Golden Gate University Law Review

Volume 6 | Issue 3 Article 3

January 1976

Murguia v. Municipal Court: California Recognizes the Defense of Discriminatory Prosecution

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MURGUIA V. MUNICIPAL COURT: CALIFORNIA RECOGNIZES THE DEFENSE OF DISCRIMINATORY PROSECUTION

Recently, in *Murguia v. Municipal Court*,[1] the California Supreme Court resolved conflicting California court decisions regarding the availability of the defense of discriminatory law enforcement in a criminal prosecution. *Murguia* involved misdemeanor prosecutions against six members of the United Farm Workers Union (UFW) which arose out of their union organizing and picketing activities in Kern County, California, during the summer of 1973. The California Supreme Court, in an opinion by Justice Tobriner, recognized the defense of discriminatory law enforcement as a ground for the dismissal of a criminal prosecution. The court made it clear that the equal protection clauses of both the United States and California Constitutions "safeguard individuals from 'intentional and purposeful invidious' discrimination in the enforcement of all laws, including penal statutes . . . ."[2]

This Comment will examine the case of *Murguia v. Municipal Court* and will compare its treatment of the defense of discriminatory law enforcement with the past treatment accorded the defense by both the United States and California Supreme Courts. In addition, a discussion of the rationale of this defense will demonstrate the necessity of permitting its use in light of several important policy considerations: (1) the interest of society in maintaining uniform enforcement of its laws and in deterring illegal police conduct; and (2) the interest of the judiciary in refusing to participate in illegal governmental conduct. Finally, this Comment will look to the implications of the *Murguia* decision and to potential changes in the law which would ease the heavy burden of proof presently required to sustain a claim of intentional discrimination in the enforcement of a statute—a burden which must be eased if an individual's right to equal law enforcement is to be both meaningful and enforceable.

1. 15 Cal. 3d 286, 540 P.2d 44, 124 Cal. Rptr. 204 (1975).
2. *Id.* at 293, 540 P.2d at 48, 124 Cal. Rptr. at 208.

I. THE UNITED STATES SUPREME COURT AND THE DEFENSE OF DISCRIMINATORY PROSECUTION

A. The Origin of the Defense

The fourteenth amendment of the United States Constitution prohibits any state action which denies citizens of states equal protection of the laws.[3] The traditional equal protection test prohibits discrimination, either on the face of a statute or in its application, which has no reasonable relationship to a legitimate governmental objective.[4] Under this test, legislatures and law enforcement officials are presumed to have acted in a manner comporting with the principles of the equal protection clause, and statutory classifications are presumed permissible unless they are based on criteria "wholly unrelated to the objective of the statute."[5] The constitutionality of a statute will be upheld as long as there is reasonable relationship between the classification prescribed therein and the statute's purpose.[6] When the discrimination on the face of a statute or in its application is based upon a suspect classification[7] or infringes on a fundamental right,[8] a "very heavy burden of justification"[9] is usually demanded for upholding the constitutionality of such a statute, and states are required to demonstrate a compelling governmental interest to justify such discrimination.[10]

In *Yick Wo v. Hopkins*,[11] the United States Supreme Court held that the discriminatory administration of an otherwise valid statute was within the constitutional prohibitions of the equal

3. *See, e.g.*, O'Shea v. Littleton, 414 U.S. 488, 502-03 (1974); *Ex parte* Virginia, 100 U.S. 339, 347 (1880). U.S. Const. amend. XIV, § 1 provides in part: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

4. *See, e.g.*, Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). For a detailed analysis of equal protection principles see *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969).

5. Reed v. Reed, 404 U.S. 71, 76 (1971); *See* McDonald v. Board of Elections, 394 U.S. 802, 809 (1969); McGowan v. Maryland, 366 U.S. 420, 425 (1961).

6. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 40-41 (1973).

7. For cases which discuss suspect classifications see Reed v. Reed, 404 U.S. 71, 76 (1971) and Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

8. Fundamental rights are discussed in Schilb v. Kuebel, 404 U.S. 357, 365 (1971) and in Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

9. Loving v. Virginia, 388 U.S. 1, 9 (1967).

10. The Supreme Court may be adopting a new approach to equal protection which differs from the two-tier approach. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 Harv. L. Rev. 1, 18-24 (1972).

11. 118 U.S. 356 (1880).

protection clause. Yick Wo was convicted of violating a municipal ordinance which made it a misdemeanor to operate a laundry without a permit issued by a city board of supervisors. Two hundred and eighty applicants had applied for permits, and although all applicants were apparently equally qualified, the board granted only 80 permits, all to non-Chinese applicants. The Supreme Court reversed Yick Wo's conviction, holding that public officials had administered the law in a discriminatory manner by denying permits to all those of Chinese ancestry, and that such discrimination violated the mandates of the equal protection clause. The Court held that

> [t]hough 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.[12]

B. The Scope of the Defense

Subsequent decisions of the Court have more clearly defined the scope of the defense of discriminatory law enforcement. *Two Guys v. McGinley*,[13] decided by the Court in 1961, involved a store owner who sought an injunction to restrain the district attorney from enforcing a Sunday closing law on the ground that the law was being enforced against the store owner in a discriminatory manner. The Supreme Court upheld the lower court's refusal to grant an injunction, stating that the plaintiff could have "defend[ed] against any such proceeding that [was] actually prosecuted on the ground of unconstitutional discrimination . . . ."[14] *Two Guys* thus explicitly recognized that the discriminatory enforcement of a criminal statute could be raised as a defense in a criminal proceeding.

12. *Id.* at 373-74. The *Yick Wo* decision left open the question whether its principles could be extended to discriminatory enforcement of criminal laws. This problem is discussed in Givelber, *The Application of Equal Protection Prciples to Selective Enforcement of Criminal Law*, 1973 U. Ill.. L.F. 88. For a discussion of the California Supreme Court's resolution of this issue see text accompanying notes 62-66.

13. 366 U.S. 582 (1961).

14. *Id.* at 588-89. The Supreme Court also noted that the issue was not moot, as the lower court had asserted, because prosecutions were still pending in the state courts against the plaintiff's employees.

In *Oyler v. Boles*,[15] the Court clarified the type of discriminatory law enforcement that would constitute a violation of the equal protection clause. *Oyler* involved a defendant who challenged the enforcement of a West Virginia criminal statute which provided for a mandatory life sentence following a third conviction of a crime punishable by confinement in a penitentiary. Oyler claimed the statute was enforced in a discriminatory manner[16] by alleging that the statute had not been applied to a large number of individuals who were eligible to be sentenced under its terms. However, it was not alleged whether the failure to proceed against other habitual offenders was due either to the prosecutor's lack of knowledge of prior offenses or to a deliberate policy of not invoking the statute against certain classes of individuals.

The Court rejected the defendant's contention that his allegations demonstrated a denial of equal protection, and thus affirmed his conviction. The *Oyler* Court carefully noted that the "conscious exercise of some selectivity of the enforcement [of laws] is not in itself a federal constitutional violation."[17] Since the defendant failed to allege that there was a deliberate, selective enforcement of the law based upon some "unjustifiable standard such as race, religion, or other arbitrary classification,"[18] *Oyler* found that no denial of equal protection had occurred. *Oyler* thus reiterated the important distinction, made in past decisions of the Court,[19] between "intentional and purposeful discrimination" in the enforcement of laws and the "non-arbitrary selective enforcement" of laws. Violation of the principles of equal protection occurs only when state officials engage in purposeful or intentional discriminatory enforcement of the law based upon some invidious or arbitrary classification.

15. 368 U.S. 448 (1960).

16. *Id.* at 456. The statute involved is W. VA. CODE ANN. § 6130 (1961). Punishment under this statute was invoked by the prosecuting attorney upon conviction and before sentencing. Oyler claimed that from 1940-1955, six men were subject to prosecution as habitual criminals and only Oyler was sentenced under the statute even though all the other men had three or more felony convictions. He also claimed that 904 known offenders in West Virginia were not sentenced under this statute. 368 U.S. at 455.

17. 368 U.S. at 456.

18. *Id.*

19. The Court has always clearly indicated that mere errors of judgment by state officials will not support a claim of discriminatory enforcement of the laws. *See, e.g.*, Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352-53 (1918). The administration of a state statute, fair on its face, which results 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." Snowden v. Hughes, 321 U.S. 1, 8 (1944).

II. THE MURGUIA DECISION

A. Facts of the Case

The six defendants[20] involved in *Murguia* were UFW members and were charged with a variety of minor offenses[21] which, they alleged, occurred while they were engaged in activities on behalf of their union. The defendants filed a pretrial motion for dismissal of the misdemeanor charges against them on the ground that such charges were part of the unequal and discriminatory enforcement of penal statutes by the Kearn County District Attorney, sheriff, and county law enforcement agents.[22] In conjunction with the motion to dismiss, the defendants filed a discovery motion to compel the district attorney to produce documents and testimony relating to the defense of discriminatory prosecution.[23] In support of the discovery motion, the defendants filed 104 unchallenged affidavits[24] which related to the

20. The California Supreme Court noted: "Although defendants in the underlying criminal prosecutions are technically petitioners in the instant discovery proceedings, for convenience and clarity we shall refer to these individuals as 'defendants' throughout this opinion." 15 Cal. 3d at 290 n.1, 540 P.2d at 46 n.1, 124 Cal. Rptr. at 206 n.1.

21. The charges included violations of the following statutes: willful disobedience of a court order (Cal. Penal Code § 166(4) (West 1970)); malicious mischief (*id.* § 594); driving without a license in possession (Cal. Vehicle Code § 12951(a) (West 1971)); failure to pass another vehicle at a safe distance (*id.* § 21750); and reckless driving (*id.* § 23103). 15 Cal. 3d at 291 n.2, 540 P.2d at 47 n.2, 124 Cal. Rptr. at 207.

22. 15 Cal. 3d at 291, 540 P.2d at 47, 124 Cal. Rptr. at 207.

23. *Id.* The defendants sought minutes of meetings and interdepartment memoranda of the Kern County District Attorney and the Kern County Sheriff which related to the UFW and Teamsters Union, in addition to letters exchanged by Teamster officials and the District Attorney and the Kern County Sheriff. *Id.* at 305 n.16, 540 P.2d at 57 n.16, 124 Cal. Rptr. at 217 n.16.

24. The court of appeal summarized the affidavits as follows:

> The declarations are divided into several categories. The first category attests to numerous incidents of alleged criminal conduct on the part of growers, members of the Teamsters Union and 'private security groups' perpetrated against the members of the U.F.W. which were observed and ignored by the sheriff's deputies and, although complained of, the deputies chose either to ratify the acts or to arrest the victims (members of the U.F.W.). The second category of declarations attests to the pervasive use of excessive force and brutality by sheriff's deputies against the members of the U.F.W. The third category relates to numerous incidents that allegedly demonstrate an anti-U.F.W. bias and racial prejudice against Mexican-Americans by the sheriff's deputies. The fourth category documents instances in which the sheriff's department was allegedly acting as the private security force of the growers. The remaining sets of declarations document instances that allegedly show many members of the U.F.W.

harassment and discriminatory treatment of UFW members by sheriff's deputies. The trial court found that the affidavits submitted by the defendants established a prima facie case of discriminatory enforcement,[25] but denied the discovery motion, holding that California law did not clearly establish that the present defendants were entitled to use the defense.[26]

B. The Decision of the Court of Appeal

The *Murguia* defendants sought a writ of mandate in the court of appeal compelling the municipal court to grant their motion of discovery. On its review of the decision of the trial court, the court of appeal considered two opposing contentions: (1) the attorney general claimed that discriminatory law enforcement is never a defense to a criminal prosecution, and (2) the defendants claimed that the defense is always legally available if the facts of the case merit its assertion.[27] The court of appeal adopted a "middle solution"—the court's opinion stated that the availability of the defense depends upon the facts of each case, including the nature and type of offense involved. [28] The court considered con-

> were not only unjustly arrested but that once arrested they were treated worse than other prisoners.
>
> One affidavit introduced also details participation in meetings by representatives of the district attorney's office and the sheriff's office and several private citizens, including growers and lawyers, wherein several standard form injunctions and affidavits (complete with blanks and spaces for marks) which had been prepared by the district attorney were distributed and discussed. Also allegedly discussed were various other methods of protecting growers, and various admissions were allegedly made by some of the above mentioned public officials which tend to support petitioners' allegations of discriminatory enforcement of the criminal law against the U.F.W.

Murguia v. Municipal Court, 117 Cal. Rptr. 888, 891 n.6, *vacated*, 15 Cal. 3d 286, 540 P.2d 44, 124 Cal. Rptr. 204 (1975).

25. 15 Cal. 3d at 293, 540 P.2d at 48, 124 Cal. Rptr. at 208.

26. *Id.* at 293, 540 P.2d at 48, 124 Cal. Rptr. at 208. The California Supreme Court had never addressed itself to this issue at the time of the trial and the state appellate courts had arrived at conflicting decisions. For a discussion of the conflicting results reached in California and other state courts see Annot., 4 A.L.R.3d 404 (1965).

27. Murguia v. Municipal Court, 117 Cal. Rptr. 888, 891, *vacated*, 15 Cal. 3d 286, 540 P.2d 44, 124 Cal. Rptr. 204 (1975). Once the California Supreme Court accepts a decision of the court of appeal for hearing, "[t]he . . . decision of the . . . Court of Appeal . . . become[s] a nullity and [is] of no force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed." Ponce v. Mar, 47 Cal. 2d 159, 161, 301 P.2d 837, 839 (1956). The supreme court decision is discussed at notes 42-66 *infra* and accompanying text.

28. 117 Cal. Rptr. at 892.

flicting California decisions [29] relating the equal protection clause to the discriminatory enforcement of penal statutes, and concluded that discriminatory enforcement can be a valid legal defense only if the case meets the following three requirements. The first requirement is that the discrimination be intentional, purposeful and deliberate, as opposed to a mere lack of uniformity in law enforcement.[30] This requirement is consistent with the principle that the mere presence of other violators of the law who are not punished does not by itself violate the equal protection clause.[31]

The second requirement imposed by the court of appeal is that the intentional discrimination "must be based on race, color

29. *Id.* at 893 n.9. The following cases represent the conflicting California decisions regarding the availability of the defense of discriminatory enforcement in a criminal prosecution. The cases which permit the use of the defense include People v. Gray, 254 Cal. App. 2d 256, 63 Cal. Rptr. 211 (1967) (ordinance prohibiting the posting of handbills on buildings) (dictum); City of Banning v. Desert Outdoor Advertising, Inc., 209 Cal. App. 2d 152, 25 Cal. Rptr. 621 (1962) (suit to enjoin maintenace of a billboard violating a setback ordinance); People v. Gordon, 105 Cal. App. 2d 711, 234 P.2d 287 (1951) (prosecution for violating Unfair Trade Practices Act); Downing v. California State Bd. of Pharmacy, 85 Cal. App. 2d 30, 192 P.2d 39 (1948) (prosecution under Pure Food and Drug Act) (dictum); Wade v. City & County of San Francisco, 82 Cal. App. 2d 337, 186 P.2d 181 (1947) (action to enjoin anti-magazine solicitation ordinance); People v. Oreck, 74 Cal. App. 2d 215, 168 P.2d 186 (1946) (bookmaking charge—court would limit defense to discrimination on basis of race or religion); People v. Harris, 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (1960) (gambling prosecution); People v. Winters, 171 Cal. App. 2d Supp. 876, 342 P.2d 538 (1959) (gambling prosecution).

Cases which deny the use of discriminatory enforcement as a defense include: People v. Vatelli, 15 Cal. App. 3d 54, 92 Cal. Rptr. 763 (1971) (prosecution for possession of a knife by a prisoner) (dictum); People v. Pope, 168 Cal. App. 2d 666, 336 P.2d 236 (1959) (prosecution for possession of a knife by a prisoner); People v. Flanders, 140 Cal. App. 2d 765, 296 P.2d 13 (1956) (gambling) (dictum); People v. Van Randall, 140 Cal. App. 2d 771, 296 P.2d 68 (1956) (gambling) (dictum); People v. Hess, 104 Cal. App. 2d 642, 234 P.2d 65 (1951) (embezzlement and falsification of accounts by public officer); People v. Darcy, 59 Cal. App. 2d 342, 139 P.2d 118 (1943) (perjury) (alternate holding); People v. Montgomery, 47 Cal. App. 2d 1, 117 P.2d 437 (1941) (dictum) (pandering); People v. Sipper, 61 Cal. App. 2d Supp. 844, 142 P.2d 960 (1943) (practicing law without a license).

30. 117 Cal. Rptr. at 894. This principle is discussed in Snowden v. Hughes, 321 U.S. 1, 8 (1944); Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350 (1918) (discriminatory tax assessment).

31. *See In re* Finn, 54 Cal. 2d 807, 356 P.2d 685, 8 Cal Rptr. 741, 744 (1960); People v. Vatelli, 15 Cal. App. 3d 54, 58, 92 Cal. Rptr. 763, 765 (1971); People v. Pearce, 8 Cal. App. 3d 984, 988, 87 Cal. Rptr. 814, 817 (1970); People v. Gray, 254 Cal. App. 2d 256, 268, 63 Cal. Rptr. 211, 219 (1967); City of Banning v. Desert Outdoor Advertising, Inc., 209 Cal. App. 2d 152, 154, 25 Cal. Rptr. 621, 623 (1962); Wade v. City & County of San Francisco, 82 Cal. App. 2d 337, 338, 186 P.2d 181, 182 (1947); People v. Oreck, 74 Cal. App. 2d 215, 221, 168 P.2d 186, 191 (1946); Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1115 (1961) [hereinafter cited as Comment, *Nondiscriminatory Enforcement*].

or some other suspect classification" or based upon an infringement of religious or political beliefs or the exercise of some other "fundamental right."[32] This second requirement was based on a misinterpretation by the court of the decision in *Oyler v. Boles*,[33] which required that the selective enforcement be based on an unjustifiable standard. *Oyler* did not expressly limit an unjustifiable standard to a suspect class or infringement upon a fundamental right, as the court of appeal believed, but rather included discrimination on the basis of any arbitrary classifications.[34]

The court of appeal then added a third requirement which would condition the availability of the defense upon the nature and type of offense involved. It stated that

> [t]he court should determine whether the legitimate public interest of the state in enforcing the penal provisions of a particular statute is sufficiently compelling to justify the *incidental* invasion of the defendant's right not to have the laws discriminatorily enforced . . . . It is manifest that counting heavily in the outcome of such a weighing process is the nature and character of the particular criminal offense involved.[35]

The court of appeal based this balancing approach on the reasoning found in the line of cases beginning with *People v. Montgomery*,[36] which limited the defense of discriminatory law enforcement to prosecutions for harmless crimes.[37]

In support of this balancing approach, the court of appeal stated there were effective means of protecting an individual's rights without "punishing the victim and offending society by turning the criminal loose to violate again with impunity."[38] The

32. 117 Cal. Rptr. at 894.

33. 368 U.S. 448 (1962).

34. *Id.* at 456. *Oyler* stated that the selective enforcement must be "deliberately based upon an unjustifiable classification such as race, religion, *or other arbitrary classification*." *Id.* (emphasis added).

35. 117 Cal. Rptr. at 895 (emphasis added).

36. 47 Cal. App. 2d 1, 117 P.2d 437 (1941).

37. *See* People v. Vatelli, 15 Cal. App. 3d 54, 92 Cal. Rptr. 763 (1971); People v. Flanders, 140 Cal. App. 2d 765, 296 P.2d 13 (1956); People v. Van Randall, 140 Cal. App. 2d 771, 296 P.2d 68 (1956); People v. Montgomery, 47 Cal. App. 2d 1, 13, 117 P.2d 437, 446 (1941); People v. Winters, 171 Cal. App. 2d Supp. 876, 342 P.2d 538 (1959). Later California cases did not follow this limitation. *See, e.g.*, People v. Harris, 182 Cal. App. 2d 837, 5 Cal. Rptr. 852 (1960); People v. Gray, 254 Cal. App. 2d 256, 63 Cal. Rptr. 211 (1967).

38. 117 Cal. Rptr. at 896.

court suggested utilizing either a suit for damages under the Civil Rights Act of 1871 (42 U.S.C. section 1983), the power of the ballot, the influence of the press, or public pressure as more appropriate remedies.[39]

In applying this balancing approach, the court concluded that all but one [40] of the violations involved in *Murguia* were "of such an intrinsically harmful and grievous nature and related to such grave societal values that the state's compelling interest in enforcing them outweighs the lesser interest of the individual in nondiscriminatory enforcement of them."[41] The court of appeal thus denied the defendants' petition for a writ of mandate.

C. The Decision of the Supreme Court

The California Supreme Court, in its review of the decision of the trial court, issued a peremptory writ of mandate which compelled the trial court to vacate its order denying the discovery motion.[42] The supreme court, in holding that the trial court improperly foreclosed discovery with respect to the defendants' claim of discriminatory prosecution, first examined the three requirements of the defense of discriminatory enforcement as articulated by the court of appeal.

Intentional Discrimination

The *Murguia* court approved of the first requirement imposed by the court of appeal; the discrimination complained of must be intentional or purposeful.[43] The supreme court emphasized that when a defendant demonstrates that he or she has been singled out for prosecution on the basis of some arbitrary criterion, discriminatory prosecution becomes a compelling ground for dismissal:

> [I]n order to establish a claim of discriminatory enforcement a defendant must demonstrate

39. The Civil Rights Act is codified at 42 U.S.C. §§ 1981 *et seq.* (1970). The court of appeal discussed alternative remedies in 117 Cal. Rptr. at 896. In Petitioner's Brief for Rehearing at 21 n.17, Murguia v. Municipal Court, 15 Cal. 3d 286, 540 P.2d 44, 124 Cal. Rptr. 204 (1975), the defendants responded to these alternative remedies by stating that the court's suggestions "simply ignore the real world. Petitioners are representatives of a class that has for generations been alienated, disenfranchised, powerless . . . ." *See generally* United States Commision on Civil Rights, Mexican Americans and the Administration of Justice in the Southwest (1970).

40. The court excluded driving without a license from crimes considered intrinsically harmful. 117 Cal. Rptr. at 897.

41. *Id.*

42. 15 Cal. 3d at 306, 540 P.2d at 57, 124 Cal. Rptr. at 217.

43. *Id.* at 297, 540 P.2d at 51, 124 Cal. Rptr. at 211.

> that he has been deliberately singled out for prosecution on the basis of some invidious criterion. Because the particular defendant, unlike similarly situated individuals, suffers prosecution simply as the subject of invidious discrimination, such defendant is very much the direct victim of discriminatory enforcement practice. Under these circumstances, discriminatory prosecution becomes a compelling ground for dismissal of the criminal charge, since the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.[44]

In the course of approving the requirement that the discrimination complained of must be intentional or deliberate, the supreme court disapproved of prior California court decisions limiting the scope of the defense of discriminatory enforcement.[45]

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44. *Id.* at 298, 540 P.2d at 51-52, 124 Cal. Rptr. at 211-12.

45. *See* People v. Flanders, 140 Cal. App. 2d 765, 296 P.2d 13 (1956); People v. Van Randall, 140 Cal. App. 2d 771, 296 P.2d 68 (1956); People v. Darcy, 59 Cal. App. 2d 342, 139 P.2d 118 (1943); People v. Montgomery, 47 Cal. App. 2d 1, 117 P.2d 437 (1941); People v. Sipper, 61 Cal. App. Supp. 2d 844, 142 P.2d 960 (1943). *Darcy* involved prosecution for perjury on voter registration forms. The defendant attempted to prove he was singled out for prosecution since he was a Communist. He attempted to introduce thousands of untrue statements in other registration documents where voters had been permitted to correct their statements. The court found his proof insufficient and alternatively held that the defense of discriminatory enforcement did not apply to the crime of perjury (malum in se). Justice Peters' dissent objected to the narrow application of *Yick Wo* and expressed his belief that it was better for society that the accused go free than for prosecutions to be based on political prejudice:

> [O]ur system of government is that all people, including the weak, the outnumbered and the nonconformist, stand before the courts on a basis of equality with all other litigants. If the criminal processes can be deliberately and intentionally abused to prosecute a particular individual because he is a communist, not because of what he has done but because of his beliefs, the fundamental cause for which we are now fighting a great war becomes a hollow mockery. The protecting arm of the Fourteenth Amendment prohibits prosecutions based on prejudice and persecution.

59 Cal. App. 2d at 359-60, 139 P.2d at 129.

People v. Flanders involved a prosecution for maintaining a gambling house. The defendant argued it was a denial of equal protection to prosecute him while others equally guilty escaped punishment. The trial court on its own motion set aside part of the indictment. The trial court took judicial notice that other gambling was practiced in churches and was even advertised. No proof was offered by the defendant to support his claim of discriminatory enforcement. The court of appeal reversed, relying on *Montgomery* and *Darcy* for the proposition that equal protection extended only to persons in pursuit of a lawful occupation regardless of their race.

People v. Montgomery[46] was the initial California decision which gave a restricted application to the *Yick Wo* doctrine of discriminatory law enforcement. In *Montgomery*, the court of appeal affirmed a defendant's conviction for pandering. At trial, the defendant had offered no proof of discriminatory enforcement of the law; he merely claimed that there had been others who had committed the same crime as himself, yet had not been prosecuted. The jury had been instructed that the fact the other violators had not been prosecuted was not a possible defense to the charges against the defendant. On appeal, the defendant contended that the judge's instruction to the jury had failed to consider the equal protection principles enunciated in *Yick Wo*. The court of appeal, instead of rejecting the defendant's contention as misconstruing the *Yick Wo* holding,[47] simply stated that "no person has the right to demand protection of the law in the commission of a crime."[48] The *Montgomery* court went on to distinguish *Yick Wo* from the defendant's situation in that it involved a prosecution for harmless activity, and concluded that the defense of discriminatory enforcement applied only to harmless statutory crimes (malum prohibitum), but not to dangerous crimes (malum in se).[49]

Subsequent California court of appeal decisions used the language quoted above from *Montgomery* as a basis for denying the defense of discriminatory enforcement to defendants charged with crimes such as perjury[50] or gambling.[51] These decisions declared that *Yick Wo* did

> not stand for the proposition that persons violating the law are to have equal protection from prosecution, but rather for the proposition that equal protection of the law will be extended to all persons in the pursuit of their lawful occupations regardless of their race . . . . [T]he basis of the claim in *Yick Wo* [was]

The defense was again refused in *People v. Sipper* and in *People v. Van Randall*, both of which relied on *Montgomery*. For additional discussion of the judicial reluctance to extend *Yick Wo* see Comment, *Nondiscriminatory Enforcement*, *supra* note 31, at 1107.

46. 47 Cal. App. 2d 1, 117 P.2d 437 (1941).

47. *Yick Wo* concerned "unjust and illegal discrimination" by public authorities in the administration of the laws, and not simply the failure of public authorities to prosecute all violators of the law. *See* notes 11-12 *supra* and accompanying text.

48. 47 Cal. App. 2d at 14, 117 P.2d at 446.

49. *Id.*

50. *See* People v. Darcy, 59 Cal. App. 2d 342, 139 P.2d 118 (1943).

51. *See* People v. Winters, 171 Cal. App. Supp. 2d 876, 342 P.2d 538 (1959).

> that the petitioner had been refused a license because of his nationality and not that he had been arrested because he was Chinese. If the rationale of *Yick Wo* were applied to persons arrested for crimes the effect would be that if some guilty persons escape prosecution, others who are apprehended should not be prosecuted.[52]

The supreme court expressly disapproved[53] of these prior California decisions which relied on *Montgomery* as authority for the proposition that the defense of discriminatory enforcement was inapplicable in criminal prosecutions. *Murguia* indicated that these decisions misapplied the principles of *Yick Wo*.[54] The unequal treatment complained of by the defendant in *Montgomery* simply represented non-arbitrary selective enforcement or mere laxity in enforcement of the law, actions which have never been

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52. People v. Vatelli, 15 Cal. App. 3d 54, 59, 92 Cal. Rptr. 763, 766 (1971) (citations omitted). *See* Comment, *Ramifications of United States v. Falk on Equal Protection from Prosecutorial Discrimination*, J. CRIM. L. & CRIMINOLOGY 62 (1974) [hereinafter cited as *Ramifications of United States v. Falk*]. *Vatelli* involved a prison inmate who was charged with possession of a knife (in violation of CAL. PENAL CODE § 4502 (West 1970)). The defendant claimed the trial court erred in denying his motion to call other inmates to show the law was not uniformly applied. 15 Cal. App. 3d at 58, 92 Cal. Rptr. at 765. Although the court correctly held that it is not a denial of equal protection that one person is prosecuted while others equally guilty are not (*see* authorities cited at note 31 *supra*), it reiterated the rationale of *Montgomery*, concluding that the defense of discriminatory enforcement was not available.

53. *See* 15 Cal. 3d at 301 n.11, 540 P.2d at 54 n.11, 124 Cal. Rptr. at 214 n.11. For other state decisions relying on *Montgomery* see note 73 *infra*.

54. Although some California cases approved the remedy of granting injunctions against discriminatory prosecutions prior to this time, *see* People v. Gordon, 105 Cal. App. 2d 711, 721, 234 P.2d 287, 293 (1951); Downing v. California State Bd. of Pharmacy, 85 Cal. App. 2d 30, 36, 92 P.2d 39, 42 (1948); Wade v. City & County of San Francisco, 82 Cal. App. 2d 337, 186 P.2d 181 (1947), it was not until 1960 that the claim of discriminatory enforcement was successful as a defense to a criminal prosecution. *See* People v. Harris, 182 Cal. App. Supp. 2d 837, 5 Cal. Rptr. 852 (1960), *noted in* Comment, *Nondiscriminatory Enforcement*, *supra* note 31, at 1109.

The defendants in *Harris* were nineteen black men convicted for violating gambling laws. In support of their claim of discriminatory enforcement, the defendants offered proof of disproportionate gambling prosecutions against blacks, police awareness of gambling in white clubs, and non-enforcement of the gambling laws against these white clubs. The trial court rejected this offer of proof as insufficient to prove intentional discrimination. The appellate division of the superior court reversed and held that "[a]n unconstitutional application of an ordinance is always available as a defense to prosecutions . . . ." 182 Cal. at 841, 5 Cal. Rptr. at 855. The *Harris* court mentioned neither the past California cases nor the distinction between harmful and innocent acts. The court extended the defense to criminal prosecutions relying on those cases which had granted injunctive relief from discriminatory enforcement:

> If equity will intervene to prevent discriminatory enforcement of an ordinance valid on its face, it would seem to be un-

considered a denial of equal protection.[55] Since *Montgomery* involved only selective enforcement of the law and not deliberate discriminatory enforcement, its language regarding the availability of the defense of discriminatory enforcement was only erroneous dictum, and thus could not be used as authority for denying the use of the defense in subsequent cases. The supreme court relied on *Two Guys v. McGinley*, *Oyler v. Boles* and numerous other federal and state decisions [56] and held that the defense of deliberate discriminatory enforcement of the laws could be raised as a viable defense to a criminal prosecution. Although past California decisions had not resolved the question of whether the the defense of discriminatory enforcement should be tried by the court or the jury, the supreme court concluded that the availability and validity of this defense is to be resolved by the trial court.[57] Hence, the defense must be raised through a pretrial motion to dismiss the charges against the defendant.[58]

Arbitrary Classifications

The supreme court did not adhere to the second requirement imposed by the court of appeal and rejected its narrow interpreta-

> necessary to require such intervention as a prerequisite, when the constitutional objection has been squarely raised and the objection to prosecution made as a defense in a criminal prosecution.

Id. at 840, 5 Cal. Rptr. at 854.

55. 15 Cal. 3d at 295 n.5, 540 P.2d at 50 n.5, 124 Cal. Rptr. at 210 n.5.

56. *Id.* at 300, 540 P.2d at 53, 124 Cal. Rptr. at 213. *See, e.g.*, O'Shea v. Littleton, 414 U.S. 488 (1973); Spomer v. Littleton, 414 U.S. 514 (1973); United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974); United States v. Oaks, 508 F.2d 1403 (9th Cir. 1974); United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973); United States v. Falk, 479 F.2d 616 (7th Cir. 1973); Shaw v. Garrison, 467 F.2d 113 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972); Duncan v. Perez, 321 F. Supp. 181 (E.D. La. 1970), *aff'd*, 445 F.2d 557 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971); People v. Pearce, 8 Cal. App. 3d 984, 87 Cal. Rptr. 814 (1970); Powers v. Floersheim, 256 Cal. App. 2d 223, 63 Cal. Rptr. 913 (1967); People v. Gray, 254 Cal. App. 2d 256, 63 Cal. Rptr. 211 (1967); City of Banning v. Desert Outdoor Advertising, Inc., 209 Cal. App. 2d 152, 25 Cal. Rptr. 621 (1962); People v. Gordon, 105 Cal. App. 2d 711, 234 P.2d 287 (1950); Wade v. City & County of San Francisco, 82 Cal. App. 2d 337, 186 P.2d 181 (1947); People v. Oreck, 74 Cal. App. 2d 215, 168 P.2d 186 (1946); People v. Harris, 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (1960); People v. Winters, 171 Cal. App. 2d Supp. 876, 342 P.2d 538 (1959); People v. Amdur, 123 Cal. App. 2d Supp. 951, 267 P.2d 445 (1954).

57. 15 Cal. 3d at 293 n.4, 540 P.2d at 48 n.4, 124 Cal. Rptr. at 208 n.4. The court resolved the issue by relying on decisions of other jurisdictions which hold that the question of discriminatory enforcement concerns a constitutional defect in the initiation of prosecution and should be tried before the court. The rationale of this practice is discussed in United States v. Berrigan, 482 F.2d 171, 175 (3d Cir. 1973); People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962).

58. 15 Cal. 3d at 293 n.4, 540 P.2d at 48 n.4, 124 Cal. Rptr. at 208 n.4. Despite the

tion of *Oyler v. Boles*.[59] The supreme court stated that intentional, discriminatory enforcement of the law need only be based upon an unjustifiable standard or other arbitrary classification in order to constitute a valid defense. Since a "policy which singles out individuals for prosecution on the basis of their right to join the union of their choice is . . . presumptively . . . unjustifiable . . .,"[60] the supreme court had no reason to consider or further define the range of classifications which may be arbitrary. An arbitrary classification is one that bears no rational relationship to legitimate law enforcement interests.[61] Clearly the concept of an arbitrary standard of enforcement should be given a much broader interpretation than that of the court of appeal's, which limited the arbitrary standard to discrimination based on a suspect classification or an infringement of a fundamental right.

A Rejection of Balancing and the Applicability of the Defense to Serious Crimes

The supreme court also rejected the balancing approach set forth within the court of appeal opinion, an approach which suggested that the state's compelling interest in prosecuting serious criminals renders the defense of discriminatory enforcement inapplicable to crimes of a harmful and grievous nature. The *Murguia* court found that this approach rested on a "fundamental misunderstanding of the 'compelling interest' analysis."[62]

> Although the state unquestionably has a compelling interest in prosecuting serious criminal conduct, that interest is not related to and does not justify the *discriminatory enforcement* of criminal statutes.[63]

Since this interest remains the same notwithstanding the nature of the offense, no balancing of any type should permit a discriminatory prosecution. The supreme court, citing *Oyler v. Boles*,

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lack of California statutory authority for this type of pretrial dismissal motion, the supreme court concluded the courts have the authority to hear this type of claim. *Accord*, Jones v. Superior Court, 3 Cal. 3d 734, 738-39, 478 P.2d 10, 12-13, 41 Cal. Rptr. 578, 580-81 (1970).

59. 368 U.S. 448 (1962).

60. 15 Cal. 3d at 302, 540 P.2d at 55, 124 Cal. Rptr. at 215.

61. *Id.*

62. *Id.* at 304, 540 P.2d at 56, 124 Cal. Rptr. at 216.

63. *Id.* (emphasis in original). The court found no support for this balancing approach except one "erroneous lower court decision [*Montgomery*]." *Id.* at 303, 540 P.2d at 55-56, 124 Cal. Rptr. at 215-16.

acknowledged that if one can show a deliberate policy of discrimination based on an unjustifiable standard, a denial of equal protection has occurred, even in the prosecution of serious penal statutes. The court rejected the dictum relied on in *People v. Montgomery* and subsequent cases,[64] suggesting that the equal protection clause was inapplicable to the enforcement of a serious criminal statute.

The *Murguia* court concluded that the constitutional prohibition against discriminatory enforcement applies to the wrongful administration of *any* criminal law:

> The fact that most claims of discriminatory enforcement to date have involved relatively minor crimes reflects no more than that law enforcement officials generally prosecute without discrimination serious criminal offenders . . . .[65]

Thus, it is clear that in California the nature or seriousness of the crime is irrelevant with respect to the issue of whether the defense of discriminatory enforcement may be raised in a particular case. However, meeting the burden of proving intentional discrimination may be more difficult when a serious crime is involved.[66]

III. THE IMPLICATIONS OF THE MURGUIA DECISION

A. The Adequacy of Alternative Remedies

Since the supreme court in *Murguia* found considerable support for the proposition that the defense was available in any criminal prosecution, it was unnecessary to explicitly deal with the contention of the court of appeal that other defenses were both more available and more appropriate.[67] The appellate court had suggested that a civil suit for damages was one more appropriate remedy. The court apparently failed to realize that generally persons of middle and low incomes, who are often the victims of discriminatory treatment, do not have the financial capacity to bring such a suit:

> The costliness of such litigation is immense—especially in light of the unlimited resources of publicly funded law offices whose duty it is to

64. *Id.* at 301 n.11, 540 P.2d at 54 n.11, 124 Cal. Rptr. at 214 n.11.
65. *Id.* at 304, 540 P.2d at 56, 124 Cal. Rptr. at 216.
66. *See* United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973).
67. 117 Cal. Rptr. at 896.

> defend law enforcement clients. The resources available to the defense and the skill of highly trained lawyers experienced in making the prosecution of civil suits against the police as costly as possible to plaintiffs, render the civil remedy inadequate both as a compensatory device to the individual plaintiff and as a deterrent mechanism for society's protection.[68]

In addition, since public officials are often immune from civil liability,[69] civil suits for damages are of limited practical utility.

The use of injunctions as a remedy, as suggested by the court of appeal, is also ineffective. Injunctions are often denied because the possibility that a defense of discriminatory enforcement is available is an adequate legal remedy[70] or because of the doctrine of "unclean hands."[71] In view of the shortcomings of both civil suits and injunctions, the use of discriminatory law enforcement as a defense is one of the few means by which an individual citizen can "force law enforcement agencies to obey the law."[72]

B. Obstacles to the Use of the Defense

Prosecutorial Discretion and the Need for Uniform Enforcement of the Law

In light of *Murguia*, it is unlikely that future California decisions will rely on the *Montgomery* reasoning to restrict the use of the equal protection clause as a defense against prosecutorial discrimination.[73] Nevertheless, there remain substantial obstacles to

68. Petitioner's Brief for Rehearing at ii, Murgia v. Municipal Court, 15 Cal. 3d 286, 540 P.2d 44, 124 Cal. Rptr. 204 (1975).

69. *See* Cal. Penal Code § 836.5 (West 1970).

70. *See* Two Guys v. McGinley, 366 U.S. 582, 588 (1961). The Court in *Two Guys* denied an injunction since petitioners could have raised the claim of discriminatory enforcement as a defense in the criminal proceeding, while the court of appeal in *Murguia* attempted to justify restricting the defense since injunctive relief was a more appropriate remedy. 117 Cal. Rptr. at 892-93, 896. If both of these principles were applied simultaneously, a defendant could conceivably be left without a remedy when subjected to a discriminatory prosecution.

71. *See, e.g.*, Jackie Cab Co. v. Chicago Park Dist., 366 Ill. 474, 9 N.E.2d 213 (1937) (injunction only to protect property rights). Society of Good Neighbors v. Van Antwerp, 324 Mich. 22, 36 N.W.2d 308 (1949), succinctly summarizes the doctrine of unclean hands. Since the foundation of equitable relief is "good conscience," equity will not lend its aid to law violators: "He who hath committed iniquity shall not have equity and he who comes into equity must come with clean hands." *Id.* at 28, 36 N.W.2d at 310.

72. Mapp v. Ohio, 361 U.S. 643, 651 (1960); People v. Gray, 254 Cal. App. 2d 256, 266, 63 Cal. Rptr. 211, 217 (1967); *cf.* Irvine v. California, 347 U.S. 127, 137 (1954); Wolf v. Colorado, 337 U.S. 25 (1947).

73. *But see* Sims v. Cunningham, 203 Va. 347, 124 S.E.2d 221 (1962). *Sims* involved a

the use of the defense. One problem is that while prosecutorial discretion[74] should not be unlimited, some degree of discretion and selectivity is inevitable in the area of law enforcement. Obviously, all criminals cannot be apprehended, nor will all violators be prosecuted.[75] The discretionary function of the prosecutor permits flexibility in making decisions in the early stages of the judicial process.[76] Roscoe Pound has emphasized the need for predictability and continuity in the application of laws. Yet he has also stated that laws rigidly administered may result in positive injustice, and therefore "[d]iscretion . . . is necessary to avoid unjust and rigid application of the law."[77] There is always this "competing tension between the need in prosecutorial decision-making for certainty, consistency, and an absence of arbitrariness on the one hand, and the need for flexibility . . . on the other."[78] However, although some amount of prosecutorial discretion is inevitable, there comes a point when the courts must interfere. The misuse of such discretion can easily lead to arbitrary discriminatory enforcement.[79] As *Murguia* explained,

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habitual criminal statute (similar to the statute in *Oyler v. Boles*) that was allegedly discriminately enforced because it applied only to Virginia offenders. The court expressly approved of *Montgomery* and concluded that the *Yick Wo* principles did not apply. *Sims* accepted the limitation in *Montgomery* that *Yick Wo* only applies to those in pursuit of lawful occupations and not to protect individuals in the commission of serious crimes. For additional reliance on *Montgomery* see State v. Boldonado, 79 N.M. 175, 441 P.2d 215 (1968); Bailleaux v. Gladden, 230 Ore. 606, 370 P.2d 722, *cert. denied*, 371 U.S. 848 (1962); State v. Hicks, 213 Ore. 619, 325 P.2d 794, *cert. denied*, 359 U.S. 917 (1958). Whether other jurisdictions will continue their reliance on *Montgomery* in light of *Murguia* is an open question at this time.

74. For a general discussion on prosecutorial discretion see Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967); Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A.L. REV. 1 (1971); Givelber, *supra* note 12, at 88; Kaplan, *The Prosecutorial Discretion—A Comment*, 60 N.W.U.L. REV. 174 (1965).

75. *See* Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960).

76. Abrams, *supra* note 74, at 5; H. JACOB, *Trials, Negotiations, and Settlements*, in LAW AND ORDER IN A DEMOCRATIC SOCIETY 52 (N. Summers & T. Barth eds. 1970).

77. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 390 (1976), *citing* Pound, *Discretion, Dispensation, and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U.L. REV. 925, 936-37 (1960).

78. Abrams, *supra* note 74, at 3.

79. The role of prosecutorial discretion in criminal justice is also discussed in ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 33-34 (Tentative Draft 1970); W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 61-82 (1965); F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 158-66 (1969); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960); Tieger, *Police Discretion and Discriminatory Enforcement*, 1971 DUKE L.J. 717.

In speaking of discriminatory law enforcement, Justice Black once commented:

> We are not impressed by the argument that law enforcement

> the principal objective of the equal protection guarantee with respect to administrative enforcement of statutes is to safeguard individuals from administrative officials who utilize their discretionary powers of selective enforcement as a vehicle for intentional invidious discrimination.[80]

Balanced against the need for prosecutorial discretion, is society's interest in seeing that the laws are uniformly enforced and that the integrity of the judiciary branch is thereby maintained.[81]

> It must be presumed that legislatures intend that the laws they pass be impartially applied. The availability of discriminatory enforcement as a defense thus serves a good purpose: it acts as a constant reminder to the executive that the will of the people, expressed through the legislative branch, should be obeyed.[82]

Naturally, there is a strong public interest in the uniform enforcement of laws. While it is true that certain violators will go unpunished to uphold this interest, it is the law that sets them free, for the very "existence of the government will be imperiled if

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> methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end . . . . Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime is the handmaid of tyranny. Under our Constitutional system, courts stand against any winds that blow, as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice or public excitement.

Chambers v. Florida, 309 U.S. 227, 240-41 (1939) (footnote omitted).

80. 15 Cal. 3d 286, 305, 540 P.2d 44, 56, 124 Cal. Rptr. 204, 216 (1975). For a comprehensive discussion of prosecutorial discretion see Cox, *supra* note 77. This article discusses various problems inherent in the presence of such broad prosecutorial discretion, as well as the necessity and advantages of such discretion. An examination of the internal and external controls necessary for the proper utilization of such discretion is also included.

81. If the judiciary allows prosecutions resulting from discriminatory enforcement, they are condoning this unconstitutional conduct and breeding disrespect for the law. Justice Brandeis once wrote that

> [our government] teaches the whole people by its example . . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Olmstead v. United States, 277 U.S. 438, 485 (1927) (Brandeis, J., dissenting).

82. People v. Gray, 254 Cal. App. 2d 256, 266, 63 Cal. Rptr. 211, 217 (1967).

it fails to observe the law . . . ."[83] The holding in *Murguia* recognizes this important societal interest, unlike the decision of the court of appeal, which characterized one's right to nondiscriminatory law enforcement as "incidental."[84]

An additional consideration in evaluating the merits of the defense of discriminatory enforcement is society's interest to be free from unlawful police conduct. These are the same purposes which have been articulated by the United States Supreme Court to justify the exclusionary rule in search and seizure cases:[85] (1) to deter law enforcement officials from engaging in unconstitutional activity; and (2) to relieve the court from being compelled to participate in illegal police conduct.[86]

Burden of Proof Requirements

Reflecting the tension between the need for prosecutorial discretion and society's interest in equal law enforcement, the greatest obstacles to the assertion of the defense of discriminatory law enforcement are the heavy burden of proof required and the fine distinctions that courts have drawn between deliberate, invidious discrimination and non-arbitrary selective enforcement.[87] These difficulties are also a reflection of the court's "traditional . . . reluctance to review the prosecutor's exercise of discretion."[88] Since this reluctance varies in different jurisdictions, a defendant attempting to assert the defense of discriminatory en-

83. Olmstead v. United States, 277 U.S. 438, 485 (1927) (Brandeis, J., dissenting).

84. 117 Cal. Rptr. at 895.

85. *See* note 81 *supra*. The rationale of the exclusionary rule is also discussed in Elkins v. United States, 364 U.S. 206 (1960); Dixon v. District of Columbia, 394 F.2d 966, 970 (D.C. Cir. 1968); People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

86. *See* People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955). The dangers of illegal police conduct are immense:

> A sturdy, self-respecting democratic community should not put up with lawless police and prosecutors. Our people may tolerate many mistakes of both intent and performance, but with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights, those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism.

J. EDGAR HOOVER, FEDERAL BUREAU OF INVESTIGATION LAW ENFORCEMENT BULLETIN 1 (1952).

87. *See* Oyler v. Boles, 368 U.S. 448, 456 (1962). This distinction between discrimination and selectivity in enforcement is important since "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Id.*

88. Givelber, *supra* note 12, at 101. The rationale for permitting a great latitude of discretion is discussed in Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967).

forcement "is confronted with a considerable divergence of judicial opinion both as to substantive and procedural matters"[89] which he or she must prove in order to meet the burden of proof. The elements of the defense of discriminatory enforcement include: (1) deliberate discriminatory enforcement (*i.e.*, purposeful or intentional);[90] (2) based on an unjustifiable standard or other arbitrary classification (*e.g.*, race or religion).[91] These elements are not independent of each other and the quantum of evidence required to meet the burden of proof appears to vary according to the nature of the discrimination or the type of classification.[92]

The first obstacle is showing intentional or deliberate discrimination. The United States Supreme Court emphasized this element in *Snowden v. Hughes*,[93] which stated that

> [t]he unlawful administration by state officers of a state statute . . . 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.[94]

Although some cases require a showing that the prosecution is unfair or maliciously pursued,[95] the better view allows that arrest statistics or proof of certain methods of law enforcement reflect this discriminatory intent.[96] The language in *Snowden* does not require specific proof of discriminatory motive on the part of the prosecution or police. Rather, the element of purposeful discrimi-

89. Russo, *Equal Protection From the Law: The Substantive Requirements for a Showing of Discriminatory Law Enforcement*, 3 LOY. L.A.L. REV. 65, 66 (1970).

90. Murguia v. Municipal Court, 15 Cal. 3d 286, 300, 540 P.2d 44, 53, 124 Cal. Rptr. 204, 213 (1975).

91. *Id.* at 302, 540 P.2d at 54, 124 Cal. Rptr. at 214.

92. *See* notes 94-98 *infra* and accompanying text.

93. 321 U.S. 1 (1944) (alternate holding). Snowden ran in the Republican primary for a seat in the Illinois General Assembly and placed second, thus qualifying for a place on the ballot. The State Primary Canvassing Board failed to put Snowden on the ballot and he brought a suit for damages under the Civil Rights Act of 1871.

94. *Id.* at 8. Snowden's complaint was dismissed on the pleadings which alleged the board erroneously or negligently performed its legal duty. There was no proof that this omission was due to any intentional discrimination against Snowden.

95. *See* People v. Pearce, 8 Cal. App. 3d 984, 87 Cal. Rptr. 814 (1970); People v. Thompson, 10 Cal. App. 3d 129, 88 Cal. Rptr. 753 (1970). These cases are discussed at note 142 *infra*.

96. *See, e.g.*, People v. Superior Court (Hartway), 56 Cal. App. 3d 608, 128 Cal. Rptr. 519 (1976), *hearing granted*, S.F. No. 23477, Cal. Sup. Ct., June 9, 1976.

nation may be implied from the acts of law enforcement officers with respect to a particular class or person.[97]

Proof of selective enforcement against a class of persons appears to be sufficient in most cases to fulfill the requirement of "intentional and deliberate discrimination."[98] In *Murguia*, there were allegations of a conscious policy of selective enforcement directed against members of the UFW which, if proved, would be "prima facie invalid under the equal protection clause."[99] Although *Murguia* did not explicitly deal with the quantum of evidence necessary to show intentional discrimination, other California and federal courts have struggled with this aspect and arrived at conflicting results.[100]

In *People v. Gray*,[101] the California court of appeal reviewed the quantum of evidence required to support a claim of discriminatory law enforcement. The court held it was error to require clear and convincing evidence and instead found that proof by a preponderance of the evidence was the correct measure:[102]

> To rule that the defendant must carry the heavy burden of proof . . . is to hold that equal protection may be denied if the denial cannot be clearly and convincingly proved. We doubt that the Fourteenth Amendment sanctions so cynical a posture.[103]

Even so, the burden of proof remains a large barrier to successful claims of discriminatory law enforcement.[104] One suggested approach which would make the defense more accessible is to lower the burden of proof required to raise the de-

97. 321 U.S. at 8. *Accord*, Hawkins v. Town of Shaw, 461 F.2d 1171 (5th Cir. 1972); Zayre of Georgia, Inc. v. Atlanta, 276 F. Supp. 892 (N.D. Ga. 1967). *But see* People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962), where the court required a defendant to show that the selective enforcement was designed to discriminate against him.

98. *But see In re* Elizabeth G., 53 Cal. App. 3d 725, 126 Cal. Rptr. 118 (1975).

99. 15 Cal. 3d at 301, 540 P.2d at 54, 124 Cal. Rptr. at 214.

100. *See* Weissman, *The Discriminatory Application of Penal Laws by State Judicial and Quasi-Judicial Officers: Playing the Shell Game of Rights and Remedies*, 69 Nw. U.L. Rev. 489 (1975). "Nowhere in this expanding volume of case law . . . have the difficult issues [of discriminatory enforcement] been fully analyzed and confronted." *Id.* at 501.

101. 254 Cal. App. 2d 256, 63 Cal. Rptr. 211 (1967).

102. *Id.* at 266, 63 Cal. Rptr. at 217.

103. *Id.*

104. Many cases fail because of the difficulties in showing intentional discrimination. *See, e.g.*, Edelman v. California, 344 U.S. 357 (1953); Rhinehart v. Rhay, 440 F.2d 718 (9th Cir. 1971); Moss v. Hornig, 314 F.2d 89 (2d Cir. 1963).

fense.[105] Under this approach, when there is reasonable doubt concerning the existence of purposeful discrimination, the burden would switch to the government to show that no improper discrimination was practiced. To establish this reasonable doubt, a defendant would have to produce: (1) evidence that a generally unenforced law has been sporadically enforced against only a few of the known violators; or (2) evidence that a law has been enforced against only a fraction of the known violators and that fraction is unrepresentative of the total group of violators with respect to a characteristic which is irrelevant for valid law enforcement purposes.[106]

Several recent federal cases cited with approval in *Murguia* demonstrate the trend away from the strict requirements of proving intentional discrimination. In these cases, the defendants alleged and proved that among persons who were similarly situated and who had violated the same statutes, only those who had exercised their first amendment rights in a manner that was deemed undesirable by the government were prosecuted.[107] In *United States v. Steele*,[108] the defendant was convicted of refusing to answer questions on a census form. The Court of Appeals for the Ninth Circuit found purposeful discrimination by census authorities based simply on the following evidence: the defendant, along with three others who participated in a census resistance movement was prosecuted, while at least six others committed the same offense and were not; and reports were compiled only on the four who publicly attacked the census. The court in *Steele* noted that no explanation was offered for this selective enforcement by the government.[109]

A similar approach was taken in *United States v. Crowthers*,[110] where the Court of Appeals for the Fourth Circuit reversed a conviction for disorderly conduct because the defendants, who were protesting the war in Vietnam, were less noisy than other groups (military bands) who were not prosecuted. The court suggested that when defendants raise an inference of discrimination, the burden of proof should switch to the government to justify the selective enforcement:[111]

105. Givelber, *supra* note 12, at 105.
106. *Id.* at 106-24.
107. *See* notes 108-22 *infra* and accompanying text.
108. 461 F.2d 1148 (9th Cir. 1972).
109. *Id.* at 1152.
110. 456 F.2d 1074 (4th Cir. 1972).
111. *Id.*

> It is neither novel nor unfair to require the party in possession of the facts to disclose them. We think defendants made a sufficient prima facie showing that application of the noise and obstruction regulation to them was pretensive and that the government, being in possession of the facts as to noise and obstruction of approved activity, should have come forward with evidence, if it could, to rebut the inference of a double standard.[112]

Finally, in *United States v. Falk*,[113] the Court of Appeals for the Seventh Circuit adopted the approach suggested in *Crowthers*. Upon a showing of reasonable doubt, the court shifted the burden to the prosecution to provide compelling evidence that the decision to prosecute was arrived at in good faith.[114] The court disapproved of the frequent practice of simply

> dismissing all allegations of illegal discrimination in the enforcement of criminal laws with a reference to . . . [the *Oyler* statement] that the conscious exercise of some selectivity in the enforcement of laws does not violate the Constitution.[115]

Instead, the court maintained that when selective enforcement is used as a means of punishing those who are exercising their first amendment rights, it may still be presumed to be invidious discrimination which is inconsistent with the principles of equal protection.[116]

The defendant in *Falk* was convicted of failure to possess a

112. *Id.* at 1078 (citation omitted). The burden of proving discrimination shifts to the prosecution in many other areas of the law. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court considered the allocation of the burden of proof in a private action challenging employment discrimination under Title VII of the employment provisions of the Civil Rights Act of 1964. The complainant, stated the Court, has the initial burden to show discrimination: for example, a black person could show she applied for a job, was rejected, and that the position remained open. The burden then shifts to the employer to show a legitimate nondiscriminatory purpose. Similarly, in proving a retaliatory eviction, if a tenant shows that she exercised a statutory right or engaged in a constitutionally protected activity, the landlord must disprove a retaliatory motive. *See* CAL. CIV. CODE § 1942.5 (West 1975); Moskovitz, *Retaliatory Eviction—A New Doctrine in California*, 46 CAL. ST. B.J. 23 (1971). For a similar approach in discriminatory jury selection challenges see Alexander v. Louisiana, 405 U.S. 625 (1972); Turner v. Fouche, 396 U.S. 346 (1970); Givelber, *supra* note 12, at 107.

113. 479 F.2d 616 (7th Cir. 1973).

114. *Id.* at 623-24.

115. *Id.* at 624.

116. *Id.* at 623-24.

selective service card. The evidence showed that 25,000 men who turned in their draft cards were not prosecuted.[117] In addition, the Selective Service had a policy of not prosecuting violators of the card possession regulations.[118] Additional evidence showed that the government was opposed to the defendant's draft counseling service.[119] The court in *Falk* found this evidence established a prima facie case of improper discrimination, and the court shifted the burden of proof to the prosecution to show that its motives were proper.[120]

The impact of the *Falk* decision is uncertain. The facts of that case involved substantial evidence of intentional discrimination. One commentator has suggested that if the *Falk* approach is adopted by other courts,

> many more defendants may raise the defense of prosecutorial discrimination, but few will be successful in fulfilling the threshold standard of reasonable doubt . . . . Even under *Falk* defendants must overcome skeptical courts and the heavy obstacles of proving intentional discrimination based on improper grounds. Nevertheless, more crowded court dockets may become a legacy of the *Falk* deci-

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117. *Id.* at 621. The dissent found that this evidence did not support a conclusion of an invidiously discriminatory prosecution. *Id.* at 626-38. The dissent also argued that the *Falk* decision was inconsistent with the decision in United States v. O'Brien, 391 U.S. 367 (1968), where the United States Supreme Court refused to look into the legislative purpose in making draft card burning illegal. The dissent in *Falk* claimed that the reasons for the *O'Brien* Court's refusal to use congressional motive in striking down a statute were grounded on the doctrine of separation of powers:

> [T]hey apply with equal, if not greater, force to close the door to judicial inquisition into the purpose or motive of the executive in seeking an otherwise valid indictment.

479 F.2d at 629. *Falk* is distinguishable from *O'Brien* in several respects. First, the prohibitions against draft card burning, at issue in *O'Brien*, were strictly enforced, unlike the provisions for possessing draft cards, at issue in *Falk*. In addition, the Court in *O'Brien* found a legitimate governmental interest in prosecuting defendants for destroying their draft cards. The issue in *Falk* was not concerned with the purpose behind the law itself, but rather the problem of discriminatory enforcement of the law. *See Ramifications of United States v. Falk*, *supra* note 52, at 62.

118. 479 F.2d at 623.

119. *Id.* at 621. The dissent noted with approval the draft panel's decision to prosecute:

> [S]elect enforcement of a law against someone in a position to influence others is unquestionably a legitimate prosecutorial scheme to secure general compliance with the law.

Id. at 634.

120. *Id.* at 624. *See Ramifications of United States v. Falk*, *supra* note 52, at 62.

> sion which probably will be considered by future courts in deciding whether to adopt *Falk* in other jurisdictions.[121]

However, despite the fact that shifting the burden of proof to the prosecutor upon a showing of reasonable doubt would most probably increase the number of discriminatory prosecution claims, the threat of crowded court dockets should not be a determining factor. By requiring enforcement officials to justify selective enforcement, prosecutors will be forced to articulate guidelines which will give increased order and structure to prosecutorial decision-making[122] and will also give an individual an effective and enforceable remedy against discriminatory law enforcement.

C. Evidence Admissible in Support of the Defense

While *Murguia* indicates a positive trend toward acceptance of the defense of discriminatory law enforcement, the California Supreme Court did not clarify what type of evidence will be sufficient to substantiate a claim of discriminatory enforcement. This question will undoubtedly be determined on a case-by-case basis and more guidelines will certainly be established in the future. However, *Murguia* does indicate that defendants might successfully pursue the defense of discriminatory enforcement through discovery of the prosecution's records.[123] Hopefully, the use of discovery will ease the defendant's proof problems since

> [e]vidence of discriminatory enforcement usually lies buried in the consciences and files of . . . law enforcement agencies and must be ferreted out by the defendant.[124]

In assessing what kinds of evidence may be required to prove the elements of discriminatory enforcement, it is interesting to note several questions which arise out of the particular facts of *Murguia*. Although the defendants were arrested for crimes such as reckless driving and driving without a license,[125] which have generally been enforced to some degree in the larger community, the *Murguia* court concluded that their allegations of invidious and purposeful discrimination were valid. Was *Murguia* really

121. *Ramifications of United States v. Falk*, *supra* note 52, at 73.
122. *See generally* Givelber, *supra* note 12, at 103.
123. 15 Cal. 3d at 306, 540 P.2d at 57, 124 Cal. Rptr. at 217.
124. People v. Gray, 254 Cal. App. 2d 256, 266, 63 Cal. Rptr. 211, 217 (1967).
125. *See* note 21 *supra*.

attempting to deal with problems of discriminatory *motivation* on the part of police officers rather than actual discriminatory *enforcement*? If this is the case, it is necessary to inquire how far back into the factual history of a particular prosecution a court can reasonably delve in a search for the unlawful motivation of law enforcement officials. *Murguia* indicates that a purposeful presence by police officers at a particular place and time in order to catch certain persons in the commission of actual violations constitutes this type of unlawful motivation.

In most of the previous cases in which a claim of discriminatory enforcement was raised, the charges involved laws which were generally unenforced.[126] In other cases, it was necessary for the defendants to prove that other known violators were not prosecuted.[127] In *People v. Utica Daw's Drug Co.*,[128] the court placed the following limitation on the defense:

> It is only when selective enforcement is designed to discriminate against the persons prosecuted, without any attempt to follow it up by general enforcement against others, that a constitutional violation may be found.[129]

This limitation is no longer operative in light of *Murguia* since the offenses involved therein were commonly enforced.

It is, of course, not very difficult for a defendant to claim an unjustifiable standard of discrimination was utilized in his or her prosecution, and hence it is likely that claims of discriminatory enforcement will proliferate in the future. Many of these claims will attempt to establish that arrest and prosecution were based on an improper motive, or on the arresting officer's personal dislike of the arrested individual. As noted above, however, the extent to which a court will inquire into motivation remains an open question. In addition, asserting the defense may involve the risk, in some cases, that other defenses such as alibi or mistake will become unusable, since it may be necessary to admit the offense in order to claim discriminatory motive on the part of enforcement officials.

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126. *E.g.*, People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962), involved a Sunday closing law.

127. *See* United States v. Falk, 479 F.2d 616 (7th Cir. 1973).

128. 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962).

129. *Id.* at 20, 225 N.Y.S.2d at 136.

IV. THE APPLICATION OF THE MURGUIA DECISION

The defense of discriminatory law enforcement has significant implications in the current controversy about the enforcement of laws prohibiting prostitution. The proof problems may be eased in these cases, since sex is a suspect classification in California[130] and therefore the prosecution must show a compelling interest in discrimination. Since the arrest statistics often demonstrate substantial disparities between the numbers of men and women who are prosecuted for prostitution or solicitation, such statistics may establish a prima facie case of intentional discrimination.[131] In addition, the common use of law enforcement practices designed to facilitate the arrest of women only, such as the use of male decoys, would reflect an arbitrary and discriminatory pattern of enforcement.[132]

A. *In re Elizabeth G.*

While *Murguia* advocates a broad application of the *Yick Wo* principles, at least one California Court of Appeal has restrictively applied the principles set forth in *Murguia*. The case of *In re Elizabeth G.*[133] involved a minor who was arrested for prostitution[134] who raised the defense of discriminatory law enforcement. Since the statute was enforced discriminatorily against women, the trial court allowed the defense to be raised and made the following findings:

> (1) there are "many more arrests for solicitation for prostitution of women than there are of men;" (2) the Stockton Police Department "hires and deploys men for the purpose of catching women soliciting for prostitution and does not hire women for the purpose of solicit-

130. The California Supreme Court held that sex is a suspect classification in Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

131. *See* People v. Harris, 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (1960). The arrest statistics in *Harris* reflected the intentional discrimination against blacks. *See* note 54 *supra*.

132. *Cf.* Avery v. Georgia, 345 U.S. 559 (1953).

133. 53 Cal. App. 3d 725, 126 Cal. Rptr. 118 (1975); *In re Elizabeth G.* was decided approximately two months after *Murguia*.

134. CAL. PENAL CODE § 647(b) (West 1971) provides in part:

> Every person who commits [the following acts] is guilty of disorderly conduct, a misdemeanor:
> (b) who solicits or who engaged in any act of prostitution. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.

> ing . . . ;" and (3) "being a woman as opposed to being a man is a protected class in the sense that law enforcement would not be allowed to deliberately selectively enforce a law based on sex."[135]

However, despite these findings, the trial court concluded that having only male decoys was a "rational way" to proceed with the control of prostitution.[136] The court thus held the defense of discriminatory enforcement was not applicable.

The court of appeal affirmed the holding of the trial court that the evidence did not demonstrate intentional discrimination, and noted that the differential impact on the sexes of the enforcement of anti-prostitution laws was based on reasonable law enforcement. The reasoning of this case seems to ignore the inference of intentional discrimination shown by the statistical data, as well as the discriminatory method of enforcement. Although the statistics demonstrated that during 1973-1975 approximately 89% of the persons arrested for prostitution were women,[137] the court of appeal adopted the trial court's conclusion that

> the mere fact that fewer men are arrested and many women does not necessarily show a deliberate bias along sex lines enforcement . . . and it does appear inherently from the nature of things that it is more likely to be more women committing—soliciting for prostitution than men.[138]

These conclusions seem to ignore the guidelines in *Murguia*, since intentional discrimination appears obvious from the administrative design of the enforcement program and the arrest statistics.

In re Elizabeth G. concluded that the issue involved in *Murguia* was the narrow issue of a discovery order, and distinguished the case on that basis. Therefore, in the view of the court of appeal, the *Murguia* court "had no reason to set forth the requisites for . . . [the] defense [of discriminatory enforcement] or to define its limits with any particularity."[139] The court of appeal then incorrectly applied the guidelines set forth in *Murguia* by stating that

135. 53 Cal. App. 3d at 731, 126 Cal. Rptr. at 121.

136. *Id.* at 732, 126 Cal. Rptr. at 121.

137. *Id.* at Cal. App. 3d at 729, 126 Cal. Rptr. at 120.

138. *Id.* at 732, 126 Cal. Rptr. at 121. The court appears to incorrectly conclude that the crime of solicitation cannot be committed by a male customer.

139. *Id.* at 732, 126 Cal. Rptr. at 122.

one must first show intentional and invidious discrimination, and "[f]urthermore, [one] must be able to show that she would not have been prosecuted except for such invidious discrimination against her."[140] The *Murguia* court did not impose the requirement that one must show there would be no prosecution but for the discrimination. Once an individual demonstrates intentional discrimination based on an unjustifiable standard, it is assumed that the prosecution would not have been pursued except for the discriminatory design.[141]

It seems obvious that had *Murguia* been intended to have been limited to the issue of discovery, the court would not have engaged in a lengthy discussion on the unconstitutionality of discriminatory enforcement. Rather, it can be presumed that the supreme court opinion was intended as a guide to lower courts in handling such claims. Finally, the discussion in *Murguia* concerning the elements of the defense should not be considered as dicta, since it was necessary to determine in the actual holding that the defense of discriminatory enforcement was available to the defendants.

The court of appeal in *In re Elizabeth G.* also relied on several cases unmentioned in *Murguia* which, in dicta, required that the enforcement be "unfair"[142] or be accompanied by a "malicious

140. *Id.*

141. *See* 15 Cal. 3d at 298, 540 P.2d at 51-52, 124 Cal. Rptr. at 122-21. One commentator concludes that *Murguia* imposes a "but for" test which must be satisfied to successfully assert the defense of discriminatory enforcement. *See* Comment, *Development of the Defense of Discriminatory Prosecution: Murguia v. Municipal Court*, 8 Sw. L. Rev. 687, 697 (1976). This "new test" is based on language in *Murguia* which states that dismissals are essential when individuals can show that they would not have been prosecuted except for invidious discrimination against them. *Id.* The language from which the "but for" test was derived was simply the court's response to the People's argument that one should not be relieved of criminal penalties "simply because of the wrongful behavior of prosecutorial officials." 15 Cal. 3d at 297, 540 P.2d at 51, 124 Cal. Rptr. at 211. This language should not be construed as establishing a "new test" since this would impose a nearly impossible burden for defendant's attempting to assert this defense, and does not appear to be supported by the court's opinion.

142. The court relied upon People v. Thompson, 10 Cal. App. 3d 129, 88 Cal. Rptr. 753 (1970), where the court of appeal found that a trial judge had abused his discretion by setting aside a guilty plea on the basis that others involved were not prosecuted. *Thompson* involved facts quite different from those in *In re Elizabeth G.* The court in *Thompson* stated that in order to make a claim of discriminatory enforcement, there must be a policy of unfair law enforcement. *Id.* at 134, 88 Cal. Rptr. at 756. In People v. Pearce, 8 Cal. App. 3d 984, 87 Cal. Rptr. 814 (1970), also relied on by the *Thompson* court, it was held that charging a defendant by a grand jury indictment, rather than by information (and preliminary hearing) is not a denial of equal protection. *Pearce* then stated that generally a claim of discriminatory enforcement requires "malicious intent" on the part of the prosecutor. *Id.* at 988, 87 Cal. Rptr. at 817 (dictum).

intention on the part of the prosecution . . . ." These requirements seem to impose drastic limitations on the availability of the defense and were not approved or recognized by the California Supreme Court. Hopefully, other courts of appeal will apply the test in a manner that is more consistent with the intent of the *Murguia* decision.[143]

Several cases have recognized that prostitution statutes are often discriminatorily enforced against women.[144] Most of the recent attacks are by way of actions for injunctive relief.

B. *Reimer v. Jensen*

The Alameda County Superior Court considered the same type of evidence as did the court in *In re Elizabeth G.* in *Reimer v. Jensen*,[145] and concluded that the Oakland Police Department systematically and deliberately discriminated among persons on the basis of sex. The court in *Reimer* issued an injunction against the Oakland Police Department, restraining them from enforcing anti-prostitution statutes. The court found that the disproportionate arrest statistics indicated intentional and discriminatory law enforcement. The use of only male decoys in enforcing Penal Code section 647(b)[146] was also found constitutionally impermissible. There was additional evidence that women were more often incarcerated than men, who were usually given citations and then simply released. The law enforcement defendants' unsuccessful attempt to justify this differential treatment was based on the following state interests: (1) women were more likely to continue violating the law if released, but men would probably return home; and (2) women pose a higher risk of spreading venereal diseases. These asserted interests, the court found, were unsubstantiated and unjustifiable.

Although Reimer was a superior court decision and is pre-

143. The petition for hearing in *In re Elizabeth G.* was denied by the California Supreme Court on Jan. 28, 1976.

144. *See, e.g.*, People v. Superior Court (Hartway), 56 Cal. App. 3d 608, 128 Cal. Rptr. 519 (1976), *hearing granted*, S.F. No. 23477, Cal. Sup. Ct., June 9, 1976; United States v. Wilson, 15 Crim. L. Rep. 2001 (D.C. Super. Ct. 1974); United States v. Moses, 41 U.S.L.W. 2298, 12 Crim. L. Rep. 2198 (D.C. Super. Ct. 1972). *See generally* Wade, *Prostitution and the Law: Emerging Attacks on the Women's Crime*, 43 U.M.K.C.L. REV. 413, 416-22 (1975).

145. Civil No. 455371-9 (Alameda County Super. Ct., Apr. 1, 1975), *appeal filed*, Civil No. 38985 (Ct. App. 1st Dist., Jan. 19, 1976).

146. The text of the relevant parts of section 647(b) of the Penal Code may be found at note 134 *supra*.

sently being appealed,[147] its findings of intentional discrimination are consistent with the principles set forth in *Murguia*. The conscious policy of selective enforcement directed at women (a suspect classification in California) should be treated like selective enforcement directed against members of a labor organization in *Murguia*. Such practices are "prima facie invalid under the equal protection clause."[148] Thus, under *Murguia*, discriminatory enforcement should be a valid defense against the enforcement of prostitution laws.

C. *People v. Superior Court (Hartway)*

Four months after *Murguia*, in *People v. Superior Court (Hartway)*,[149] the court of appeal relied on *Murguia* and affirmed a lower court order restraining the prosecutions of over two hundred and fifty women[150] under California Penal Code section 647(b)[151] because of the unconstitutional application of this statute by the Oakland Police Department. The court of appeal found invidious discrimination in the enforcement of prostitution laws based on the disproportionate number of women charged with violation of section 647(b).[152] The explanation offered for this statistical imbalance was predicated on an artificial distinction made between prostitutes and customers:

147. *See* note 145 *supra*.

148. 15 Cal. 3d at 301, 540 P.2d at 54, 124 Cal. Rptr. at 214.

149. 56 Cal. App. 3d 608, 128 Cal. Rptr. 519 (1976), *hearing granted*, S.F. No. 23477, Cal. Sup. Ct., June 9, 1976.

150. *Id.* at 611, 128 Cal. Rptr. at 521. The original action involved 60 women but, upon stipulation, women whose cases were pending in municipal court as of July 25, 1976 joined the present action. Thus, approximately 252 individual actions were involved. *Id.* at 612 n.2, 128 Cal. Rptr. at 521 n.2.

151. This same statute was under review in *In re* Elizabeth G., 53 Cal. App. 3d 725, 126 Cal. Rptr. 118 (1975). For a discussion of the case see text accompanying notes 133-43 *supra*.

152. The Vice Control Division's records show that in 1973, 785 women and 117 men were arrested for violations of California Penal Code section 647(b). Of the 117 men, 79 were male prostitutes, 36 were men who solicited an undercover woman decoy, and 2 were customers of female prostitutes. In 1974, the Division arrested 708 women and 76 men. Of the 76 men, 55 were male prostitutes and 21 were men who solicited an undercover woman decoy. Between January 1, 1975 and April 20, 1975, the Division arrested 178 women and 46 men; of the 46 men, 14 were male prostitutes and 32 were men who solicited an undercover woman decoy. Reporter's Transcript, vol. 1, at 15-17, 31, 33, People v. Superior Court (Hartway), 56 Cal. App. 3d 608, 128 Cal. Rptr. 519 (1976). In 1973, approximately 25% of the 647(b) arrests were in "trick" cases, where a male customer made contact with an alleged female prostitute. In 1974 and 1975, approximately 15% were "trick" cases. Reporter's Transcript, vol. 1, at 55. Thus, out of approximately 325 "trick" cases in a period of over two years, only two male customers were arrested for soliciting what appeared to be an actual prostitute. *Id.*, vol. 2, at 33. In no case were both the man and woman arrested. *Id.*, vol. 1, at 45.

> This distinction . . . [the People] contend constitutes a rational basis for law enforcement emphasis on prostitutes rather than on customers, since police must expend their finite resources on the *most criminal element* . . . .[153]

The court of appeal rejected this distinction and acknowledged "changing social perspectives" which require that enforcement policies resulting in such disproportionate treatment must cease.[154] Since the enforcement discriminated against women on the basis of sex, the prosecution would have to show a compelling interest that necessitated the discriminatory enforcement.[155] The court in *Hartway* concluded that under the

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153. *Id.* at 616, 128 Cal. Rptr. at 524. The "most criminal element" referred to those who profit from the crime financially and to those who are considered most disruptive to the community.

Lt. Strelo, the head of the Vice Control Division, testified at the superior court trial that the primary target of the Division was the exploiter of the professional prostitute—the pimp, the panderer, and the bar and motel owner. He also testified that the Division spent about 60% of its time on these "exploiters," 30% on the actual street prostitute, and 5% on customers. Reporter's Transcript, vol. 2, at 61-62, 109, 148. The Division's policy of devoting more time to the prostitute rather than to the customer was a personal decision made by Lt. Strelo. No policy directive or memorandum on the matter was ever issued. *Id.* at 28.

154. 56 Cal. App. at 617, 128 Cal. Rptr. at 524. The court of appeal agreed that the emphasis on the commercial aspect of prostitution would allow men freedom to solicit and engage in prostitution without fear of any sanctions. *See* Leffel v. Municipal Court, 54 Cal. App. 3d 569, 126 Cal. Rptr. 773 (1976), where a customer claimed that California Penal Code section 647(b) applied only to solicitation by a prostitute and not by a customer. The court concluded that the statute applied to both. *Id.* at 575, 126 Cal. Rptr. at 776-77.

The People's contention that prostitutes, not women, are the focus of selective enforcement was supported by some evidence which indicated that male prostitutes were treated in a similar way to female prostitutes. However, homosexual prostitution is only a small part of the total prostitution activity:

> In contrast to the vast amount of data real parties in interest produced on the discriminatory enforcement against women in the area of heterosexual prostitution, petitioners produced only two cases involving homosexual prostitution, and in each case the police arrested *both* the prostitute and the customer. Thus, contrary to petitioner's assertion, the prostitute-customer distinction does not run through the entire operation of the vice squad.

Supplemental Brief for Real Parties in Interest at 3, People v. Superior Court (Hartway), 56 Cal. App. 3d 608, 128 Cal. Rptr. 519 (1976).

155. 56 Cal. App. 3d at 617, 128 Cal. Rptr. at 524. The People asserted the fight against organized crime and the protection of public health and welfare as compelling interests. There was no showing that the enforcement emphasis was necessary to further these goals. The evidence supported the fact that emphasis on both the cus-

guidelines of *Murgia*, the prosecuting authorities, in administering the statute, followed an enforcement pattern deliberately based upon an unjustifiable standard and thereby violated the mandates of the equal protection clause.[156]

The California Supreme Court recently accepted the *Hartway* case for hearing.[157] The most difficult issue facing the supreme court is whether a gross statistical imbalance is sufficient to demonstrate intentional discrimination against women.[158] The de-

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tomer and the prostitute would be more effective. The Oakland Police Department's policy has not had a great deterrent effect on prostitutes. Lt. Strelo's testimony shows that prostitutes were arrested over and over again, only to return "to the streets." Arrested customers, on the other hand, have a recidivist rate that is "basically nil." Reporter's Transcript, vol. 2, at 89-90.

156. 56 Cal. App. 3d at 617, 128 Cal. Rptr. at 524-25. The court of appeal in *Hartway* additionally held that the word "solicit" in California Penal Code section 647(b) was not unconstitutionally vague as the lower court had found. *Id.* at 618, 128 Cal. Rptr. at 525. For judicial definitions of the term "solicit" see Leffel v. Municipal Court, 54 Cal. App. 3d 569, 575, 126 Cal. Rptr. 773, 777 (1976).

157. *See* note 149 *supra*.

158. The use of statistics alone to prove intentional discrimination was rejected by the United States Supreme Court in Washington v. Davis, 96 S.Ct. 2040 (1976). In *Davis*, the plaintiffs claimed that the District of Columbia Police Department's recruiting procedures, which included a written personnel test, were racially discriminatory and violated the due process clause of the fifth amendment. The major proof offered in support of this contention was that the written test excluded a disproportionately high number of black applicants.

In applying a Title VII test, the district court and the Court of Appeals for the D.C. Circuit held that the plaintiffs had offered sufficient evidence of racial impact to shift the burden of proving job-relatedness to the defendant police department. However, the district court granted summary judgment to the defendants, noting the absence of any claim of intentional discrimination. The district court considered the fact that 44% of the new police officer recruits were black and emphasized the affirmative efforts of the police department to recruit blacks. These factors were found to rebut any inference of intentional discrimination.

The court of appeals reversed and directed summary judgment in favor of the plaintiffs. The court of appeals applied the standard upheld in Griggs v. Duke Power Co., 401 U.S. 424 (1971), which held that Title VII of the Civil Rights Act of 1964 prohibits the use of tests that operate to exclude minorities, unless the employer demonstrates that the procedures are substantially related to job performance. The Supreme Court reversed, holding that the court of appeals erroneously applied the legal standards applicable to Title VII cases and held that a racially disproportionate impact alone will not constitute an invidious discrimination. 96 S. Ct. at 2040.

The Court did admit that an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact that a particular law bears more heavily on one race than another. Disproportionate impact is therefore extremely relevant to proof of racial discrimination, but not solely determinative. The Supreme Court disapproved of a long line of cases, most in the context of public employment, where various courts of appeals had found that a substantially disproportionate racial impact of a statute or official practice alone suffices to prove racial discrimination. *Id.* at 2050 n.12. The Supreme Court emphasized that discriminatory purpose must be proved by additional facts in order to constitute a violation of the equal protection clause.

fendants in *Hartway* have also contended that intentional discrimination can be inferred from the police department's persistent use of male decoys and its lack of efforts to employ any significant amount of women in a similar capacity.[159] Finally, the defendants have claimed that the differential treatment of women and men after arrest by the quarantine practices of Alameda County also is indicative of discriminatory intent.[160]

The concurring opinion of Justice Stevens emphasized that a substantial disproportionate impact could be sufficient proof of discrimination in some cases:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds . . . . It is unrealistic . . . to require the victim of alleged discrimination to uncover the actual subjective intent of the decision maker . . . .

Id. at 2054. *See also* Bakke v. Regents of the University of California, 18 Cal. 3d 34,— P.2d—, —Cal. Rptr.— (1976), where the California Supreme Court refused to find that the Medical College Admission test amounted to discrimination in fact against minorities simply because it resulted in the exclusion of a disproportionate number of minority applicants. *Id.* at 59 (dictum).

159. The overwhelming amount of undercover decoy work by the Oakland Police Department was performed by males. The Vice Control Division also briefly used the 125 police recruits who were trained in 1973, of whom no more than two were women. Reporter's Transcript, vol. 1, at 19-26. The arrest figures demonstrate that in terms of arrest per decoy hour, the few female decoys used were slightly more effective in arresting male customers than male decoys were in arresting female prostitutes. Return to Real Parties Alternative Writ of Prohibition at 13, People v. Superior Court (Hartway), 56 Cal. App. 3d 608, 128 Cal. Rptr. 519 (1976). Lt. Strelo, the commander of the Vice Control Division, admitted that the use of female decoys was an effective way of reducing prostitution. Reporter's Transcript, vol. 2, at 86. Moreover, news publicity of Judge Avakian's Memorandum of Decision in *Reimer v. Jensen*, discusses at text accompanying notes 145-48 *supra*, which directed police to arrest customers, had a "devastating effect on reducing street prostitution activity." Reporter's Transcript, vol. 2, at 89-90. Despite the effectiveness of female decoys, at no time between 1973 and 1975 did Lt. Strelo send any memoranda or bulletins to request women to apply for decoy work. Although he testified that there were budgetary limitations, he never applied to the department for funds specifically for female decoy work on prostitution. Lt. Strelo testified that there were budgetary limitations on the amount of compensation to pay female decoys. However, he did not try to hire women from outside the department because of insurance factors, although men were employed in such a capacity. *Id.*, vol. 5, at 541. The Division offered no pay incentives to police women to induce them to do undercover work. *Id.* at 36.

An analogy can be drawn in this area to school desegregation cases, where the Court has found that the availability of "more promising courses of action" to a school board to dismantle a dual school system places "a heavy burden upon the board to explain its preference for an apparently less effective method." Green v. County School Bd., 391 U.S. 430, 439 (1968).

160. Prior to April, 1975, Alameda County was the only county in California still enforcing a quarantine on alleged prostitutes. Reporter's Transcript, vol. 3. at 81-82.

> The quarantine practices of the Oakland Police Department also indicated discriminatory intent. For years, virtually all

It is unrealistic to require victims of alleged discrimination to uncover the actual subjective intent of a prosecutor or enforcement agency.[161] Such a harsh burden would reduce the redress proffered in *Murgia* to an illusory promise.[162] Under the guidelines of *Murgia*, the evidence in *Hartway* should be sufficient to demonstrate the systematic discriminatory enforcement of the prostitution laws.

CONCLUSION

The use of discriminatory law enforcement as a defense in a criminal prosecution is a viable remedy to uphold the guarantees of the equal protection clause. *Murgia*'s acceptance of the validity of this defense is a response to the frequent abuses in the administration of laws. The enormous power and discretion of law enforcement officials inevitably allows for arbitrary applications and illegal discrimination in law enforcement, prohibited by the equal protection clause. But while recognizing some discretion in the enforcement of laws as essential, *Murguia* also recognizes that the courts must continue to impose judicial restraints to curtail these illegal actions of law enforcement officials and thereby maintain the integrity of our constitutional principles:

> *You delight in laying down laws,*
> *Yet you delight more in breaking them.*
> *Like children playing by the ocean who*
> *build sand-towers with constancy and then*
> *destroy them with laughter.*
> *But while you build your sand-towers the*
> *ocean brings more sand to the shore,*
> *And when you destroy them the ocean*

> women arrested under Penal Code section 647(b) were quarantined, thereby preventing their release on bail for several days and subjecting them to compulsory examination and treatment, whereas the few male customers who were arrested were merely given citations and released. Coincidentally, on the day after Judge Avakian's preliminary injunction [in *Reimer v. Jensen*], that quarantine restrictions could be imposed on women only if the same restrictions were imposed on men, was to go into effect, the quarantine practice was discontinued. The timing of a city's actions may properly be considered in an assessment of whether it has acted in a discriminatory manner.

Return to Real Parties Alternative Writ of Prohibition at 13. *See* Wright v. Council of City of Emporia, 407 U.S. 451, 467 (1972).

161. *See* Washington v. Davis, 96 S.Ct. 2040, 2054 (1976) (Stevens, J., concurring).

162. Supplemental Brief for Real Parties in Interest at 6.

laughs with you.
Verily the ocean laughs always with the innocent.[163]

Sheri L. Perlman

163. K. GIBRAN, THE PROPHET 44 (1964).