# DISCRIMINATORY ENFORCEMENT OF THE LAW AS A DEFENSE TO A CRIMINAL PROSECUTION

Researched and Written

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I

DISCRIMINATORY ENFORCEMENT IS AVAILABLE AS A DEFENSE TO A CRIMINAL PROSECUTION

The case most frequently cited as being the origin of the defense of unconstitutionally discriminatory enforcement of the laws in preconviction criminal proceedings is Yick Wo v. Hopkins (1886), 118 U.S. 356, although itself a postconviction habeus corpus proceeding. The case involved a municipal ordinance regulating public laundries, which the court found to be enforced in a manner which unjustly and arbitrarily discriminated against persons of Chinese nationality. After so finding, the court went on to state in relevant part (118 U.S. at 373, 374):

> ...the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Later federal court cases continue to recognize the viability of the defense and propriety of raising it on behalf of the accused at some stage of a criminal proceeding,

whether it be through a pretrial motion to dismiss or motion to quash, or as a defense to the prosecution during trial. In Two Guys From Harrison-Allentown, Inc. v. McGinley (1961), 366 U.S. 582, the appellant, a corporation operating a large discount department store, brought suit in a Federal District Court to enjoin the allegedly discriminatory enforcement of a state Sunday closing law. In affirming the District Court's denial of injunctive relief, the Supreme Court assumed the availability of the defense of discriminatory enforcement at some stage of the criminal proceedings, and stated (366 U.S. at 588, 589), "...appellant contends that there are still pending prosecutions against its employees initiated as the result of the alleged discriminatory action. Since appellant's employees may defend against any such proceeding that is actually prosecuted on the ground of unconstitutional discrimination, we do not believe that the court below was incorrect in refusing to exercise its injunctive powers at that time."

The appellate courts of California have, since the handing down of the opinion in Two Guys, given full recognition to the availability of the defense of discriminatory enforcement in criminal prosecutions. In People v. Gray (2d Dist. 1967), 254 Cal.App.2d 256, 63 Cal.Rptr. 211, the appellants had been charged with violations of a section of the Los Angeles Municipal Code prohibiting the posting of signs or handbills on private property without the owner's consent. In dealing with the argument of the appellants

that the ordinance had been discriminatorily enforced against them, the court stated (254 Cal.App.2d at 263), "There is no particular need to review the somewhat inconsistent positions which have been taken by California appellate tribunals with respect to the availability of discriminatory enforcement of a penal law as a defense to a criminal action...We are quite satisfied that Two Guys From Harrison-Allentown v. McGinley, (citations omitted), disposes of all arguments, persuasive or otherwise, to the contrary."

## II

## THE PROPER METHOD OF RAISING THE DEFENSE OF DISCRIMINATORY ENFORCEMENT UNDER CALIFORNIA AUTHORITY HAS NOT BEEN CLEARLY SETTLED

Discriminatory enforcement of the law has been raised as a defense in criminal proceedings in various California cases both as a defense at trial and through a motion to dismiss. The propriety of the former course of action has been well established in several California decisions to be treated later in this section. The permissability of raising such a defense on a motion to dismiss remains unresolved.

In People v. Gray, supra, perhaps the latest treatment on the subject of the raising of the defense, the court elaborates on the issue in a footnote while pointing out in the body of the opinion that the question is not directly before the court on appeal. The opinion reads (254 Cal.App.2d at 264), "...the question of whether or not

the defense of discriminatory enforcement is properly triable to the jury is not before us. The parties simply proceeded to try it to the jury. The propriety of that course is therefore not involved on this appeal. Much can be said for either course of action."

The footnote to this comment (254 Cal.App.2d at 264 n.11) indicates that the appellate department of the superior court reviewing Gray decided the point following a New York intermediate appellate decision, People v. Utica Daw's Drug Co. (1962), 16 App.Div.2d 12, 225 N.Y.S.2d 128, 4 A.L.R.3d 393. That decision held that the issue is one properly triable to the court on a motion to dismiss, rather than to the jury. In holding that the defendant should be entitled to a dismissal of the prosecution as a matter of law if the burden resting on him is sustained, the court described the proper approach to the problem as follows (4 A.L.R.3d at 398):

> The claim of discriminatory enforcement should not be treated as a defense to the criminal charge, to be tried before the jury and submitted to it for decision, but should be treated as an application to the court for a dismissal or quashing of the prosecution upon constitutional grounds. Insofar as a question of fact may be involved, the court should take the evidence in the absence of the jury and should decide the question itself. If the court finds that there was an intentional and purposeful discrimination, the court should quash the prosecution, not because the defendant is not guilty of the crime charged, but because the court as an agency of government should not lend itself to a prosecution the maintenance of which would violate the constitutional rights of the defendant.

It should be pointed out that the highest appellate tribunal of the state of New York has ruled to the contrary, holding in People v. Walker (1964), 14 N.Y.2d 901, 200 N.E.2d 799,

that a defendant in a criminal prosecution should have a fair opportunity to establish the defense of discriminatory enforcement during trial.

The appellate courts of California have long held that the defense may be raised during trial. The case of People v. Van Randall (1956), 140 Cal.App.2d 771, 776, 296 P.2d 68, may be cited for the proposition that discriminatory enforcement is not properly raised on a motion to dismiss an indictment where the law itself is not alleged to be unconstitutional on its face. Cases which affirmatively hold that the question is properly raised as a defense during trial include People v. Winters (1959), 171 Cal.App.2d Supp. 876, 342 P.2d 538, and People v. Harris (1960), 182 Cal.App.2d Supp. 837, 5 Cal. Rptr. 852. In People v. Winters, the People appealed from an order of the municipal court dismissing "in the interest of justice" certain complaints involving gambling violations, where such dismissals were based solely on the extrajudicial belief of the presiding judge that the laws had been enforced in a discriminatory manner. In reversing the order of dismissal, the Appellate Department of the Superior Court of Los Angeles stated the following (171 Cal.App.2d Supp. at 883):

> Upon trial, defendants are entitled to present proof, if any, that there has been intentional discrimination based on any improper consideration. Discriminatory law enforcement, to constitute a want of due process of law, and a denial of the equal protection of the laws, must be intentional and purposeful. It will not be presumed, and before it can be established, proof thereof must be judicially made.

In People v. Harris, supra, another case involving

violations of gambling statutes, the judgment of conviction was reversed with directions ordering a new trial in which evidence upon the issue of the unconstitutional application of that statute should be allowed. In addition to citing People v. Winters for the statement set out above, the court further added (182 Cal.App.2d Supp. at 841), "An unconstitutional application of an ordinance is always available as a defense to prosecution for violation thereof."

Perhaps the confusion in this area could be resolved by analogizing the raising of this defense to that of the defense of entrapment. Entrapment is usually a question of fact, rather than of law. (See Masciale v. United States (1958), 356 U.S. 386) However, a defendant is entitled to a finding of entrapment as a matter of law when the undisputed evidence offered by the prosecution sustains such an allegation. (See Sherman v. United States (1958), 356 U.S. 369; Enciso v. United States (9th Cir. 1967), 370 F.2d 749) Conceivably, the defense of discriminatory enforcement could be established from facts offered by the prosecution, entitling the defendant to a dismissal as a matter of law. Such could be the case in a situation involving discriminatory selectivity in the decision to prosecute some individuals and not others, where all were arrested for committing the same offense.

In most cases, however, establishing the defense of discriminatory enforcement will involve offering comparative evidence of enforcement practices over a specific period of time. This evidence, as well as any conflicting evidence offered by the prosecution, is properly subject to dispute

and should be presented before the trier of fact for resolution.

## III

## PROOF OF DISCRIMINATORY ENFORCEMENT MUST BE OFFERED IN AN ADVERSARY PROCEEDING

In People v. Winters, supra, the court makes it clear that the defense of discriminatory enforcement must be put at issue and proof of same received in an adversary context. It is improper for a trial judge to interject the issue on his own motion and dismiss an action based on his own personal knowledge of discriminatory practices in law enforcement. In commenting upon the dismissals in the instant case, the court stated (171 Cal.App.2d Supp. at 882):

> A dismissal "in furtherance of justice", upon review, must show that there has been the exercise of a valid legal discretion amounting to more than the substitution of the predilections of a judge for the alleged predilections of the peace officers. It is an abuse of discretion for a judge without a hearing to hold there is deliberate or intentional unequal enforcement, since in all cases it is presumed that official duty has been fully and regularly performed by the public authorities until there is judicial proof to the contrary.

Additional authority on this point include People v. Flanders (1st Dist. 1956), 140 Cal.App.2d 765, 296 P.2d 13 and People v. Van Randall (1st Dist. 1956), 140 Cal. App.2d 771, 296 P.2d 68.

## IV

## CALIFORNIA COURTS APPARENTLY MAKE A DISTINCTION BASED ON THE NATURE OF THE OFFENSE INVOLVED WHEN PERMITTING THE DEFENSE OF UNCONSTITUTIONALLY DISCRIMINATORY LAW ENFORCEMENT

Many of the cases discussed under the above points testify to the availability of the defense of discriminatory law enforcement where the offense involved is a misdemeanor violation of a criminal statute of a regulatory or merely prohibitive nature. These offenses, properly denominated mala prohibita, have been held in several older California cases to be the only instances of criminal prosecution in which the defense will be allowed. The case of People v. Montgomery (2d Dist 1941), 47 Cal.App.2d 1, 117 P.2d 437, involved a felony conviction for the offense of pandering. On appeal, the defendant took exception to an instruction which provided that the failure to arrest and prosecute other violators of the same law was no defense, and contended that this violated equal protection provisions of the California and Federal constitutions. In rejecting the appellant's contention, the court stated (47 Cal.App.2d at 14):

> Appellant now in effect argues from this that equal protection should also be extended to any person to enable him to commit a crime on a basis of equality with all other persons. While all persons accused of crime are to be treated on a basis of equality before the law, it does not follow that they are to be protected in the commission of crime. It would be unconscionable, for instance, to excuse a defendant guilty of murder because others have murdered with impunity. The remedy for unequal enforcement of the law in such

instances does not lie in the exoneration of the guilty at the expense of society.

Further in the same paragraph the court adds, "In this connection, it should be stated that the only possible application of the doctrine of the Yick Wo case to a criminal prosecution would appear to be in an instance where a person was under prosecution for the commission of some otherwise harmless act which ordinarily had not theretofore been treated as a crime."

In People v. Darcy (1st Dist. 1943), 59 Cal.App.2d 342, 139 P.2d 118, the court rejected the argument of the appellant, an avowed communist, that he had been unconstitutionally discriminated against in a prosecution for perjury because of his political beliefs. Even assuming that evidence could be offered to support this contention, the court would not allow the defense on the basis of People v. Montgomery, supra, as the offense of perjury is a "crime per se". A strong dissent by Justice Peters, however, suggests that the court in Montgomery failed to distinguish between mere selective enforcement and enforcement which is both purposeful and based on a unjustifiable standard. He reasoned as follows (59 Cal.App.2d at 358, 359):

> It is of course, the law that a person committing a crime cannot claim an unlawful discrimination upon a mere showing that other persons or classes of persons have committed the same offense and have not been prosecuted therefor. The cases cited in the majority opinion clearly and properly establish that principle. But where that fact is shown plus an arbitrary, intentional and deliberate discriminatory intent on the part of the law enforcement officers, a different problem is presented. In such case, an accused has made out a case of denial of equal protection.

After discussing several recent federal Supreme Court decisions on the issue, Justice Peters concludes (59 Cal. App.2d at 360), "It is much better for society that an accused should go free than for our criminal processes to be polluted by prosecutions founded on predjudice against and hatred for the political beliefs of the accused."

Recent California decisions which deal with the issue of unconstitutionally discriminatory enforcement of the law make no mention of the malum in se/malum prohibitum distinction, even though the offenses involved may arguably be categorized as mala in se. In People v. Maldonado (2d Dist. 1966), 240 Cal.App.2d 812, 50 Cal.Rptr. 45, the defendants were convicted of violating Cal. Penal Code § 288(a) (oral copulation), an offense traditionally viewed as being inherently wrong or evil and involving moral turpitude. The defense was discussed with no mention of its availability being conditionally related to the nature of the offense. The same is true in the case of People v. Pearce (2d Dist. 1970), 8 Cal.App.3d 984, 87 Cal.Rptr. 814, in which the defendant appealed from felony convictions for possession of marijuana and sale of heroin. This recent trend in California case law seems to indicate that a distinction based on the nature of the offense involved is no longer valid, if indeed it be assumed that its validity was ever firmly established under California decisional authority.

V

THE BURDEN OF PROOF RESTS UPON THE DEFENDANT TO NEGATE A PRESUMPTION OF REGULARLY PERFORMED OFFICIAL DUTY

The defense of discriminatory enforcement of the law amounts to a claim by the defendant that the official duties of the law enforcement agency involved have not been performed in their regular or customary manner. This brings into consideration the presumption set forth in Cal. Evidence Code § 664 (West 1968), which provides in relevant part, "It is presumed that official duty has been regularly performed."

This presumption is one which affects the burden of proof (Cal. Evidence Code § 660). The effect of such a presumption, as explained in Cal. Evidence Code § 606 (West 1968) is to "impose upon the party against whom it operates the burden of proof as to the non-existence of the presumed fact."

VI

THE DEFENDANT MUST SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT OFFICIAL DUTY HAS NOT BEEN REGULARLY PERFORMED

The court in People v. Gray (1967), 254 Cal.App.2d 256, 63 Cal.Rptr. 211, makes it exceedingly clear that to place a burden of proof upon the defendant greater than that of establishing the existence or non-existence of a fact by a preponderance of the evidence, is to virtually nullify the

availability of the doctrine of Yick Wo v. Hopkins (1886), 118 U.S. 356, as a defense to a criminal prosecution (254 Cal.App.2d at 256). The reasoning of the court in so concluding is worthy of examination.

The court sets forth two primary reasons for not subjecting the defendant to a heavier burden of proof. The first is a regognition of the defense as a deterrent to police malpractice, and is articulated by the court as follows (254 Cal.App.2d at 266):

> Although no case which we have read says so in so many words, the recognition of discriminatory enforcement of a penal law as a defense to a criminal action is one of the few means the individual citizen has to force public officials to do their job properly. Perhaps one of the unarticulated reasons why discriminatory enforcement is recognized as a defense to a criminal prosecution is pretty much the same as the basis for the rule excluding illegally obtained evidence. We refuse to admit such evidence because we know of no other way to force law enforcement agencies to obey the law.

Secondly, the court is giving substantial weight to the recognition of the practical problems a defendant may encounter in securing evidence of discriminatory enforcement. The court states (254 Cal.App.2d at 266):

> Relative convenience in gathering the facts pertaining to a particular defense is frequently decisive in allocating the burden of proof. There is no reason why this consideration should not also affect the quantum of evidence required to sustain that burden. Evidence of discriminatory enforcement usually lies buried in the consciences and files of the law enforcement agencies involved and must be ferreted out by the defendant.

The case of People v. Harris (1960), 182 Cal.App.2d Supp. 837, 5 Cal.Rptr. 852, discusses the question of what type

of evidence will be held admissable on the issue of alleged discriminatory enforcement. The court on appeal, in holding as predjudicial error the trial court's rejection of certain evidence offered by the defense to show discriminatory enforcement of gambling statutes on the basis of race, ordered a new trial in which all of the following evidence would be admissable (182 Cal.App.2d Supp. at 839): 1) Racial population figures and percentages in the city of Pasadena; 2) Record of Pasadena gambling arrests for three consecutive years, showing the comparative number of whites and negroes arrested; 3) Existence of gambling for years in three all-white men's clubs, in which no arrests had ever been made; and 4) Routine police procedure as testified to by members of the police force, including arresting officers.

In People v. Gray, supra, (254 Cal.App.2d at 268), the court took judicial notice that between January 1 and July 31, 1966, the dockets of the Municipal Court of the Los Angeles Judicial District showed only two prosecutions for violations of the statute in question, while evidence showed that numerous violations, many of which were observed by the police, had occurred within the year. The court also indicated (254 Cal.App.2d at 267-268), that in certain cases it could exercise a power of independent review of the facts on appeal bearing on the issue of discriminatory enforcement.

VII

THE DEFENDANT MUST SHOW THAT THE ALLEGED DISCRIMINATORY ENFORCEMENT IS INTENTIONAL AND PURPOSEFUL

It is insufficient for the defendant merely to allege that the law in question is being selectively enforced against some individuals or groups of individuals while others who have committed the same offense are neither arrested nor prosecuted. A witness testifying on behalf of the Los Angeles Police Department in People v. Gray, supra, points out (254 Cal.App.2d at 256), that certain exigencies of law enforcement, such as the frequency of occurrence of various offenses at certain times and places, the seriousness of the offense, and availability of manpower, legitimately demand that the laws be selectively enforced.

Ample federal, as well as state authority exists to support this proposition. In Snowden v. Hughes (1944), 321 U.S. 1, 8, an action at law for alleged infringement of petitioner's civil rights in violation of the Fourteenth Amendment and certain federal statutes, the court stated, "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

In Oyler v. Boles (1962), 368 U.S. 448, 456, the Supreme Court rejecting petitioner's contention that the

selective enforcement of the West Virginia habitual offenders penalty statute was a denial of his right to equal protection said:

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

Evidence of selective enforcement is admissable, however, when offered in connection with other evidence in support of a contention of unconstitutional discriminatory enforcement. In People v. Utica Daw's Drug Co., supra, holding that the lower court erred in refusing to admit evidence of selective enforcement upon the authority of Snowden v. Hughes, supra, the court stated (4 A.L.R.3d at 397):

> In so ruling, the court misconstrued the cases upon which it relied. While it is true that they held that mere non-enforcement is insufficient of itself to establish discrimination, they did not hold that proof of non-enforcement is not admissable in evidence, in a case in which the defendant asserts that there had been intentional discrimination. It is true that in order to find a violation of the constitutional guarantee, the trier of the facts must be satisfied that there was intentional discrimination, and not mere laxity in enforcement, but in the effort to persuade the trier of the facts of the truth of its ultimate contention, the defendant is entitled to introduce evidence of non-enforcement as relevant evidence bearing upon that contention.

Substantial California authority exists to support the proposition that a defendant must plead and prove that any allegedly discriminatory enforcement of the law is intentional

and purposeful on the part of the law enforcement agency. Such authority includes People v. Winters (1959), 171 Cal. App.2d Supp. 876, 878, 342 P.2d 538; People v. Harris (1960), 182 Cal.App.2d Supp. 837, 842, 5 Cal.Rptr. 852; People v. Gray (1967), 254 Cal.App.2d 256, 63 Cal.Rptr. 211, which cites and affirms the statement from Snowden v. Hughes, supra, set out above, and Ganz v. Justice Court (1969), 273 Cal.App.2d 612, 78 Cal.Rptr. 348.

At least one case possibly indicates that a lesser showing than intentional and purposeful discrimination would be held sufficient to constitute a defense to a criminal prosecution. In People v. Maldonado (1966), 240 Cal. App.2d 812, 816, 50 Cal.Rptr. 45, the court stated, "In the absence of evidence that the authorities had or have a policy and practice of unfair and unequal law enforcement, the fact that some wrongdoers are proceeded against while others equally suspect are not, does not of itself, amount to illegal discrimination." It is questionable, however, whether the use of this language represents a departure from, or merely an attempted paraphrasing of the traditional requirements.

If discriminatory enforcement is being charged against the prosecution, it must be shown that the unequal enforcement is accompanied by "malicious intent" on the part of the prosecution, although it would seem that a showing of "administrative bias" against the particular defendant or defendants may also be sufficient. (People v. Pearce (1970), 8 Cal. App.3d 984, 988-989, 87 Cal.Rptr. 814.

## VIII

## THE DEFENDANT MUST SHOW THAT SELECTIVE ENFORCEMENT OF THE LAW IS BASED ON A STANDARD WHICH IS UNJUSTIFIABLE AND ARBITRARY

As was stated in Oyler v. Boles (1962), 368 U.S. 448, 456, in order for the defendant to sustain an allegation of discriminatory enforcement of the law, he must show that selectivity in enforcement is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."

The justifiability of a classification is traditionally tested according to the legitimate purposes behind the enactment of the legislation which is sought to be enforced. By far the majority of the cases in this area deal with legislative classification of individuals or groups of individuals which is evident upon the face of the legislation. However, the same standards should logically apply in those cases where selective enforcement is based upon classifiation solely as a matter of policy by the particular law enforcement agency.

As is pointed out in People v. Pearce, supra, (8 Cal. App.3d at 988), the purpose of the Equal Protection Clause is not to insure absolute equality of treatment, but rather "that all persons under like circumstances shall be given equal protection in the enjoyment of personal and civil rights." In the enforcement of any law, some classification will inevitably arise and will be considered constitutionally permissable. Such permissable classification arises when

a law enforcement agency enforces a particular law against those parties posing the largest threat to the state, or enforces the law in a manner which is the most efficient given the limited resources of that state agency. Some authority exists, however, for the proposition that a state agency may not justify a denial of equal protection by arguing that the alternative to a challenged classification would create a situation which might require more work on the part of the administering agency. The case, Williams v. San Francisco Unified School District (N.D. Cal. 1972), 340 F.Supp. 438, 445, involved an attack on a school district's mandatory maternal leave policy.

When a state legislature seeks to classify individuals for the purpose of enforcement of a state law, the validity of such a classification is measured by the relevance it has to the legitimate ends sought to be accomplished by the legislation. In McGowen v. Maryland (1960), 366 U.S. 420, 425-426, the United States Supreme Court dealt with the charge that a state Sunday closing law violated the Equal Protection Clause by prohibiting some retail sales activity on Sunday while exempting other instances of activity. In discussing legislative discretion in the enactment of laws which affect some groups of citizens differently than others, the court states:

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that in practice, their laws result in some inequality. A statutory discrimin-

ation will not be set aside if any state of facts reasonably may be conceived to justify it.

When a criminal prosecution is defended against on the grounds that a penal law fair on its face has been enforced in an unconstitutionally discriminatory manner, the law enforcement agency involved may respond by either attempting to show that some of the before-mentioned exigencies of law enforcement demand selectivity, or that selective enforcement bears some relevance to legitimate state interests. In regards to this latter response, as the state legislature did not feel compelled to express these interests by incorporating some classification into the law itself, a defendant attempting to show discriminatory enforcement based upon an arbitrary classification should not have as heavy a burden of proof in terms of the quantum of evidence required to sustain his contention, as he would have if attempting a facial attack upon the law itself. It may even be argued in such cases, where neither compelling needs of the law enforcement agency nor legitimate state interests appear to be involved as underlying grounds for selective enforcement, the burden of proof should be upon the law enforcement agency to justify its selective practice of enforcement.

This argument was given effect in a recent federal Court of Appeals case, United States v. Steele (9th Cir. 1972), 461 F.2d 1148. The defendant, together with three other individuals, was convicted in the United States District Court for the District of Hawaii of violating a statute governing the refusal or neglect to answer questions on a

census form. All four individuals prosecuted were vocal participants in a census resistance movement. The defendant attempted to establish at trial that he had been singled out for prosecution because of his public advocation of non-compliance with the census requirements. The government, when asked how many others in Hawaii had committed the same offense, replied that the information was not available. Yet the defendant himself located six other individuals who had completely refused on principle to complete the census forms, none of whom were recommended for prosecution. The Court of Appeals, faced with this evidence, concluded as follows (461 F.2d at 1152):

> The government offered no explanation for its selection of defendants, other than prosecutorial discretion. That answer simply will not suffice in the circumstances of this case. Since Steele had presented evidence which created a strong inference of discriminatory prosecution, the government was required to explain it away, if possible, by showing the selection process actually rested upon some valid ground.

## IX

## ARGUMENTS MAY BE MADE AGAINST THE NECESSITY OF SHOWING INTENTIONAL, PURPOSEFUL, OR BAD FAITH ENFORCEMENT

The majority of cases dealing with discriminatory enforcement of the law as violative of the Equal Protection Clause of the Fourteenth Amendment, clearly hold that this constitutional provision prohibits only those state actions which are "invidiously discriminatory" (i.e. intentionally comprising some wrongful purpose). In certain areas of activ-

ity, however, particularly those dealing with civil rights and racial discrimination, both federal and state courts have been willing to recognize as prohibited by the Equal Protection Clause activity which may have a discriminatory result even though lacking a discriminatory purpose. At least one state court of appeals has upheld this principle in a suit to enjoin enforcement of a penal statute in which it was alleged that the law was enforced in a discriminatory manner.

In Smith v. Texas (1940), 311 U.S. 128, the United States Supreme Court recognized that the Equal Protection Clause may be violated by activity which is not deliberately or intentionally discriminatory. The petitioner in this case, a Negro, claimed that members of his race were being systematically excluded in the selection of grand juries. The state denied any intentional and systematic discrimination against negro jurors and claimed that the failure to select negroes was because the commissioners in charge of selection were not personally acquainted with any members of that race. Giving the greatest possible weight to the state's evidence, the court concluded (311 U.S. at 132), "Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand."

This concept is reiterated in a more recent Supreme Court case, Burton v. Wilmington Parking Authority (1960), 365 U.S. 715. In this case, the appellant, also a Negro, sued in a state court for injunctive and declaratory relief against a restaurant which refused him service and the state agency which held the lease to the restaurant, claiming that refusal to serve him abridged his rights under the Equal Protection Clause of the Fourteenth Amendment. The state supreme court denied relief, and the case came before the U.S. Supreme Court on writ of certiorari. Recognizing that the state agency involved did not intend the discriminatory practices of the restaurant, the court still felt compelled to find liability on the state's part. The court reasons (365 U.S. at 725), "But no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."

This notion has found particularly strong application in the area of equal housing. In Banks v. Perk (N.D. Ohio 1972), 341 F.Supp. 1175, it was charged that action by a city in revoking permits to a federally assisted housing project for construction in predominantly white areas, denied non-caucasian tenants equal protection of the laws. The court accepted this argument, although no showing was made that city officials intended or designed any discrimination. The court states (341 F.Supp. at 1180):

If proof of a civil right violation depends on an

> open statement by an official of intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection. Therefore, in the absence of any supervening necessity or compelling governmental interest, any municipal action or inaction, overt, subtle or concealed, which perpetuates or reasonably could perpetuate discrimination, especially in public housing, cannot be tolerated.

In Norwalk Core v. Norwalk Redevelopment Agency (2d Cir. 1968), 395 F.2d 920, 931, another case dealing with equal housing, the court states:

> Equal protection of the laws means more than merely the absence of governmental action designed to discriminate;...we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

It should be stressed that the parties protesting violations of their constitutional rights in the above mentioned cases were not engaged in criminal activity. It may be argued, however, that the rationale of testing for violations of equal protection by focusing on the discriminatory results of state activity rather than the intent of state officials, should be extended to the enforcement of those criminal laws dealing with activity which is merely malum prohibitum. As society has little to fear from the commission of offenses having only minimal injurious consequences, public policy should not be allowed to become an obstacle in according these offenders the full measure of their constitutional rights. At least one state has taken this position with regards to the discriminatory enforcement of municipal ordinances. In City of Ashland v. Hacks, Inc.

(1966), 407 S.W.2d 421, a Kentucky Court of Appeals case, the plaintiff sought to enjoin the enforcement of a Sunday closing law against his department store on the grounds of discriminatory enforcement in violation of equal protection. In affirming the lower court's issuance of an injunction, the court states (407 S.W.2d at 424-425):

> In fairness to the municipal officers who are engaged in this litigation, let it be understood that there is no suggestion of a dishonest or opprobrious motivation in their actions and policies. On the contrary, it is manifest that they are the innocent victims of a persisting legislative neglect, disinclination or inability (whichever it may be) to come to grips with the problem --indeed, the obligation--of bringing a poor law into conformity with the facts of life. Nevertheless, "the equal protection of the laws" vouchsafed by the 14th Amendment to every person is not qualified; it is absolute; it cannot be denied, either in bad faith or in good faith.

## X

## A STATISTICAL ANALYSIS OF THE COMPLAINTS FILED IN DIVISION 81 OF THE L.A. MUNICIPAL COURT FOR VIOLATIONS OF CAL. PENAL CODE § 647(a) DEMONSTRATES A SELECTIVE ENFORCEMENT OF THIS STATUTE AGAINST HOMOSEXUAL MALES

Cal. Penal Code § 647(a) makes it a misdemeanor for anyone to solicit a person to engage in lewd or dissolute conduct, or to actually engage in lewd or dissolute conduct in a public place or in a place exposed to public view. The statute actually contains two separate offenses: (1) solicitation in a public place or (2) engaging in lewd conduct in a public place or place exposed to the public view.

The statute does not make distinctions between heterosexual solicitation or homosexual solicitation; between solicitation by a male or solicitation by a female; between lewd conduct between two males, or two females, or a male and a female. All solicitation and all lewd conduct in a public place has been deemed a crime by the legislature, without exception.

Within the City of Los Angeles it is the duty of the Los Angeles Police Department to enforce this statute. The method of enforcement rests within the discretion of the chief of police, supervisory personnel, and the individual officer on "vice" patrol. Major policy decisions regarding the manner and type of enforcement and the emphasis placed by the department on a particular type of vice activity are generally made by the chief of police.

Statistics were recently gathered by two law students in Los Angeles for all 647(a) complaints filed in Division 81 of the L.A. Municipal Court during the months of June, July, August and September of 1972. The product of their efforts clearly show that Cal. Penal Code § 647(a) is almost exclusively utilized by the Los Angeles Police Department in the arrest of male homosexuals. (See Enforcement of § 647(a) of the California Penal Code by the Los Angeles Police Department, by Barry Copilow and Thomas Coleman, January 1973)

XI

## THE LOS ANGELES POLICE DEPARTMENT PRACTICES INTENTIONAL AND PURPOSEFUL DISCRIMINATION AGAINST HOMOSEXUAL MALES

Numerous statements have been made by the chief of police which show his intense personal predjudices against homosexuals. (See supporting documentation in Enforcement). It should be notedthat "homosexuality" is not a crime, and in fact one might be a homosexual, practice homosexual sex acts in private, yet never violate any California criminal law regulating sexual behavior. Mutual masturbation and other forms of sexual behavior in private are not prohibited. It should also be noted that there is no statutory provision which singles out homosexual acts or solicitations for punishment. Every statute regulating sexual begavior (except rape) can be equally applied to a person regardless of whether he is homosexual or heterosexual. According to the Kinsey statistics probably a majority of Americans and a majority of Los Angeles residents are violating some criminal law directed at sexual behavior. And yet chief Davis directs his predjudices at the homosexual rather than the heterosexual.

There seems to be an unbalanced preoccupation by the Los Angeles Police Department with homosexuality. There is currently a major revision being made in the Crimianal Code of California. Numerous hearings were held throughout the state by the Joint Legislative Committee for Revision of

the Penal Code. Although major changes were being proposed in most areas of the law, the only topic which sparked enough interest by the L.A.P.D. to send a representative was that of laws directed against "deviate" sexual behavior. Commander Devin acted as spokesman for the L.A.P.D. and his official statement of the department's stand on homosexuality is replete with remarks concerning the "criminally compulsive" nature of homosexuals and the homosexual's proclivity for violence and other forms of criminal conduct, "most notably public lewdness and the seduction and molestation of adolescents and children." When questioned about the harassment of homosexual patrons of gay bars, Commander Devin made it clear that the purpose of the police is to protect the general public, and as gay bars are "public places", the police must ensure the public's right to patronize such establishments without being subjected to "offensive conduct". (Complete text in Appendix sect. 1 of Enforcement).

Yet the findings in Enforcement of 647(a) clearly establish that (1) over 90% of 647(a) bar arrests occured in gay bars, none of which involved private citizen complaints (Enforcement at p.5) and (2) that the vice details of those Los Angeles police divisions involved with homosexual arrests are made up almost exclusively of male officers who serve as decoys in the arrest technique, rendering it virtually impossible for a heterosexual male to be arrested for solicitation (Enforcement pp. 2, 6). These findings, together with the facts that homosexual's comprise only about 4 to 8 per cent

of the general population and that Los Angeles is known to abound with "topless", "bottomless", and "swingers" bars which cater to a heterosexual trade, lead inevitably to a conclusion that Cal. Penal Code § 647(a) is purposefully and intentionally enforced in a selective manner against male homosexuals.

XII

SELECTIVE ENFORCEMENT OF CAL. PENAL CODE § 647(a) BY THE LOS ANGELES POLICE DEPARTMENT IS BASED UPON AN ARBITRARY CLASSIFICATION

As was recently elaborated by the United States Supreme Court in Oyler v. Boles (1962), 368 U.S. 448, 456, in order for a defendant to successfully establish the defense of discriminatory enforcement, he must show intentional and purposeful selective enforcement of the law, where such selectivity is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."

"Arbitrary" is defined by Black's Law Dictionary, Fourth Revised Edition, as "nonrational". Webster's Third New International Dictionary (1964), lists as one definition of arbitrary, "given to willful irrational choices and demands". The Supreme Court of the United States defined "capriciously and arbitrarily" in United States v. Carmack (1946), 329 U.S. 230, 243, as "without adequate determining principle" or "unreasoned". In that case the court combined the defi-

nitions of "arbitrary" found in Funk & Wagnalls New Standard Dictionary of the English Language (1944) and Webster's New International Dictionary, 2d Ed. (1945) (329 U.S. at 243 n.14). In East Texas Motor Freight Lines v. United States et al. (1951), 96 F.Supp. 424, 427, the U.S. District Court for the Northern District of Texas stated its definition of arbitrary. The court stated, "The general meaning of arbitrary and capricious is 'without any reasonable cause...in disregard of evidence.' It is comparable to, without justification or excuse; with no substantial evidence to support it; a conclusion contrary to substantial, competent evidence."

The general theme throughout all of these definitions is that "arbitrary" means "nonrational" or "unreasoned". The California Evidence Code § 210 (West 1968) defines "relevant evidence" as, "evidence...having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." If evidence was irrelevant, it would have "no tendency in reason" to prove a fact in dispute. Under the Cal. Evidence Code it seems that "irrelevant" and "arbitrary" would be synonymous.

The enforcement of a criminal law in a selective manner against homosexuals is arbitrary. It is "unreasoned" and "nonrational". The criminal laws of this state apply equally to heterosexuals and homosexuals alike. Cal. Penal Code § 647(a) does not distinguish homosexual or heterosexual lewd conduct or solicitation. Homosexuals are no more predisposed to violate 647(a) or any other statute regulating

sexual behavior than are heterosexuals. (See People v. Giani (1956), 145 Cal.App.2d 539, 302 P.2d 813). In that case, which was a prosecution for sex perversion in violation of Cal. Penal Code § 288a, the prosecutor, upon cross-examination, asked the defendant if he was a homosexual. The counsel for the defense objected to the question on the ground that it was irrelevant. The objection was overruled and the defendant answered the question in the affirmative. The defense assigned this as predjudicial error and made a motion for a new trial. The court granted this motion and the state appealed.

The appellant contended that homosexuality was a "'psychobiological condition which predisposes, indeed compels, a party to commit an abnormal sexual offense'" (145 Cal.App.2d at 541). The Court of Appeal reviewed a series of Sexual Deviation Research Reports of studies officially conducted by the State Department of Mental Hygiene. The court stated (145 Cal.App.2d at 542), "We have perused those reports but find nothing therein which seems to support counsel's broad claim that every (court's emphasis) homosexual is predisposed to commit crimes, sexual crimes, crimes of the nature of the crime defined and proscribed by section 288a. Instead we find such statements as these; 'The facts are that the majority of homosexuals are no particular menace to society. A small number of them, like those who are heterosexual, will attempt to seduce, or sexually assault others or try to initiate sex relations with small children'".

The court went on to say that the burden of showing that homosexuals were predisposed to commit sex offenses was on the prosecution. The court stated (145 Cal.App.2d at 543), "The probable lack of a scientific basis for any such assumption seems indicated by the following statement made at the conclusion of the state's four-year sexual deviation study:

> Up to now much research in sexual deviation has been theoretic and speculative rather than empiric, and most of the empiric research has been clinical and descriptive rather than experimental. It is suggested that an important task is that of developing and applying reliable scientific procedures in the effort to discover basic principles in the area of human sexuality. This difficult task involves searching systematically and empirically for the components of personality, of culture, of interpersonal relationships, of heredity, and constitution that contribute to sexual deviation and to sexual conformity."

The court further added (145 Cal.App.2d at 543), "In this state of the record we perceive no sound basis (emphasis added) for entertaining a presumption or an inference that every homosexual is 'psycho-biologically' predisposed to perform the acts proscribed by section 288a of the Penal Code." The court then emphasized its position by adding (145 Cal.App.2d at 543), "Perhaps we could express it more clearly were we to assume the charge to be that of rape, 'accomplished with a female not the wife of the perpetrator' ...and that the prosecutor asked the defendant upon cross-examination 'Are you a heterosexual?' the contention being that every heterosexual is of a 'psyco-biological' makeup which 'predisposes, indeed compels,' him to commit rape."

The court then added in a footnote (145 Cal.App.2d at 543, 544), "We note in passing that the acts proscribed by section 288a are equally condemned whether committed by persons of the same sex or of opposite sexes. Appellant's argument, pressed to a logical conclusion, would seem to tend toward the view that if the information herein charged defendant with violating section 288a in participation with a person of the opposite sex (adult or minor, consenting or non-consenting) it would be proper for the cross-examiner to as 'Are you a heterosexual?" upon the theory that such a person is predisposed to commit such an act."