling, 468 F.2d 389, 410 (7th Cir. 1972), *rev'd on other grounds sub nom.* O'Shea v. Littleton, 414 U.S. 488 (1974); NAACP v. Levi, 418 F. Supp. 1109, 1117 (D.C. Cir. 1976). The plaintiffs in *Littleton* alleged that the prosecutor refused to prosecute white citizens for assaults and batteries committed against black citizens. The Seventh Circuit held that the alleged pattern of discrimination, even though entailing prosecutorial discretion, was subject to review and reversal for abuse of discretion. The court concluded that an

cumstances under which the courts have indicated their willingness to intervene in the prosecutor's charging decision parallel the limited grounds that comprise the discriminatory prosecution defense.

If a failure to charge violates the equal protection clause, a writ of mandamus should issue to compel prosecution. The judicial contention that mandamus will not lie because the decision to prosecute is discretionary is circular. If the courts hold that the prosecutor has a duty not to decline prosecution on a constitutionally impermissible basis, the decision not to prosecute for these reasons is no longer discretionary. A writ of mandamus to compel prosecution should be available to those litigants who demonstrate that the prosecutor would have filed charges if he had not considered the constitutionally illicit factor.[305]

C. Judicial Remedies When Prosecution is Declined

The questions of how to prove that an unconstitutional motive played a role in the prosecutor's charging decision and what the effect of such a motive should be, have been considered only in the context of the discriminatory prosecution defense. These issues have not arisen in suits by victims of crime or other citizens aggrieved by a decision not to prosecute because these potential litigants have been unable to meet the threshold requirements for standing and mandamus.[306] If these barriers were removed so that victims or other aggrieved citizens could bring suit to compel prosecution, the courts would have to ascertain the motives behind the charging decision and determine the effect of an unconstitutional motive.

Even if the Supreme Court loosened the "nexus" requirement that accounted for the denial of standing in *Linda R.S.*, a mere allegation of an injury from a violation of the law would not be sufficient in itself to confer standing. The litigant also would have to allege a constitutional violation by the prosecutor. The plaintiff could assert that the decision not to prosecute was based in "substantial part" on race, religion, or the desire to prevent the exercise of a constitutional

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injunction mandating non-discriminatory enforcement was both appropriate and preferable to reliance on the assumption that a defense of discriminatory enforcement would ultimately deter the discrimination. 468 F.2d at 414. The precedential value of *Littleton* is questionable. Although the prosecutor did not appeal the mandamus action, judges who were defendants in related claims did appeal. The Supreme Court reversed the judgment against them on the ground that the plaintiffs lacked standing. O'Shea v. Littleton, 414 U.S. 488, 493 (1974).

305. A more difficult issue is what the judicial response should be when a constitutionally impermissible motive is one of several reasons for declining to file a criminal charge. In Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974), the court indicated that "to mandamus a particular prosecution, a court would have to determine that no legitimate consideration informed the prosecutor's decision not to prosecute the individual in question." *Id.* at 679 n.18. This conclusion does not appear warranted when a litigant proves not only that discrimination on the basis of race, religion or a desire to chill the exercise of a constitutional right played a "substantial role" in the decision not to charge, but also that a contrary decision would not have been reached absent consideration of the impermissible factor. For a full discussion of this issue as it applies to the discriminatory prosecution defense, see notes 217-43 *supra* and accompanying text.

306. *See* notes 270-305 *supra* and accompanying text.

right.[307] Such constitutionally impermissible factors might affect the charging decision either through favoritism shown to the alleged suspect, or through prejudice against the victim of the alleged crime. Unless the prosecutor could show that the decision not to charge would have been made without consideration of the impermissible factor, the appropriate remedy would be to compel the filing of charges.

A victim or other party granted standing could also establish a prima facie equal protection violation by showing that the prosecutor failed to file charges even though the prosecutor's written guidelines indicated that under the circumstances charges should be filed.[308] The prosecutor would then have the burden of showing some legitimate reason for the decision not to charge.

VI. Conclusions

Judicial review of charging decisions on equal protection grounds obviously raises troublesome evidentiary and constitutional problems. The difficulty of these issues plays a significant role in the courts' traditional reluctance to review the charging decision and may account for the de facto alteration in the substantive meaning of the equal protection clause as it applies to prosecutors. Prosecutors are not required either to treat like cases in a like manner or to rationally distinguish cases in which criminal charges are filed from those in which prosecution is declined.

The courts have avoided constitutional scrutiny of the charging decision in three ways. In cases in which victims of crimes or disgruntled citizens allege that there is an unconstitutional motive behind a prosecutor's decision not to file charges and seek to compel the filing of criminal charges, courts have erected the barriers of standing and the difficult requirements for mandamus actions. Second, when a defendant charged with a crime claims unequal treatment in the charging process, the courts have held that such unequal treatment does not constitute a constitutional violation unless the filing of charges is motivated by considerations of race, religion, or a desire to prevent the exercise of constitutional rights. Unequal treatment on other grounds is not a matter of judicial concern. Finally, even when the defendant alleges that the selection for prosecution has been made on the basis of race, religion, or a desire to chill the exercise of constitutional rights, courts are reluctant to find that the facts in a given case prove an invidious motive on the part of a coordinate branch of government.

When the defendant alleges discriminatory prosecution, the avoid-

307. *See* notes 222-31 *supra* and accompanying text.
308. *See* notes 244-69 *supra* and accompanying text.

ance of close constitutional scrutiny seems ultimately attributable to the notion that judicial review of the charging decision is inappropriate and unfeasible. This premise may also play a role in decisions denying standing to aggrieved citizens seeking to compel prosecution. The idea that constitutional review of the charging decision is unrealistic, however, should not be axiomatic. This notion must be reevaluated in view of the considerable judicial experience gained in examining the motives of other government officials in equal protection cases and the motives of employers in employment discrimination cases under Title VII of the 1964 Civil Rights Act.

Judicial competence to ascertain when the prosecutor is motivated by impermissible considerations may now be achievable. Extensive case law describes the types of evidence that may be used to prove discriminatory motive and the quantum of evidence that is sufficient to meet the burden of proof. Further, the Supreme Court apparently has answered the question, in other contexts, of what effect a showing of impermissible motive should have on governmental action. Under *Mount Healthy City School District Board of Education v. Doyle*,[309] when a person aggrieved by an official decision shows that an unconstitutional motive played a "substantial part" in that decision, the government must prove that the decision would have been the same even if the unconstitutional motive had not been present.

Except in cases of discrimination on the basis of race, religion, or a desire to prevent the exercise of constitutional rights, the judiciary alone may be incapable of enforcing the equal protection clause. The mere lack of uniformity in prosecution does not constitute an equal protection violation. Even here, however, some judicial enforcement of the equal protection clause may be possible if prosecutors voluntarily outline the acceptable goals of prosecution by adopting written guidelines that specify the factors to be considered when making the charging decision. A deviation from such guidelines should establish a prima facie case of an equal protection violation.

The courts are even more reluctant to review, at the request of a victim of a crime or another aggrieved citizen, a decision by the prosecutor not to file criminal charges. Denial of standing to those seeking review is consistent with current standing doctrines. Once again, however, the courts' concerns about overseeing the prosecutor's charging procedures contribute to the erection of standing as a barrier. To the extent that standing is a flexible concept designed to assure that cases are suitable for adjudication, the procedural and evidentiary experience that courts will gain by reviewing charging decisions in discriminatory prosecution cases may encourage them to grant aggrieved parties standing to compel prosecution.

The most important step toward realistic judicial enforcement of the equal protection clause may be as subjective as heeding the century-old admonition of Judge Field: "[W]e cannot shut our eyes to matters of public notoriety and general cognizance. When we take

309. 429 U.S. 274, 287 (1977).

our seats on the bench we are not struck with blinders and forbidden to know as judges what we know as men . . . ."[310] The language of the fourteenth amendment and the important consequences resulting from the filing of criminal charges mandate that judicial review of the prosecutor's charging decision become something more than tilting at windmills.

310. Ho Ah How v. Nanan, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879) (No. 6,546).