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Rethinking Selective Enforcement in the First Amendment Context

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NOTES

RETHINKING SELECTIVE ENFORCEMENT IN THE FIRST AMENDMENT CONTEXT

The Selective Service System's "passive enforcement" of the most recent draft registration law has called attention to the defense of selective prosecution. Under a passive enforcement policy, an enforcement agency makes no effort to discover violators, but refers to the Justice Department for prosecution only those violators who turn themselves in by writing a letter of protest to the government, or who are turned in by third parties.[1] The effect of such a policy is to select for prosecution only those who have openly criticized the government and indicated their noncompliance as evidence of the intensity of their opposition.[2] Quiet offenders are for all practical purposes rendered immune from prosecution.[3] In practice, passive enforcement makes registration itself voluntary, but criticism of the registration program a crime.

Under the current law of selective prosecution a claim that the practice violates the first amendment[4] has little chance of success. Nearly every circuit applies a two-part test for the defense of selective prosecution under which the defendant must show not only disproportionate selection but a prosecutorial motive to punish or deter the exercise of first amendment rights. Such a motive is nearly impossible to establish since the Selective Service can justify the passive enforcement policy on three nonspeech grounds: cost-savings, the deterrence value of prosecuting the visible offender, and the evidentiary value of public statements. The tension between the motive test and the first amendment values implicated by passive enforcement has led to inconsistent determinations in courts reviewing the Selective Service policy.[5] While the Ninth Circuit has resolved the tension in favor of the traditional motive test, the

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1. See United States v. Wayte, 549 F. Supp. 1376, 1379 (C.D. Cal. 1982), rev'd, 710 F.2d 1385 (9th Cir. 1983). The Selective Service System has since abandoned passive enforcement and now identifies violators by using social security and driver's license records. See N.Y. Times, June 30, 1983, at D23, col. 4.

2. United States v. Wayte, 549 F. Supp. 1376, 1379 & n.3 (C.D. Cal. 1982), rev'd, 710 F.2d 1385 (9th Cir. 1983).

3. Id. at 1384.

4. The first amendment reads in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances . . . ." U.S. Const. amend. I.

5. Compare United States v. Wayte, 710 F.2d 1385 (9th Cir. 1983) (rejecting inference of motive), and United States v. Eklund, 551 F. Supp. 964 (S.D. Iowa 1982) (failure to establish motive), with United States v. Schmucker, No. 82-3701 (6th Cir. Nov. 25, 1983) (available on LEXIS, Genfed library, Cir file) (recognizing that passive enforcement may be a guise for suppressing criticism), and United States v. Wayte, 549 F. Supp. 1376 (C.D. Cal. 1982) (inference of motive), rev'd, 710 F.2d 1385 (9th Cir. 1983).

Sixth Circuit has resolved the tension in favor of short-circuiting the motive test.[6]

This Note argues for the use of a balancing-of-interests approach in place of the current two-part test when enforcement policies are challenged on first amendment grounds. The Note begins by explaining the current two-part test and analyzing how it conflicts with other first amendment doctrines. Next, an inquiry into the development of current law reveals that the origins of both the selective prosecution defense and its motive requirement lie in equal protection review of administrative action. These roots suggest a defect in the application of an equal protection test in place of a direct application of the first amendment. The Note then examines both equal protection and agency review applications of the motive requirement and concludes that neither model of review supports a motive requirement for a first amendment challenge to federal enforcement policy. Finally, the Note subjects the passive enforcement policy to first amendment analysis. The policy violates the first amendment whether it is assessed as a content-based or as a content-neutral regulation of speech.

I. The Tension Between Selective Prosecution and First Amendment Analyses

A. *Role of Prosecutorial Motive in Current Selective Prosecution Analysis*

Currently, a selective prosecution defense will be successful only if the defendant shows both selection and that such selection is motivated by a hostility to the defendant or his exercise of constitutional rights. This test has been applied to free speech claims. In all other first amendment contexts, however, the courts do not require a showing of hostile motives to sustain a challenge to government action. This conflict between the selective prosecution motive requirement and general first amendment analysis makes clear the need for a reexamination of first amendment–selective prosecution analysis.

The Supreme Court has never sustained a defense based on selective prosecution. Nevertheless, in *Oyler v. Boles*,[7] a 1962 case rejecting such a defense, the Court suggested that in the proper case the defense was available.[8] Following this dictum, nearly every circuit has adopted the defense of selective prosecution and a two-part test for applying it.[9] While both parts

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6. Compare United States v. Wayte, 710 F.2d 1385 (9th Cir. 1983) (valid justifications defeat inference of motive), with United States v. Schmucker, No. 82-3701 (6th Cir. Nov. 25, 1983) (available on LEXIS, Genfed library, Cir file) (defense could be made out without direct showing of motive).

7. 368 U.S. 448 (1962).

8. Id. at 456; see also Two Guys, Inc. v. McGinley, 366 U.S. 582, 588 (1961) (noting in dictum that selective prosecution would be a defense).

9. E.g., United States v. Bourque, 541 F.2d 290 (1st Cir. 1976); United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974); United States v. Johnson, 577 F.2d 1304 (5th Cir. 1978); United States v. Hazel, 696 F.2d 473 (6th Cir. 1983); United States v. Peskin, 527 F.2d 71 (7th Cir. 1975), cert. denied, 929 U.S. 818 (1976); United States v. Ojala, 544 F.2d 940 (8th Cir. 1976); United States v.

have their roots in the *Oyler* opinion,[10] an oft-cited articulation of the test appears in the 1974 Second Circuit opinion in *United States v. Berrios*:[11]

> To support a defense of selective or discriminatory prosecution, the defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.[12]

The first part of the *Berrios* test is the self-evident threshold requirement that some selection have taken place. If the government has prosecuted all offenders, there can be no claim of selective prosecution. Nevertheless, this part of the test is more easily stated than applied. Courts disagree on whether the defense requires: (1) proof only that other violators were not prosecuted,[13] (2) proof that other violators were not prosecuted and that the government knew generally that there were other violators,[14] or (3) proof that other individual violators were known to the government but not prosecuted.[15] Also unclear is whether a defendant must show that only members of the impermissible class were prosecuted, or merely that a disproportionate number of vocal violators were prosecuted.[16]

The second part of the *Berrios* test is more directly related to prosecutorial motive, and its application has been more problematic. The most liberal

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Steele, 461 F.2d 1148 (9th Cir. 1972); United States v. Mangieri, 694 F.2d 1270 (D.C. Cir. 1982). For discussions of the selective prosecution doctrine, see generally Cardinale & Feldman, The Federal Courts and the Right to Nondiscriminatory Administration of the Criminal Law: A Critical View, 29 Syracuse L. Rev. 659 (1978); Note, *United States v. Falk*: Developments in the Defense of Discriminatory Prosecution, 72 Mich. L. Rev. 1113 (1974); Comment, The Right to Nondiscriminatory Enforcement of State Penal Laws, 61 Colum. L. Rev. 1103 (1961).

10. See infra text accompanying notes 57–59.

11. 501 F.2d 1207 (2d Cir. 1974).

12. Id. at 1211.

13. Cf. United States v. Hazel, 696 F.2d 473 (6th Cir. 1983) (allegation only that 34 other violators were not prosecuted sufficient basis to get evidentiary hearing).

14. See United States v. Wayte, 710 F.2d 1385 (9th Cir. 1983) (evidence that estimated 500,000 violators not prosecuted sufficient to meet first part of test without evidence that government knew of other individuals).

15. See United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974) (allegation that other violators existed without identifying any individuals fails first part of test). The *Oyler* Court's initial rejection of the selective prosecution claim was based on defendant's failure to allege "more than a failure to prosecute others because of a lack of knowledge of their prior offenses." Oyler v. Boles, 368 U.S. 448, 456 (1962). This language supports the most stringent test of knowledge of individual violators.

16. Compare United States v. Scott, 521 F.2d 1188 (9th Cir. 1975) (tax fraud; first test not satisfied because of vigorous IRS general enforcement policy), cert. denied, 424 U.S. 955 (1976), with United States v. Hazel, 696 F.2d 473 (6th Cir. 1983) (tax fraud; first test satisfied by allegation of 34 violators not prosecuted).

phrasing of the test for unconstitutional selection criteria—"based upon impermissible grounds such as . . . the exercise of constitutional rights"[17]—suggests the possibility of the defense when the prosecutor selected the defendant on the basis of good-faith but constitutionally unsound distinctions. However, the *Berrios* formulation, which requires a showing that selection is "invidious or in bad faith, i.e., based upon such impermissible considerations as . . . the desire to prevent his exercise of constitutional rights,"[18] is more common. Courts often require showings of "reprisal"[19] or "desire to penalize."[20] These tests require a showing of personal hostility on the part of the prosecutorial decisionmaker, towards either the defendant or the constitutional right exercised. For example, even if the defendant can show that his exercise of first amendment rights is the but-for cause of his selection for prosecution, the defense is denied if the prosecution was not "made in retaliation for his exercise of his first amendment right"[21] but rather "rests upon the amount of publicity [his] protests receive[, which] . . . serves a legitimate governmental interest in promoting public compliance."[22]

This harsh motive requirement is mitigated somewhat by two procedural devices that have been built into the selective prosecution law. First, a defendant can shift the burden of proof to the prosecutor if he establishes a prima facie case of selective prosecution by alleging improper motive and introducing evidence raising a reasonable doubt as to the prosecutor's good faith.[23] Second, a defendant alleging facts sufficient to take the selective prosecution defense "past the frivolous stage" may get court-ordered discovery of documents related to prosecutorial policy, in preparation for an evidentiary hearing on the defense.[24] Since the prosecutor is often unwilling to take the stand

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17. United States v. Wilson, 639 F.2d 500, 503 (9th Cir. 1981); accord United States v. Murdock, 548 F.2d 599, 600 (5th Cir. 1977). Both these courts found that the defense failed to pass even this liberal test. In no reported decision has a defendant succeeded under this liberal standard. But cf. United States v. Schmucker, No. 82-3701 (6th Cir. Nov. 25, 1983) (available on LEXIS, Genfed library, Cir file) (defense may be made out by causal relation between exercise of right and prosecution).

18. *Berrios*, 501 F.2d at 1211.

19. United States v. Ojala, 544 F.2d 940, 944 (8th Cir. 1976).

20. United States v. Peskin, 527 F.2d 71, 86 (7th Cir. 1975).

21. United States v. Catlett, 584 F.2d 864, 867 (8th Cir. 1978).

22. Id. at 868.

23. See, e.g., United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (memorandum indicating strict enforcement against draft protestors raises reasonable doubt as to motive); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972) (inferential proof of individual knowledge of nonvocal violators is prima facie case). The student author of Note, supra note 9, at 1114, read *Falk* as "implicitly eliminating the necessity of showing *purposeful* discrimination . . . represent[ing] an important and praiseworthy development." This praise may have been a bit premature; the "purposeful" requirement lives on. E.g., United States v. Catlett, 584 F.2d 864 (8th Cir. 1978).

24. E.g., United States v. Oaks, 508 F.2d 1403, 1404 (9th Cir. 1974). The decision whether to grant such an evidentiary hearing has been held to be a matter of trial court discretion. United States v. Wilson, 639 F.2d 500, 503 (9th Cir. 1981); United States v. Berrios, 501 F.2d 1207, 1212 (2d Cir. 1974).

on the question of good faith, or to release sensitive documents,[25] a prima facie case or nonfrivolous allegation can result in dismissal.[26]

Both the prima facie case and the nonfrivolous allegation, however, are subject to rebuttal where the government shows that the challenged policy is not motivated by an invidious desire to punish, but rather some rational prosecutorial goal. Although the Selective Service and the Internal Revenue Service (IRS) both have officially acknowledged policies that tend to direct extra prosecutorial effort toward those who vocally oppose draft registration[27] or the income tax,[28]—ordinarily enough to establish a prima facie case[29]—selective prosecution claims based on these policies have been rejected where the government established noninvidious reasons for the policy.[30] Prosecutors advance three justifications for prosecuting the vocal offender. First, they suggest that the greater media attention received in such prosecutions has a greater deterrent effect on would-be violators.[31] A second frequently advanced justification is the need to allocate limited resources and the lower cost of discovering vocal offenders.[32] The third justification focuses on the mens rea element of the crime charged: it is easier to establish a knowing[33] or "willful"[34] violation if the defendant has made public statements about his refusal to comply with the law.[35]

These three justifications are properly dispositive of a defense based on prosecutorial motive. Yet a court faced with the juxtaposition of the values served by these justifications—in terrorem effects on would-be violators, cost savings, and more easily won cases—and the values invoked by the first

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25. Of course, in camera inspection may be available. See United States v. Oaks, 508 F.2d 1403 (9th Cir. 1974); United States v. Berrios, 501 F.2d 1207, 1212–13 (2d Cir. 1974).

26. E.g., United States v. Steele, 461 F.2d 1148 (9th Cir. 1972) (failure to rebut prima facie case requires dismissal); United States v. Wayte, 549 F. Supp. 1376 (C.D. Cal. 1982) (dismissal for failure to cooperate in discovery), rev'd, 710 F.2d 1385 (9th Cir. 1983). Dismissal as a discovery sanction has been criticized. See Attorney General v. Irish People, Inc., 684 F.2d 928 (D.C. Cir. 1982).

27. See United States v. Wayte, 549 F. Supp. 1376, 1382 (C.D. Cal. 1982), rev'd, 710 F.2d 1385 (9th Cir. 1983).

28. See United States v. Catlett, 584 F.2d 864, 866 n.5 (8th Cir. 1978).

29. See United States v. Falk, 479 F.2d 616, 621–22 (7th Cir. 1973) (policy statement establishes prima facie case).

30. United States v. Catlett, 584 F.2d 864 (8th Cir. 1978) (tax protestor); United States v. Eklund, 551 F. Supp. 964 (S.D. Iowa 1982) (draft nonregistrant).

31. See, e.g., United States v. Hazel, 696 F.2d 473 (6th Cir. 1983); United States v. Catlett, 584 F.2d 864 (8th Cir. 1978).

32. United States v. Wayte, 549 F. Supp. 1376, 1384 (C.D. Cal. 1982), rev'd, 710 F.2d 1385 (9th Cir. 1983); cf. United States v. Ojala, 544 F.2d 940 (8th Cir. 1976) (limited enforcement resources support deterrence argument).

33. 50 U.S.C. app. § 462 (1976) (selective service law).

34. 26 U.S.C. § 7203 (1976) (Internal Revenue Code).

35. See, e.g., United States v. Wilson, 639 F.2d 500 (9th Cir. 1981) (stating that a tax protestor provides the strongest case for meeting the "willful" requirement); cf. United States v. Eklund, 551 F. Supp. 964 (S.D. Iowa 1982) (selective prosecution defense rejected because passive enforcement policy had the purpose of separating out the willful nonregistrants).

amendment—the political expression that is "the essence of self government"[36]—might understandably pause before rejecting the selective prosecution defense. Such was the reaction of the District Court for the Central District of California in *United States v. Wayte*.[37] Confronted with a policy that selected for prosecution only vocal draft nonregistrants, the court rejected both the cost-saving and deterrence justifications. The court clung to its inference of bad faith from the government's knowledge of the consequences of passive enforcement.[38] In *United States v. Schmucker*,[39] the Sixth Circuit showed a similar sensitivity to first amendment values and, based on the government's knowledge of the consequences of passive enforcement, remanded a draft conviction for dismissal unless the government could demonstrate nondiscriminatory enforcement. In the *Wayte* case on appeal, however, the Ninth Circuit rejected this sort of inference as "clearly erroneous" and reversed the dismissal.[40] This disagreement among courts reviewing the passive enforcement policy underscores the tension between first amendment values, which do not generally depend on the motive of the government actor disturbing them, and a test that turns on the personal motive of the prosecutorial decisionmaker.

B. *The Irrelevance of Motive in First Amendment Analysis*

The tension between the two-part selective prosecution test and first amendment doctrine becomes apparent when one considers courts' reluctance to consider the government's motive in first amendment cases. Courts often refuse to look into the motive behind legislation.[41] In the freedom of expression context, these refusals to consider motive are not based merely on the Court's reluctance to "psychoanalyze" Congress,[42] but rather on a sense that good motives are irrelevant if first amendment interests are affected.

Good motives do not generally save government action that otherwise violates the first amendment. In *NAACP v. Alabama ex rel. Patterson*,[43] the

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36. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (Brennan, J.).

37. 549 F. Supp. 1376 (C.D. Cal. 1982), rev'd, 710 F.2d 1385 (9th Cir. 1983).

38. Id. at 1382. Contra United States v. Eklund, 551 F. Supp. 964 (S.D. Iowa 1982).

39. No. 82-3701 (6th Cir. Nov. 25, 1983) (available on LEXIS, Genfed library, Cir file). The *Schmucker* court remanded the case for an evidentiary hearing to allow the government to attempt to prove its good faith.

40. United States v. Wayte, 710 F.2d 1385, 1388 (9th Cir. 1983).

41. E.g., United States v. O'Brien, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter."); Arizona v. California, 283 U.S. 423, 455 (1931); McCray v. United States, 195 U.S. 27, 56 (1904). This reluctance to consider legislative motive has disappeared in certain areas. See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (equal protection); McGowan v. Maryland, 366 U.S. 420 (1961) (establishment clause); infra text accompanying notes 90-93. See generally L. Tribe, American Constitutional Law 594-98 (1978); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970).

42. United States v. Constantine, 296 U.S. 287, 299 (1935) (Cardozo, J., dissenting).

43. 357 U.S. 449 (1958).

Supreme Court struck down a civil contempt citation for the NAACP's failure to comply with a court-ordered disclosure of its membership lists. Such disclosure would have had an adverse effect on the NAACP's members' first amendment right of association. The Court sought to discover the extent of NAACP activity within Alabama in order to adjudicate the NAACP's compliance with the Alabama foreign corporation law.[44] Since the court order's underlying objective was not the suppression of rights, it would certainly survive the "desire to prevent [the] exercise of constitutional rights" test applied under selective prosecution analysis.[45] In striking the order down, the Court refused to draw a distinction between scrutiny of legislative and judicial acts.[46] Noting that "[t]he governmental action challenged may appear to be totally unrelated to protected liberties,"[47] Justice Harlan wrote for the Court: "In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action."[48] Thus, a valid purpose for a governmental, including a nonlegislative, act does not immunize the act from first amendment scrutiny.[49]

If this same approach applies to prosecutorial policies that impinge on first amendment interests, the courts are wrong to end selective prosecution analysis once a valid motivation is shown. When confronted with a first amendment selective prosecution defense, a court must choose between settled

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44. Id. at 451.

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

46. 357 U.S. at 463.

47. Id. at 461.

48. Id. (citing American Communications Ass'n v. Douds, 339 U.S. 382 (1950)). Last Term, the Supreme Court reaffirmed the rule of *NAACP v. Alabama ex rel. Patterson* that good motives do not save legislation that violates first amendment rights. In Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 103 S. Ct. 1365 (1983), the Court struck down a use tax on large users of paper and ink:

> We need not and do not impugn the motives of the Minnesota legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment . . . [citing *NAACP v. Alabama ex rel. Patterson*, among others]. We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.

Id. at 1376 (citations omitted).

49. In the last Term the Supreme Court suggested that a motive hostile to speech is a sufficient, but not necessary, condition for invalidating a statute regulating speech. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 103 S. Ct. 1365, 1369 (1983) (dictum).

While *Minneapolis Star* suggests that a motive hostile to speech interests invalidates a governmental act, such a rule provides no support for the motive requirement in the selective prosecution defense. To say that an otherwise valid prosecutorial policy may be struck down if unconstitutionally motivated—a proposition that is entirely consistent with the current two-part test—does not require that prosecutorial policy be relieved of all constitutional scrutiny if not so motivated. Even while resurrecting the potential for striking down legislation based on a motive hostile to speech, the Supreme Court was careful to state that good motives do not shield governmental acts from first amendment scrutiny. Id. at 1376.

selective prosecution law, which requires the motive showing, and settled freedom of expression precedent, which does not. The resolution of this conflict requires a reexamination of the source and justifications for the motive requirement.

II. The Appropriate Role of Motive in First Amendment-Selective Prosecution Analysis

A review of the cases developing the selective prosecution defense reveals that the motive requirement has its roots in two diverse areas of law: suspect class equal protection analysis and judicial review of administrative action. A close consideration of equal protection analysis, however, reveals the inapplicability of a motive requirement to first amendment claims. Similarly, the reasoning behind the consideration of motive in challenges to administrative action collapses when applied to prosecutorial policy. In first amendment challenges to broadly applied policy, the focus turns to discovering the nature of that policy rather than its underlying motive.

A. *The Roots of Selective Prosecution Analysis in Equal Protection Analysis*

A review of the development of selective prosecution law reveals that the motive requirement's roots lie in equal protection review of administrative action. This perspective explains the courts' failure to look beyond the equal protection framework to a direct first amendment test that would disregard motive.

1. *Equal Protection Review of the Unconstitutional Administration of Valid Laws: from* Yick Wo *to* Oyler. — Since the decision to prosecute is a form of discretionary executive action, the selective prosecution defense constitutes judicial review of administrative action.[50] Such review draws on equal protection analysis of unequal application of neutral laws.

The current approach to selective prosecution analysis traces its origins to *Yick Wo v. Hopkins*,[51] the first case in which the Supreme Court struck down a facially valid statute because of its unconstitutional administration. San Francisco had passed an ordinance banning the conduct of a laundry business in a wooden building, unless a permit were first obtained from the Board of Supervisors. As a fire prevention regulation, the ordinance was facially valid. However, of the 200 Chinese who applied not one was granted a permit, while all but one of the whites applying received permits. The Court struck the law down as a denial of equal protection, finding the discretion granted to the Board to be "naked and arbitrary power":[52]

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authorities with an

50. See, e.g., United States v. Johnson, 577 F.2d 1304 (5th Cir. 1978).
51. 118 U.S. 356 (1886).
52. Id. at 366.

> 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.[53]

The Court required the release of those prosecuted and convicted for violating the law.

Yick Wo's relevance to a claim that a policy of selective prosecution impinges on first amendment rights is by no means self-evident. *Yick Wo* concerned the unequal administration of permits, not the selective prosecution of violators. It concerned class discrimination based on race, not individual selection based on the exercise of constitutional rights. Later cases, however, extended *Yick Wo* to both individual selection and criminal prosecution.

In *Snowden v. Hughes*,[54] the Court made clear that the reasoning of *Yick Wo* applied to individual administrative selection as well as class discrimination. Snowden, the Republican primary runner-up in an Illinois state-house election primary, claimed a denial of equal protection when the election board failed to certify him as a candidate, contrary to a state statute. The Court rejected the equal protection claim not because the selection was individual, but because Snowden had failed to prove a hostile motive: there was "no allegation of . . . intentional or purposeful discrimination between persons or classes,"[55] and thus no federally cognizable claim.[56]

In 1962, the Court first considered the selective prosecution defense in a criminal enforcement in *Oyler v. Boles*.[57] The Court's reasoning makes clear the influence of *Yick Wo*'s equal protection analysis.[58] Oyler had been prosecuted under a state habitual offender statute. He claimed that not every repeat offender was prosecuted under the harsher habitual offender statute, and that his selection was thus a denial of equal protection. The Court's rejection of his claim touched on both branches of the current two-part selective prosecution test. The Court first rejected Oyler's claim for failure to prove the prosecutor's knowledge that others were subject to the repeat offender statute, implying the selective prosecution requirement that nonprosecution of others similarly situated be proved. The Court also rejected Oyler's claim for failure to show a hostile motive:

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53. Id. at 373–74.

54. 321 U.S. 1 (1944).

55. Id. at 7.

56. Justice Stone's opinion also points out that a statute making such a selection would undoubtedly be valid under the equal protection clause. Id. at 11.

57. 368 U.S. 448 (1962). The first suggestion that such purposeful discrimination might be a defense to a criminal prosecution came in 1961, in Two Guys, Inc. v. McGinley, 366 U.S. 582 (1961). There the Court rejected a petition to enjoin enforcement of a Sunday closing law based on expected selective application, stating that "[s]ince appellant's employees may defend against any such proceeding that is actually prosecuted on the ground of unconstitutional discrimination, we do not believe that the court below was incorrect in refusing to exercise its injunctive powers." Id. at 588–89.

58. *Oyler*, 368 U.S. at 456.

> Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore, grounds supporting a finding of a denial of equal protection were not alleged.[59]

This language stands as the last pronouncement by the Supreme Court on the subject of selective prosecution. The "unjustifiable standard such as race, religion, or other arbitrary classification" test the Court posited is phrased in equal protection terms. Because *Oyler* involved a racial classification, the Supreme Court did not consider whether a different analysis is required when the defendant alleges that the selection abridges individual constitutional freedoms such as those protected by the first amendment.[60] In addition, because the claim in *Oyler* involved selective prosecution by a state, the Court did not discuss whether the same inquiry was applicable for federal prosecutions. The lower courts were left to develop the appropriate approach to right-based claims of selective prosecution by federal officials.

The circuit courts of appeals have expanded the defense of selective prosecution to encompass both federal prosecutions and claims that the selection involved not a racial or arbitrary classification, but the violation of an individual constitutional right. These extensions, however, occurred within the framework of equal protection analysis. Though such cases involve a federal violation of a federal right, few courts have been able to see beyond the equal protection origins of the defense to apply the constitutional guarantee directly.

The Court of Appeals for the District of Columbia developed these extensions in two 1968 cases. In *Washington v. United States*,[61] the District of Columbia Circuit applied selective prosecution analysis to a federal criminal prosecution. The court held that the selective prosecution defense, derived from the fourteenth amendment guarantee of equal protection, was applicable to the federal government through the fifth amendment guarantee of due process.[62] In *Dixon v. District of Columbia*,[63] Chief Judge Bazelon sustained a

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59. Id. at 456 (citing *Snowden*).

60. The *Oyler* dictum has been read to be limited to situations of class rather than individual discrimination. Moss v. Hornig, 314 F.2d 89, 93 (2d Cir. 1963). But cf. Ely, supra note 41, at 1228–30 (rejecting distinction on the ground that an individual is a class of one). Later Second Circuit cases ignored the *Moss* limitation, recognizing selective prosecution claims based on individual rights. See, e.g., United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974).

61. 401 F.2d 915 (D.C. Cir. 1968).

62. Id. at 922–23.

The court relied on Bolling v. Sharpe, 347 U.S. 497 (1954). In *Bolling*, the companion case to Brown v. Board of Educ., 347 U.S. 483 (1954), the Supreme Court found that the due process guarantee required that equal protection guarantees apply to the District of Columbia just as they apply to the states in the school desegregation context. The *Bolling* Court left open the extent to which the fifth amendment embraces the fourteenth in other contexts. 347 U.S. at 499. *Washington* extends *Bolling* to the criminal context.

63. 394 F.2d 966 (D.C. Cir. 1968).

claim of selective prosecution based on first amendment rights.[64] Dixon had been harrassed by police officers when stopped for a traffic violation. He had initially agreed not to press the harassment claim in return for a promise not to prosecute the traffic violation. When Dixon changed his mind and filed a harassment complaint, the District prosecuted for the violation. Chief Judge Bazelon's opinion treated the harassment claim as a first amendment-protected "petition for redress of grievances,"[65] concluding that such a retaliatory prosecution is both a direct violation of the first amendment and a violation of the equal protection clause, made applicable to the federal government by the due process clause.[66]

While the circuits have adopted Chief Judge Bazelon's extension of the selective prosecution defense to federally protected individual rights, the direct first amendment strand has been largely ignored. Instead, selective prosecution claims—for federal as well as for state prosecutions—have been analyzed within the equal protection framework originally suggested by *Oyler v. Boles*. A typical statement of this approach appears in *United States v. Crowthers*:[67]

> For officials of the United States government to selectively and discriminatorily enforce [a regulation] so as to turn it into a scheme whereby activitites protected by the First Amendment are allowed or prohibited in the uncontrolled discretion of these officials violates the defendants' right to equal protection of the laws embraced within the due process of law clause of the Fifth Amendment.[68]

Under this approach, the protection of first amendment rights applies to actions of the federal government since selection based on the exercise of such rights is an impermissible classification under fourteenth amendment equal protection, and equal protection is a component of the due process of law guaranteed by the fifth amendment.

This equal protection approach fails to consider that the first amendment directly applies to actions of the federal government. The inclination of the courts to focus on the equal protection clause in selective prosecution cases—an approach that can be traced through *Oyler* back to *Yick Wo*[69]—has significant implications. Ordinary first amendment analysis does not require proof of the government's motive to infringe on the right—the fact of infringement

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64. Chief Judge Bazelon wrote an opinion in which neither of the other judges joined. Each of the two other judges submitted a separate opinion concurring in the result (dismissal with prejudice) only. Both judges concurred without reaching the selective prosecution claim, basing dismissal on the District's loss of interest in prosecuting the case. Chief Judge Bazelon's opinion, while appearing first in the reporter, thus represents a minority position.

65. 394 F.2d at 968 (discussing U.S. Const. amend. I, cl. 6).

66. Id. at 968 n.3.

67. 456 F.2d 1074 (4th Cir. 1972).

68. Id. at 1080; accord United States v. Wilson, 639 F.2d 500, 503-04 (9th Cir. 1981); United States v. Peskin, 527 F.2d 71, 86 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976); United States v. Falk, 479 F.2d 616, 618 (7th Cir. 1973) (en banc).

69. See supra notes 57-67 and accompanying text.

is enough to sustain the claim.[70] For most equal protection claims, however, the party challenging the governmental action must prove an intent to discriminate for impermissible reasons.[71] First amendment-selective prosecution claims require an evaluation of the justifications for importing a motive requirement, either from equal protection jurisprudence or from some other body of law, rather than simply applying the first amendment directly.

2. *First Amendment-Equal Protection Analysis as a Source for the Motive Requirement.* — Inferences drawn from two lines of recent Supreme Court equal protection precedent can be pieced together to support the requirement in selective prosecution cases that the defendant show a governmental motive hostile to first amendment rights. For two reasons, however, this argument fails. First, equal protection jurisprudence provides no support for requiring such a motive when the classification infringes on a fundamental constitutional right. Second, the vulnerability of a first amendment right to federal infringement should not depend on whether the claim is analysed under the equal protection component of the fifth amendment or under the first amendment itself.

In recent years the Supreme Court has made clear that, standing alone, a showing that a statute's application has a disparate impact on a protected class does not trigger heightened equal protection scrutiny—only purposeful discrimination merits such scrutiny.[72] In a second line of cases, the Court has established that classifications that impinge on first amendment rights merit heightened equal protection review.[73] While the Court has held that content-based distinctions warrant such review without regard to motive,[74] it has left open the possibility of requiring motive where the administration of a neutral statute has the effect of chilling a first amendment right.[75] Thus, an advocate

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70. See supra notes 43–49 and accompanying text.

71. See, e.g., Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976).

72. See Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976).

73. The Supreme Court has held that discrimination based on the exercise of fundamental rights, such as first amendment rights, receives strict scrutiny under the equal protection clause. See, e.g., Police Dep't v. Mosley, 408 U.S. 92 (1972).

74. In Police Dep't v. Mosley, 408 U.S. 92 (1972), the Supreme Court considered first amendment and equal protection challenges to a Chicago ordinance that barred picketing within 150 feet of a public school, but exempted labor picketing from its prohibition. Finding the "equal protection claim . . . closely intertwined with First Amendment interests," id. at 95, the Court held that the content-based speech discrimination denied equal protection to the nonlabor picketer; the ordinance failed to satisfy strict scrutiny. Id. at 101–02. For a discussion of whether the passive enforcement policy is an explicit speech-based distinction like *Mosely* or a neutral regulation having a speech-based disparate impact, see infra notes 124–34 and accompanying text. The Court's decision was made without reference to motive.

75. While the Court has reviewed discrimination on the basis of the exercise of first amendment rights under strict scrutiny without regard to motive in cases in which the discrimination is based on a content-based distinction, see supra note 74, it has not addressed whether motive is relevant in cases such as those reviewing the passive enforcement policy in which the discrimination is the result of a content-neutral regulation.

of the motive requirement in first amendment-selective prosecution cases might argue that just as disparate impact on suspect classes requires heightened scrutiny only if wrongfully motivated, so too, disparate impact on speakers—the result of passive enforcement of an otherwise neutral statute—demands such scrutiny only if wrongfully motivated.

This reasoning does not withstand close analysis. All of the Supreme Court's equal protection decisions establishing a motive requirement where the aggrieved party was able to show that the classification had a disparate impact involved discrimination against protected classes such as blacks and women. In applying the fundamental interest—as distinct from the suspect class—strand of equal protection analysis, the Court has drawn no distinctions between classifications that purposely infringe on a constitutional right and those that have the unintended effect of infringing on such a right. *Dunn v. Blumstein*,[76] a right-to-travel case, illustrates this point. In *Dunn*, the Court sustained a challenge to durational residency requirements for state voting registration. The Court relied on the requirement's chilling effect on the right to travel to invoke heightened equal protection scrutiny.[77] Such scrutiny was invoked despite the state's argument that there existed no motive hostile to interstate migration.[78] If hostile motive is not required to invalidate a government act with a disparate impact on the implied fundamental right to travel, certainly such a requirement should not apply to an infringement of the explicit guarantee of freedom of speech.[79]

For an argument that the passive enforcement policy is a content-based regulation of speech, see infra notes 124–34 and accompanying text.

76. 405 U.S. 330 (1972).

77. Id. at 338–42 (alternate holding). The Court also found heightened scrutiny necessary because the regulation burdened the fundamental right to vote.

78. Id. at 339. The state attempted to distinguish Shapiro v. Thompson, 394 U.S. 618 (1969). *Shapiro* had held that a durational residency requirement for welfare benefits, designed in part to deter the immigration of welfare recipients, constituted an unconstitutional infringement of the right to travel. The state argued, in *Dunn*, that a legislative motive hostile to the constitutional right invoked was a necessary part of *Shapiro*'s holding. The *Dunn* Court rejected this argument, striking down the residency requirement while accepting the lack of a motive hostile to the right to travel.

79. Other cases involving fundamental interest-equal protection challenges support the conclusion that motive is irrelevant to such analysis. See, e.g., Zobel v. Williams, 457 U.S. 55, 66 (1982) (Brennan, J. concurring) (heightened scrutiny applied to burden on right to travel without discussion of legislative motive hostile to travel); Bullock v. Carter, 405 U.S. 134 (1972) (noting, in ballot filing fee case, the legitimate purpose of limiting number of names on ballot, but, nonetheless, striking down the law on equal protection grounds); cf. Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare residency requirement challenged; state motivation to exclude indigents not dispositive, nor do legitimate objectives of statute bar application of strict scrutiny). In City of Mobile v. Bolden, 446 U.S. 55, 112–22 (1980), Justice Marshall, in dissent, stated that the discriminatory motivation requirement of Washington v. Davis, 426 U.S. 229 (1976), does not apply when a fundamental constitutional interest is impinged. The majority's disagreement with Marshall was not whether motive was relevant to fundamental interest equal protection, but whether a fundamental interest was in fact involved. 446 U.S. at 75-80.

In addition to the uniform body of contrary precedent, a second argument undermines the suggestion that the hostile motive requirement in suspect class-equal protection analysis supports a like requirement as a component of a successful passive enforcement defense. When a federal prosecutorial policy is challenged as an infringement of the right to speech or petition, clearly the first amendment applies directly. Accordingly, the practice will fall unless, at a minimum, the government can demonstrate that a compelling state interest supports its continuation.[80] The defendant need not show a governmental motive hostile to the right to trigger this elevated standard of review.[81] If the focus is on equal protection and the claim is that the classification burdens fundamental constitutional rights such as those guaranteed by the first amendment, the classification is subjected to a virtually identical compelling state interest test.[82] It makes no sense to trigger a heightened level of equal protection scrutiny only upon a showing of hostile governmental motive when a direct application of the first amendment would automatically benefit from elevated review.[83] To require a hostile motive in this context would celebrate the form of equal protection methodology over the function of protecting first amendment rights, with the irrational consequence of allowing the choice of the mode of inquiry to dilute the protections of the first amendment.

In sum, equal protection analysis of first amendment interests does not support the motive requirement. No court taking an equal protection approach to first amendment interests, except those considering passive enforcement, has yet found legislative motive to be any more relevant than under direct first amendment analysis. Nevertheless, the motive requirement may be defended as a necessary element of judicial review of a discretionary executive decision. This justification for a required showing of hostile motive—rooted not in inferences drawn from suspect class-equal protection precedent, but rather in the procedural posture in which selective enforcement claims inevitably arise—merits examination.

B. *Judicial Review of Executive Discretion*

Even if the motive requirement enunciated in the selective enforcement cases is not justified as an element of the equal protection framework the courts have applied in such cases, it may be justified as a mechanism for assuring judicial deference to the exercise of executive discretion. The selective

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80. See, e.g., Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 639 (1980) (holding that a no-solicitation ordinance was "insufficiently related to the governmental interests asserted in its support to justify its interference with protected speech").

81. See supra notes 43-49 and accompanying text.

82. Compare Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 636-39 (1980) (first amendment), with Police Dep't v. Mosley, 408 U.S. 92 (1972) (equal protection). In *Mosley*, the Supreme Court assessed interwoven first amendment and equal protection claims together under heightened scrutiny.

83. Cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 959 (1983) (An argument rejected under first amendment analysis "fares no better in equal protection garb.").

enforcement cases and their predecessors dating back to *Yick Wo* have all involved judicial review of executive action under a facially neutral statute. Historically, the courts have shown deference to the exercise of executive discretion, and an advocate of the motive requirement might argue that the motive determination reflects such deference and, accordingly, is an appropriate threshold for judicial review.

For two reasons, however, this argument does not apply if the executive decisions rest on a generally applicable policy. First, if the executive acts under a policy there is no discretion, and therefore the traditional justifications for deference are inapplicable. Second, executive policies should be analyzed under the same standards as statutes, which are reviewed under the first amendment without regard to motive. These reasons presuppose the judicial capacity to discover the existence and nature of the policy. Discovering reviewable policy poses no great problem, however. The executive policy may be stated explicitly, as was the passive enforcement policy, or it may be inferred, from the disparate impact of the executive action.

1. *The Motive Requirement as a Mechanism for Assuring Judicial Deference to the Exercise of Executive Discretion.* — The general reluctance of the judiciary to review an exercise of prosecutorial discretion may support an argument for the relevance of motive to the selective prosecution defense. Courts occasionally state as an absolute proposition that they may never consider a challenge to a prosecutor's decision whether to prosecute.[84] Such courts often read the constitutional doctrine of the separation of powers to support their deferential approach. Judge (now Chief Justice) Burger's statement in *Newman v. United States*[85] is typical of this view:

> Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings . . . . [W]hile this discretion is subject to misuse or abuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors.[86]

Courts also have defended their refusal to review the exercise of prosecutorial discretion on such practical grounds as an unwillingness to disturb the benefi-

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84. See, e.g., Newman v. United States, 382 F.2d 479, 480, 482 (D.C. Cir. 1967); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965). See generally Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 U.C.L.A. L. Rev. 1 (1971); Cox, Prosecutorial Discretion: An Overview, 13 Am. Crim. L. Rev. 383 (1976); LaFave, The Prosecutor's Discretion in the United States, 18 Am. J. Comp. L. 532 (1970); Note, Reviewability of Prosecutorial Discretion: Failure to Prosecute, 75 Colum. L. Rev. 130 (1975). The nonreviewability of prosecutorial choices has been called the "majority rule." E.g., Cox, supra, at 394.

85. 382 F.2d 479 (D.C. Cir. 1967).

86. Id. at 480, 482; accord, e.g., Goldberg v. Hoffman, 225 F.2d 463, 465-66 (7th Cir. 1955) ("Discretion is always subject to abuse, but the framers of our Constitution have indicated their conviction that the danger of abuse by the executive is a lesser evil than to render the acts left to executive control subject to judicial encroachment."). But cf. *Newman*, 382 F.2d at 482 (Bazelon, J., concurring opinion) (advocating review of irrational or otherwise unconstitutional decisions).

cial individualization of justice,[87] protection of the accused,[88] protection of the criminal process from burdensome delay,[89] and the need for secrecy of prosecutorial policy to maintain deterrence.[90]

Not all courts, however, have refused absolutely to review prosecutorial discretion,[91] and it is in this context that the motive requirement has developed, as a middle ground between total deference and ordinary judicial review of administrative decisions. Courts are more receptive to some inquiry into prosecutorial decisionmaking where the defendant asserts a defect in the decision to prosecute as part of his own defense[92] rather than as the basis for mandamus or injunction against the person of the prosecutor.[93] The standard for review of a selective prosecution defense grew out of the line of cases suggesting that some limited review of prosecutorial discretion was appropriate. Courts in such cases, though not entirely unwilling to review prosecutorial decisionmaking, required a showing of hostile motive as a threshold to review.[94] The argument for the motive requirement in selective prosecution cases thus conceives of motive as a screening mechanism that permits courts to remain highly deferential to the exercise of prosecutorial discretion while still permitting review in a circumscribed body of cases. Under this view, motive demonstrates the "rare situation where the decision to prosecute is so abusive . . . as to encroach on constitutionally protected rights."[95] Motive thus be-

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87. See, e.g., Goldberg v. Hoffman, 225 F.2d 463 (7th Cir. 1955) (refusal of prosecutor to withdraw suit despite finding that criminal prosecution would endanger defendant's life is beyond review of the court); Pugach v. Klein, 193 F. Supp. 630 (S.D.N.Y. 1961) (myriad factors in discretion renders it unreviewable); Cox, supra note 84, at 390–91; LaFave, supra note 84, at 534.

88. See Note, supra note 84, at 141–42.

89. See Abrams, supra note 84, at 52–53.

90. See id. at 26; Note, supra note 84, at 141.

91. The cases taking the absolute position that no review of prosecutorial discretion is warranted also fly in the face of "a hundred Supreme Court decisions stating that it is the function of the judiciary to review the exercise of executive discretion." K. Davis, Discretionary Justice 210 (1969) (criticizing *Newman v. United States*).

92. See, e.g., Oyler v. Boles, 368 U.S. 448 (1962); United States v. Johnson, 577 F.2d 1304 (5th Cir. 1978); Dixon v. District of Columbia, 394 F.2d 966 (D.C. Cir. 1968); cf. Yick Wo v. Hopkins, 118 U.S. 356 (1886) (review of administrative discretion in context of criminal prosecution; unlimited discretion constitutionally suspect). But cf. Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967) (rejecting review of prosecutorial discretion asserted on equal protection grounds by defendant).

93. See, e.g., United States v. Cox, 342 F.2d 167 (5th Cir. 1965) (contempt citation for failure to obey injunction to sign indictment); Goldberg v. Hoffman, 225 F.2d 463 (7th Cir. 1955) (mandamus to enjoin criminal proceedings); cf. Younger v. Harris, 401 U.S. 37 (1971) (refusal to enjoin enforcement of criminal syndicalism statute based on first amendment chilling effect). That courts often do review prosecutorial decisions undercuts the separation of powers argument, see supra notes 91–92 and accompanying text, as a bar to review.

94. See, e.g., Oyler v. Boles, 368 U.S. 448 (1962); Yick Wo v. Hopkins, 118 U.S. 356 (1886); United States v. Johnson, 577 F.2d 1304 (5th Cir. 1978); Dixon v. District of Columbia, 394 F.2d 966 (D.C. Cir. 1968). See generally, Cox, supra note 84; Cardinale & Feldman, supra note 9; Note, supra note 9.

95. United States v. Johnson, 577 F.2d 1304, 1307 (5th Cir. 1978).

comes a justification for a limited exception to the general proposition that prosecutorial discretion ought not to be subject to judicial evaluation.

2. *The Inapplicability of a Motive Threshold Requirement to Review of Prosecutorial Policy.* — The suggestion that appropriate judicial reluctance to review prosecutorial decisions justifies requiring a showing of hostile motive fails when a broad policy of passive enforcement infringes on first amendment rights. Two arguments demonstrate the inapplicability of a threshold motive requirement to judicial review of prosecutorial policy in this context. First, an enforcement policy is not an exercise of prosecutorial discretion in the normal sense of an individual decision to prosecute. Second, any implicit discretionary grant to the Executive by Congress must be subject to the same constitutional limitations that apply to Congress.

The first argument for not requiring a showing of motive when a defendant challenges the practice of passive enforcement rests on the observation that an enforcement *policy* is not an exercise of *discretion* at all. Therefore, the various practical justifications advanced in support of nonreviewability of prosecutorial discretion[96] have no relevance. The goal of promoting individualized, nonstandardized justice is inoperative if the decisionmaking process being challenged is a standardized one.

A decision by the Selective Service to refer for prosecution only those nonregistrants who write a letter of protest is not an exercise of prosecutorial discretion but the application of such a general policy. Accordingly none of the justifications for nonreviewability—which in turn might be advanced to support a motive requirement[97]—are germane. The Selective Service does not examine the evidence and mitigating circumstances in each individual case.[98] When the constitutional implications of such a policy are raised in defense to a criminal prosecution, the separation-of-powers problems raised by granting mandamus and injunctive relief against members of the executive branch are not present. The goal of protecting the accused is not implicated where no individual determination is challenged. While the deterrence rationale remains, the government interest in deterrence is no less amenable to judicial review than other governmental interests invoked by agency action. Thus, a selective enforcement policy, where discoverable, ought to be no less reviewable than any other agency rule, without regard to the motivation for the policy. Such review of prosecutorial policy—as distinct from discretion—has both judicial[99] and scholarly[100] support.

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96. See supra notes 87–90 and accompanying text.

97. See supra notes 87–90 and accompanying text.

98. Cf. Ostereich v. Selective Service System Local Bd. No. 11, 393 U.S. 233, 238 (1968) (Draft board reclassification policy is without statutory grant of discretion; "there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved.").

99. See Nader v. Saxbe, 497 F.2d 676, 679 (D.C. Cir. 1974) (Wright, J.) (dictum). But cf. Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 674 (D.C. Cir. 1970) ("[E]ven the boldest advocates of judicial review recognize that the agencies' internal management decisions

A second argument militates against reading traditional judicial deference to the exercise of prosecutorial discretion to support a motive requirement in passive enforcement cases. Prosecutorial discretion represents an implicit congressional grant of discretion to the executive branch to choose the cases in which the law will be enforced.[101] Yet even where the legislative grant of discretion is both explicit and broad, the grant itself is still subject to constitutional limitations. For example, despite the body of precedent reading a federal statute to have created broad discretion in the Secretary of State to deny passports,[102] the Supreme Court refused to construe the statute to permit the State Department to revoke a passport solely because its holder was a supporter of the Communist Party.[103] The Court was unwilling to construe the statute to permit revocation on this ground because such an administrative policy implicates "beliefs, . . . associations . . . [and] ideological matters."[104] While explicitly declining to reach the question whether such a policy would be constitutional, this language evidences the Court's reluctance to read even a broad grant of discretion to allow consideration of constitutionally suspect factors.

Simply stated, Congress cannot grant discretion to do what it cannot itself do by statute. A prosecutorial policy can be valid only if such a policy could validly be embodied in a statute.[105] Motive is no more relevant to a first amendment analysis of an administrative policy of passive enforcement than it would be to a first amendment analysis of a passive enforcement statute.

In sum, the suggestion that traditional judicial deference to prosecutorial discretion justifies requiring a showing of hostile motive as part of a passive enforcement defense fails on two counts. First, it fails to recognize that when a decision to prosecute rests on a general policy and not on individualized considerations, the justifications for judicial deference have little relevance.

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and allocations of priorities are not a proper subject of inquiry by the courts.") (dictum). The "allocations of priorities" referred to in *Medical Committee* are priorities between substantive areas of enforcement, though, and not of prosecution between violators of the same statute.

100. See Cox, supra note 84, at 402–03; Wright, Beyond Discretionary Justice (Book Review), 81 Yale L.J. 575, 593–95 (1972); Note, supra note 84, at 160; see also Abrams, supra note 84, at 52 (allowing review of prosecutorial policy by third parties but not by criminal defendant); LaFave, supra note 84, at 539 ("As for judicial review, it is probably true that courts have exercised undue restraint in responding to challenges of prosecutorial discretion.").

101. See Abrams, supra note 84, at 20. For a rare example of congressional influence on the exercise of prosecutorial discretion, see Pub. L. No. 96-74, §§ 614, 615, 93 Stat. 559, 562 (1979) (appropriations bill denies I.R.S. authority to use funds to enforce rulings on tax exempt status of segregated schools).

102. E.g., Perkins v. Elg, 307 U.S. 325, 349–50 (1939).

103. Kent v. Dulles, 357 U.S. 116, 130 (1958).

104. Id. at 130; see also Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (FCC regulatory grant limited by first amendment).

105. Cf. Snowden v. Hughes, 321 U.S. 1, 11 (1944) (upholding an administrative policy that would be valid as a statute). Indeed, a statute granting completely unfettered discretion in its application may be invalid. See Blount v. Rizzi, 400 U.S. 410 (1971); Yick Wo v. Hopkins, 118 U.S. 356 (1886). The all but dormant nondelegation doctrine is at odds with an implicit boundless grant of prosecutorial discretion. See Wright, supra note 100, at 582–87.

Second, the argument fails to recognize that motive should be no more germane to first amendment analysis of an administrative policy than to first amendment analysis of the same policy embodied explicitly in a statute.[106] Both arguments make clear that an inquiry into motive in passive enforcement cases is inappropriate when the prosecutorial policy is known. In such cases conventional first amendment analysis[107] applies, and motive plays no role in evaluating the constitutionality of the practice.[108] In many instances, however, it is not an easy task to discern whether a broad policy underlay a decision to prosecute and, if so, what the precise content of that policy was. The discussion that follows offers a methodology for discovering prosecutorial policy and suggests that motive may indeed be relevant to that inquiry.

3. *Discovering Reviewable Policy.* — Judicial review of prosecutorial policy depends on the court's ability to recognize the existence and content of the challenged policy. The appropriate approach for determining this policy in turn depends on the context in which the claim arises. In the case of an isolated government action, the motivation for the action may be the only evidence that a policy affecting constitutional interests exists. Such a motive is not necessary to establish the existence of a policy where, as in passive enforcement, the government has publicly announced its broadly applicable policy. Further, even where enforcement policy is kept secret, sufficient evidence of disproportionate impact may serve to establish a judicially reviewable enforcement policy.

a. *Motive as the Policy of an Isolated Action.* — When a single prosecution, rather than a pattern of prosecutions, is challenged as an abridgment of first amendment rights, the policy behind the government's action is its motive. The Supreme Court's decision in *Mt. Healthy City Board of Education v. Doyle*[109] suggests this identity. In *Mt. Healthy*, the Supreme Court reviewed a teacher's challenge to the school board's failure to grant him tenure. The teacher established at trial that his protected speech activity was a substantial

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106. A third argument militates against reading traditional judicial deference to the exercise of prosecutorial discretion to support a motive requirement in passive enforcement cases. The argument relies on an analogy between motive as a threshold mechanism for deference to prosecutorial discretion and the substantive standard of review of administrative action, which also may be viewed as a vehicle for showing deference to the exercise of executive discretion. Normally, courts review administrative action under a deferential, rational basis standard, see NLRB v. Hearst Publications, 322 U.S. 111 (1944); Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 28–34 (1983), and review selective prosecution only if there is a showing of hostile motive—another means of showing deference. See supra text accompanying notes 84–95. In the face of a first amendment challenge to executive action, however, deference in the form of rational basis review is not appropriate—courts apply strict scrutiny. See, e.g., Haig v. Agee, 453 U.S. 280 (1981) (passport revocation); Zemel v. Rusk, 381 U.S. 1 (1965) (denial of permission to travel). By analogy, deference in the form of a hostile motive requirement should not be required for first amendment selective prosecution claims.

107. For a discussion of the appropriate first amendment analysis in passive enforcement cases, see infra notes 123–77 and accompanying text.

108. See supra notes 41–49 and accompanying text.

109. 429 U.S. 274 (1977).

motivating factor in the board's decision not to grant tenure, even though the board had other reasons to dismiss him that were unrelated to speech. The district court awarded damages, and the court of appeals affirmed. The Supreme Court remanded the case for a determination whether the Board could demonstrate that the dismissal would have occurred whether or not it had considered the protected activities. Only if the dismissal would not have occurred but for the teacher's speech would the first amendment provide protection. *Mt. Healthy* thus states a causation requirement for first amendment challenges to isolated administrative actions. The Court saw this requirement as necessary to avoid placing an employee "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[110]

The *Mt. Healthy* causation rule translates into a motive test for individual administrative actions.[111] The first amendment claimant bears the initial burden of establishing constitutionally protected conduct as a " 'motivating factor' "[112] for the government action. Such a requirement makes sense in the case of individual action. Simply to show that the claimant has exercised a constitutional right and then been dismissed (or prosecuted) does not demonstrate that his constitutional rights have been violated. Proof of such violation turns on evidence of some causal link between the exercise and the action. In the case of an isolated action, motive establishes this link.

The motive-causation test goes a long way towards explaining—and justifying—the judicial inclination to require a showing of a motive hostile to a protected right when confronted with selective prosecution claims. The prosecutorial discretion model[113] posits individual, case-by-case decisionmaking. When the claim arises in the context of an isolated prosecution, the policy, if any, that underlay the decision to prosecute is discoverable only by inquiring into the motive for the prosecution. On the other hand, where a pattern of prosecutions suggests the possible existence of a broadly applied, deliberate policy, or where the policy is embodied in an official statement, motive is no longer relevant to discovering that policy.

b. *Official Statements of Policy.* — When the government has issued an official statement of the determinants of its decision to enforce a statute in a given case, resort to an inquiry into motive to discover the existence or content of prosecutorial policy is not necessary. This conclusion is consistent with the analysis outlined in *Mt. Healthy*—first amendment protections are triggered only when there is a causal link between the exercise of constitutional rights and the challenged governmental action. But in the rare instance where the government has explicitly divulged its enforcement policy, the need to demonstrate a motive hostile to a protected right as evidence of this causal link

110. Id. at 285.

111. See City of Richmond v. United States, 422 U.S. 358 (1975) (individual municipal act of annexation subject to scrutiny for improper motive).

112. Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

113. See supra notes 87–90 and accompanying text.

completely disappears. For example, under the "passive enforcement" policy used by the Selective Service System, the only nonregistrants referred to the Justice Department for prosecution were those who turned themselves in or were turned in by third parties. Such a policy does not necessarily entail a hostility to the exercise of first amendment rights.[114] Prosecution is directed, however, only at nonregistrants who have exercised first amendment rights, either by writing letters of protest to the government indicating refusal to comply or by publicly stating their noncompliance with registration and being subsequently turned in by third parties. The exercise of first amendment rights provides the but-for cause of prosecution, and the existence and content of the prosecutorial policy is clear irrespective of the motive behind the practice.

The rarity of official policy statements poses an obstacle to their use as a source of reviewable policy. While commentators have urged that prosecutorial policies be articulated and made public,[115] official policy statements such as the Selective Service passive enforcement system and the IRS preference for prosecuting visible tax protestors are relatively rare.[116] If the defense of unconstitutional prosecutorial policy were available only when based on official policy statements, such statements would become even less common.

c. *Disproportionate Effects as Evidence of Policy.* — An official statement, however, is not the only way to discover a prosecutorial policy; nor should it be the only way to subject such a policy to review. A reviewable policy can be established, at least presumptively, by demonstrating a disproportionate pattern of prosecutorial choice. Cases applying equal protection analysis suggest such a use of disproportionate effects. At one extreme are cases in which the racial impact is so starkly disproportionate that invidious purpose can be inferred from the impact alone.[117] For example, the *Yick Wo* Court needed no official statement of policy to invalidate a statute applied exclusively to the disadvantage of Chinese.[118] Where the disproportionate effect is less startling, the Court has used it as the starting point for equal protection analysis. The challenged classification will merit a heightened level

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114. Cf. United States v. Catlett, 584 F.2d 864, 866-67 & n.5 (8th Cir. 1978) (IRS policy of emphasizing prosecution of visible tax protestors upheld; policy includes disclaimer of the " 'intention [or] desire to suppress dissent or to persecute individuals because they are critical of . . . the tax system or government policies.' ").

115. K. Davis, supra note 91, at 225; Abrams, supra note 84, at 25-34; Wright, supra note 100, at 590.

116. Other aspects of IRS enforcement policy, such as audit selection criteria, are carefully guarded secrets. See Cox, supra note 84, at 141.

117. See Gomillion v. Lightfoot, 364 U.S. 339 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1886); see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 260 (1977) (dictum). Were *Gomillion* and *Yick Wo* to arise today, even under the regime of *Washington v. Davis*, there can be little doubt that the extent of the disproportionate impact would serve to prove the impermissible intent.

118. Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).

of review only upon proof that its purpose was to burden a suspect class, but disproportionate impact may help to prove that purpose.[119]

While disproportionate effect is the starting point in an equal protection analysis, it is closer to the finishing point in a first amendment analysis that does not consider motive. In such an analysis the objective is not to discover impermissible motive but rather the existence and content of a policy which may then be reviewed for its effect on protected rights. Since a disproportionate effect on the exercise of first amendment rights implies a prosecutorial policy with a chilling effect, a showing of disproportionate effect ought to shift to the government the burden of proving that no such policy underlay the prosecution.[120]

The question of what degree of proportionality the defendant must show before the burden will shift is problematic. The required showing of disproportionality ought not to be set too low since any enforcement policy is likely to lead to the discovery and prosecution of a greater proportion of those who talk about their crime than of those who remain silent. Nevertheless, a showing that, of 500,000 suspected violators, all thirteen prosecuted were vocal protestors[121] ought to suffice to shift to the government the burden of denying the existence of an impermissible prosecutorial policy. Setting a high threshold requirement helps to mitigate the court-clogging effects of the selective prosecution defense since it reduces the number of defendants able to make such a claim.[122] By limiting judicial inquiry to those situations in which the effects of prosecutorial policy are public knowledge, a high threshold also protects the legitimate government interest in keeping prosecutorial policies secret. Allowing the review of policy evidenced by disproportionate effect also reduces the inhibition of public statements of policy, since policy can be reviewed whether or not it is made public.

A shift in the burden of explaining a policy may not always be fatal to the government's case. While unlikely in the case of starkly disproportionate effect, the government might show the effect to be the purely fortuitous result of a policy that would not normally favor prosecution of vocal offenders. If the government does have a policy that favors prosecution of vocal offenders

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119. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976).

120. Such a shift in burden is consistent with selective prosecution cases that infer the motive necessary to establish a prima facie claim of selective prosecution from the disproportionate number of vocal offenders prosecuted. See, e.g., United States v. Steele, 461 F.2d 1148, 1152 (9th Cir. 1972); United States v. Crowthers, 456 F.2d 1074, 1078 (4th Cir. 1972); United States v. Wayte, 549 F. Supp. 1376, 1385 (C.D. Cal. 1982), rev'd, 710 F.2d 1385 (9th Cir. 1983); cf. Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (burden of proof of causation shifted once claimant establishes exercise of first amendment rights as "'motivating factor'" behind dismissal).

121. See United States v. Wayte, 549 F. Supp. 1376, 1379 & n.3 (C.D. Cal. 1982), rev'd, 710 F.2d 1385 (9th Cir. 1983).

122. Setting a high threshold for a disproportionate-effect showing is also consistent with first amendment analysis. See infra text accompanying notes 163–70.

it can attempt to justify the disparate impact of its policy. Yet justifications such as cost savings, deterrent value, and evidentiary value must be subject to scrutiny under the first amendment. If such justifications would not validate a statute embodying the selective enforcement policy, they will not support the prosecutorial policy itself.

Thus, neither the equal protection framework within which selective prosecution analysis developed, nor the judicial review of executive discretion posture of the selective prosecution defense requires such a showing of motive where a broad policy affects first amendment interests. Further, such a policy usually can be discovered without reference to motive. Once discovered, the policy must be subject to direct first amendment review. It remains to be seen whether a passive enforcement policy survives such scrutiny.

III. Applying the First Amendment to Passive Enforcement

Passive enforcement can be analyzed either as a content-based regulation of speech or as a general regulatory measure that incidentally burdens speech. The standard of review under the first amendment turns on this determination. The starkly disproportionate effect that passive enforcement has on vocal violators suggests that it merits review as a content-based regulation. As such, passive enforcement fails first amendment review since protest against draft registration is clearly within the first amendment's protection. If a court treats passive enforcement as a content-neutral regulatory measure, the government interests offered to justify the policy must be weighed against the burden imposed on speech interests. Consideration of these interests and the alternate means available for achieving them demonstrates the constitutional invalidity of passive enforcement.

A. *Passive Enforcement as a Content-Based Distinction*

Cases[123] and commentary[124] suggest a distinct mode of first amendment analysis where government action affecting the speaker is based on the political content of his speech. Such a content-based distinction violates the first amendment unless the speech singled out is outside that amendment's protective ambit.[125]

A passive enforcement policy that prosecutes only persons who report themselves to the government looks like a content-based distinction. Prosecution depends on expression, and only expression with a particular content—"I refuse to comply"—draws prosecution. This characterization is muddied somewhat by the prosecution of persons who are reported by third parties,

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123. See, e.g., Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972).

124. See G. Gunther, Cases and Materials on Constitutional Law 1118-95 (10th ed. 1980); L. Tribe, supra note 41, at 580-84.

125. See Brandenburg v. Ohio, 395 U.S. 444, 448 (1969); Konigsberg v. State Bar, 366 U.S. 36, 50 (1961).

since conceivably prosecution in these cases may not rest on speech at all.[126] But, in the context of nonregistration for the draft, a third-party informant is almost invariably aware of the nonregistrant's violation only if he has spoken about it. Thus, even where the violation is reported by a third party, a passive enforcement policy has the nearly inevitable effect of selecting only those who express their refusal to comply. The Supreme Court has treated as content-based distinctions statutes that, though facially neutral, had an inevitable effect that was constitutionally prohibited.[127] Thus, the possibility of third party reporting does not refute the argument that a passive enforcement policy ought to be considered a content-based distinction.

A passive enforcement policy analyzed as a content-based distinction violates the first amendment if the speech concerned is protected. That the speech takes the form of a letter of protest to the government does not remove it from first amendment protection; the Supreme Court has held that private communications are protected speech.[128] In addition, a letter of protest to the government might very well be characterized as a protected "petition . . . for

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126. See infra note 135. Despite this possibility, one circuit has analyzed passive enforcement as a content-based measure. United States v. Schmucker, No. 82-3701, slip op. at 5-7 (6th Cir. Nov. 25, 1983) (available on LEXIS, Genfed library, Cir file).

127. This approach is implicit in Grosjean v. American Press Co., 297 U.S. 233 (1936). The Court invalidated a statute that imposed a tax on the advertising revenues of newspapers with a weekly circulation of over 20,000. The Court did not deny the state's power to subject newspapers to taxation, id. at 250, but found the form of the tax unconstitutional in two ways: "First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation." Id. at 244-45.

Grosjean also contains language that suggests that the statute's unconstitutionality was due to a hostile legislative motive inferred from the form of the statute. Id. at 250 ("deliberate and calculated device"). This hostile motive aspect of *Grosjean* was recently reaffirmed in a strikingly similar case, Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 103 S. Ct. 1365, 1369 (1983) (dictum), discussed supra notes 48-49. *Minneapolis Star* explictly disclaims that proof of motive is necessary to trigger these protections. Id. at 1376.

The facts of *Minneapolis Star* closely parallel those of *Grosjean*. Unlike the *Grosjean* court, however, the *Minneapolis Star* Court treated the statute not as a content-based distinction meriting automatic invalidation under the first amendment, but rather as a neutral regulatory measure that incidentally burdened speech. Accordingly, the Court applied a balancing approach. See infra notes 136-52 and accompanying text. A superficial comparison of *Grosjean* and *Minneapolis Star* might, therefore, imply that a facially neutral statute that has the inevitable effect of punishing content no longer will warrant treatment as a content-based distinction. This implication is unwarranted as the cases are distinguishable. The newspapers burdened by the statute in *Minneapolis Star* shared no common editorial view; the statute did not distinguish between newspapers on the basis of content. In *Grosjean*, on the other hand, the statute affected almost exclusively newspapers that had been critical of the legislature, and this "content-based disparate impact" influenced the court to apply the strictest first amendment scrutiny. See *Minneapolis Star*, 103 S. Ct. at 1369. Thus, the "inevitable disparate effect" test still retains its validity in first amendment analysis.

The Supreme Court has relied on inevitable disparate effects to invalidate facially valid statutes in other constitutional contexts. See Gomillion v. Lightfoot, 364 U.S. 339 (1960) (inevitable starkly disproportionate racial impact); McFarland v. American Sugar Ref. Co., 241 U.S. 79 (1916) (neutral statute inevitably applicable to only one firm).

128. Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 414 (1979).

redress of grievances."[129] Nor should the self-incriminatory nature of the expression remove it from first amendment protection.[130]

A public statement of refusal to comply is unprotected only if it can be characterized as illegal advocacy.[131] However, such a statement does not fall within the current *Brandenburg v. Ohio*[132] two-part test of unprotected advocacy, which requires that "such advocacy [be] directed to inciting or producing imminent lawless action and [be] likely to incite or produce such action."[133] Passive enforcement makes no attempt to ferret out speech "directed to" producing future nonregistration. Further, given the nature of the violation, the threat of nonregistration cannot be characterized as "imminent lawless action."[134] If analyzed as a content-based distinction, then, passive enforcement of the draft registration law is prohibited by the first amendment.

B. *Passive Enforcement as an Indirect Restriction of Speech*

Despite its startlingly disproportionate effect, a passive enforcement policy might nevertheless be analyzed as an indirect restriction of speech. A court might decline to treat passive enforcement as a content-based distinction if it were to find that the enforcement policy, while having a disproportionate impact on draft protestors, did not inevitably select only vocal violators.[135]

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129. U.S. Const. amend. I, cl. 6; cf. Dixon v. District of Columbia, 394 F.2d 966, 968 (D.C. Cir. 1968) (Bazelon, C.J.) (treating harrassment claim as protected petition).

130. See infra notes 158–62 and accompanying text; cf. Fisher v. United States, 425 U.S. 391, 401 (1976) (protection of noncompelled self-incrimination may stem from first amendment). Nor may self-incriminating statements be characterized as speech that is itself a crime. United States v. Schmucker, No. 82-3701, slip op. at 6-7 (6th Cir. Nov. 25, 1983) (available on LEXIS, Genfed library Cir file); cf. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (coercive picketing of employer is speech unprotected as criminal in itself).

131. The nonprotection of illegal advocacy is based on the "clear and present danger" test of Schenck v. United States, 249 U.S. 47 (1919). But see Leader, Free Speech and the Advocacy of Illegal Action in Law and Political Theory, 82 Colum. L. Rev. 412 (1982) (suggesting that advocacy of illegal action should be protected in most cases).

132. 395 U.S. 444 (1969).

133. Id. at 447.

134. See Hess v. Indiana, 414 U.S. 105, 108 (1973) (Statement that "[w]e'll take the fucking street again" during dispersal of street demonstration is not unprotected illegal advocacy; "at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time."). Similarly, the illegal inaction of nonregistrants can only take place at some indefinite future time. For a hint that the Court may be broadening the unprotected area of speech presenting a "clear and present danger," see Haig v. Agee, 453 U.S. 280 (1981) ("serious damage" to national security likely to result from exposure of CIA agents renders speech unprotected). The content-based analysis may in fact collapse into the balancing approach discussed infra text accompanying notes 136–52. As the analysis in *Agee* suggests, the "clear and present danger" test may simply be a balancing test in which the extreme chilling effect of a content-based distinction requires the justification of an unusually strong government interest to overcome it.

135. The selection of a nonvocal violator by passive enforcement is plausible, if unlikely. A public-spirited parent might know of her son's failure to register and turn him in without his

Viewed in this light, passive enforcement is nothing more than a neutral practice that only incidentally affects speech.

A regulation that burdens speech interests but does not explicitly regulate speech calls for a different analysis than that applied to direct regulation of speech. The Court has generally shown greater sensitivity to state interests in such cases.[136] These situations include overbroad statutes,[137] the chilling effects of the uncertain application of legal rules,[138] access to public fora,[139] and other rules of general applicability that create a disproportionate burden on certain exercises of speech.[140]

The appropriate judicial approach to such regulations is unclear.[141] The cases may be read to require a balancing approach under which the government's interests are weighed against the burden on speech.[142] An alternative reading suggests a more categorical approach: once a regulation is found to burden speech it will be considered valid only if it constitutes the least restrictive means of serving a compelling state interest.[143] The difference between these approaches may be overstated. A good deal of implicit balancing of interests goes on before a court finds a "compelling state interest" or a "burden" on speech.[144]

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having exercised speech rights. Cf. United States v. Eklund, 551 F. Supp. 964, 967 (S.D. Iowa 1982) (names of violators submitted by parents).

136. The Court has applied a test that demands a "compelling state interest" to validate such a regulation. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 680 (1972). While the compelling state interest test is strict, it is not as stringent as the "clear and present danger" test applied to content-based regulation of speech. Compare *Branzburg* (state interest in securing grand jury testimony "compelling") with Brandenburg v. Ohio, 395 U.S. 444 (1969) (clear and present danger test requires direct advocacy of imminent lawless action).

137. See, e.g., Village of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620 (1980); Broadrick v. Oklahoma, 413 U.S. 601 (1973). See generally G. Gunther, supra note 124, at 1185–95.

138. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (forcing speaker to be guarantor of truth promotes self-censorship antithetical to first amendment); Schauer, Fear, Risk, and The First Amendment: Unravelling the "Chilling Effect," 58 B.U.L. Rev. 685 (1978).

139. See, e.g., Village of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620 (1980); Schneider v. State, 308 U.S. 147 (1939).

140. See Branzburg v. Hayes, 408 U.S. 665 (1972) (assessing the burden of compelled grand jury testimony on freedom of the press); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (finding that required disclosure of membership lists disproportionately burdens unpopular groups).

141. See G. Gunther, supra note 124, at 1113–17. See generally Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482 (1975).

142. See Konigsberg v. State Bar, 366 U.S. 36, 49–51 (1961); L. Tribe, supra note 41, at 580–84; Ely, supra note 141. But see United States v. Robel, 389 U.S. 258, 268 n.20 (1967) ("inappropriate for this Court to label one [interest] as being more important or more substantial than the other"); *Konigsberg*, 366 U.S. at 56–80 (Black, J., dissenting).

143. E.g., Carey v. Brown, 447 U.S. 455 (1980).

144. See G. Gunther, supra note 124, at 1116–17; Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 914–15 (1963); cf. Haig v. Agee, 453 U.S. 280, 308–09 (1981) (not explicitly balancing interests; but where national security is threatened, revocation of passport for public statements found not to inhibit speech).

A classic statement of the balancing approach appeared in Justice Harlan's opinion in *Konigsberg v. State Bar*:[145]

> [G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.[146]

The Court's most recent decision considering an indirect burden on speech explicitly adopts this balancing approach. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[147] the Supreme Court sustained a challenge to a state use tax on large purchasers of paper and ink products. The statute did not on its face restrict speech, nor did the Court find a legislative intent to restrict speech.[148] Nevertheless, the effect of the statute was to derive two-thirds of the revenues raised from one particular newspaper. While conceding that the revenue-raising goal was legitimate,[149] the Court found it to be outweighed by the burden it imposed on expression. The Court's adoption of a balancing approach was explicit: "The appropriate method of analysis thus is to balance the burden implicit in singling out the press against the interest asserted by the State."[150]

Like the *Minneapolis Star* newsprint tax, passive enforcement has valid objectives—deterrence and cost savings,[151] for example—yet it also has a grossly disproportionate burden on those who exercise first amendment rights. Thus, unless the reviewing court considers the impact of passive enforcement on speech to be so inevitable as to warrant treatment as a content-based distinction, it will apply the balancing-of-interests approach. Under this approach, the weight of the government's interest is diminished if some other means less restrictive of speech might accomplish the same end.[152] Consideration of both the weight of the speech interests asserted in the draft nonregistration context and the less restrictive alternatives to passive enforcement that are available demonstrate the unconstitutionality of such a policy.

1. *The Speech Interests.* — The weight to be given the speech interests infringed by the government regulation has two components. First, the Court has suggested the existence of a discernable hierarchy of speech categories

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145. 366 U.S. 36 (1961).

146. Id. at 50–51 (citations omitted); accord L. Tribe, supra note 41, at 580–84.

147. 103 S. Ct. 1365 (1983).

148. Id. at 1376.

149. Id. at 1372.

150. Id. at 1372 n.7.

151. See supra notes 31–35 and accompanying text.

152. See, e.g., *Minneapolis Star*, 103 S. Ct. at 1372; Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961); Shelton v. Tucker, 364 U.S. 479 (1960). See generally, L. Tribe, supra note 41, at 582–88.

within which political speech is favored. Second, the weight of the speech depends on the degree to which the expression is chilled and the availability of alternative unrestricted forums.

a. *Conscientious Noncompliance as Highly Valued Political Speech.* — The Supreme Court has made clear that it views speech that advances political debate of primary importance in the hierarchy of first amendment values.[153] It has relied on the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open" in striking down state libel laws that allowed liability for defamation of public officials without a showing of "actual malice,"[154] and has referred to political speech as "more than self expression; [but rather] the essence of self-government."[155] These cases suggest that political speech warrants more protection than speech that serves individual expression and development.[156] This preference may be rooted in the perception that self expression is an individual right, while political expression embodies both the individual's right to express his opinion and society's right—and need—to hear that expression.[157]

The communication of one's refusal to comply with a law fits within the framework of preferred political expression. Civil disobedience is an important part of the lawmaking and self-government process.[158] Professor Leader suggests that civil disobedience has an educative function in a political system rooted in social contract; that a society may learn of a breach of such a contract only by conscientious resistance to questionable laws.[159] While the political value of conscientious legal resistance does not require immunity from prosecution for the underlying offense,[160] the educative function of civil

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153. NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409, 3426 (1982). See generally A. Meiklejohn, Free Speech and its Relation to Self Government (1948); Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965).

154. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

155. Garrison v. Louisiana, 379 U.S. 64, 75 (1964); cf. Pickering v. Board of Educ., 391 U.S. 563, 571–72 (1968) (public-issue-related expression weighed heavily in balancing).

156. See generally G. Gunther, supra note 124, at 1108–11; Note, Constitutional Protection of Commercial Speech, 82 Colum. L. Rev. 720, 730–43 (1982).

157. See Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."); Note, supra note 156, at 733–35.

158. See R. Dworkin, Taking Rights Seriously 206–22 (1977); Leader, supra note 131, at 420–25.

159. Leader, supra note 131, at 420–25.

160. See United States v. O'Brien, 391 U.S. 367 (1968); R. Dworkin, supra note 158, at 215; Leader, supra note 131, at 420–25. Both Dworkin and Leader recognize the problem of "free-riders"; those who would claim immunity from prosecution for civil disobedience when their real desire is to avoid shouldering their fair social burden. Professor Dworkin responds to this argument by reading civil disobedience as a challenge to the constitutional validity of the law; thus there can be no free-rider problem if the law is invalid. R. Dworkin, supra note 158, at 207–08. This approach, however, does not respond to the problem of distinguishing between would-be free-riders and conscientious violators if the law proves to be valid. Professor Leader would rely on enforcement, even against conscientious violators, as a means of discouraging "free-riders." Leader, supra note 131, at 424–25.

disobedience to the political process is defeated if the communication of such violations is chilled.[161] For example, a democratic nation may vote to repeal a law when the body politic learns that those affected by the law are so morally opposed to it that they are willing to face penal sanctions rather than comply. The same law may not be repealed if the communication of moral outrage is chilled.[162] That selective prosecution can distort political communication, a form of speech that is highly valued, suggests that the speech interests will be especially weighty under the balancing analysis.

2. *Degree of Chill.* — A number of Supreme Court cases suggest that the degree to which the neutral regulation chills the valued expression enters into the balancing process. For example, the Court found a "consequential, but uncertain, burden on news gathering" insufficient to override the public interest in law enforcement advanced by compelling newsmen to identify their sources.[163] Similarly, the existence of alternative means of communication discounts the weight given a particular form of expression.[164] The greater the degree of chill, the greater is the weight given the speech interest in the balancing test. In *Thomas v. Collins*,[165] for example, the Court, finding significant chilling of protected speech, reversed a contempt sentence for violation of a temporary restraining order against soliciting union memberships: "[t]he threat of the restraining order, backed by the power of contempt, and of arrest for crime, hung over every word."[166]

The chill in *Thomas* resulted from the certainty of prosecution as a result of the exercise of protected speech rights. Similarly, in the selective prosecution context, the degree of chill depends on the likelihood of prosecution of protected expression. At one extreme lies the situation in which vocal protest has no effect on the chances of selection, as where nonregistrants are discovered by matching social security and registration records, and violators are randomly selected for investigation and prosecution.[167] In this situation, speech is not chilled at all. At the other extreme lies the situation in which the nonvocal violator is effectively immunized from prosecution,[168] while only

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It may be argued that the conscientious violator deserves no first amendment defense to selective prosecution since his willingness to face the penalty is part of his communication. In response, the conscientious violator can argue that the penalty he is willing to face is that applied generally, not one applied specially to conscientious violators who communicate their protest.

161. Ironically, Professor Dworkin advocates the use of prosecutorial discretion to not prosecute conscientious offenders as a means of encouraging such communication. R. Dworkin, supra note 158, at 217–19.

162. For example, the intense political opposition to the Vietnam War, communicated in part by acts of civil disobedience, arguably led to this country's withdrawal from that conflict.

163. Branzburg v. Hayes, 408 U.S. 665, 690 (1972).

164. See United States v. O'Brien, 391 U.S. 367, 389 (1968) (Harlan, J., concurring).

165. 323 U.S. 516 (1945).

166. Id. at 534.

167. See United States v. Wayte, 549 F. Supp. 1376, 1381 (C.D. Cal. 1982), rev'd, 710 F.2d 1385 (9th Cir. 1983).

168. See id. at 1384 (government admission that "the chances that a quiet non-registrant will be prosecuted is probably about the same as the chances that he will be struck by lightning").

vocal violators are prosecuted. Passive enforcement has this result, and, accordingly, almost certainly will deter conscientious violators from communicating the intensity of their views. Between these two extremes lies a middle ground, where both quiet and vocal offenders are sought out and prosecuted, but special attention is given to the prosecution of vocal offenders. The IRS enforcement policy provides an example.[169] While expression of protest increases a tax protestor's chances of prosecution somewhat, such an effect may well be seen as a "consequential, but uncertain, burden"[170] on expression, and, as such, be outweighed by the governmental interest in better law enforcement through deterrence. This analysis suggests that if the government makes more than a token effort to prosecute nonvocal violators, the first amendment defense will not be available.

2. *Government Interests Asserted.* — The analysis of the weight of the asserted speech interests indicates that the passive enforcement of draft registration exerts a great degree of chilling on a highly valued form of speech. Such a policy may be justified only if it promotes a "strong, subordinating interest that the [government] is entitled to protect" and if such interests could not be "served by measures less destructive of First Amendment interests."[171] These two standards must be applied to the cost, deterrence, and evidentiary justifications offered for the passive enforcement policy.[172]

a. *Cost Savings.* — The cost savings of passive enforcement fail to justify its first amendment effects. In *Schneider v. State*,[173] the Supreme Court struck down an ordinance barring distribution of handbills, noting that the extra cost of litter removal imposed by allowing handbill distribution did not outweigh the speech interests implicated. Thus, a minor cost differential does not justify an enforcement policy that selects only those who exercise first amendment rights for prosecution.[174]

b. *Deterrent Effects.* — At first glance, the need for general deterrence in the enforcement of criminal laws seems to be a subordinating government interest sufficient to override the speech interests. On closer examination, however, the validity of the "deterrence" interest becomes doubtful, especially in light of the availability of less restrictive alternatives to deterring draft nonregistrations.

Deterrence is a form of government expression—a communication to would-be violators that the law will be enforced. Not every policy of enforcement that deters criminal conduct, however, advances a valid government interest. A policy of prosecuting only visible and vocal protestors of a law

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169. See United States v. Scott, 521 F.2d 1188 (9th Cir. 1975) (vigorous IRS general enforcement policy).

170. Branzburg v. Hayes, 408 U.S. 665, 690 (1972). See supra note 164 and accompanying text.

171. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 636 (1980).

172. See supra notes 31–35 and accompanying text.

173. 308 U.S. 147 (1939).

174. The fact that the Selective Service now uses an active enforcement program demonstrates that cost does not make such a system impractical. See supra note 1.

should not be considered a legitimate form of deterrence. The government has no valid interest in protecting its citizens from accurate information.[175] A policy of selective enforcement designed to create the illusion of full enforcement of a generally unenforced law is destructive of the political process and serves no valid governmental interest. Consider a body politic lulled by a series of prosecutions of highly visible violators into the belief that an income tax law was strictly enforced. A self-governing nation might reenact the tax law without modification, in ignorance of large numbers of quiet violators who avoided their fair share of the tax burden. The "deterrence" illusion destroys the search for political truth that is vital to a representative democracy.

Even if the deterrence goal is assumed to be validly aimed at communicating the government's intention to enforce the draft registration law, less restrictive means are available to achieve this objective. The government relies on the publicity given to prosecutions of the visible, vocal protestor.[176] Yet in the case of the first prosecutions under a new, controversial law, the government could easily draw media attention to any prosecution—including the prosecution of a quiet nonregistrant. Indeed, such a strategy may have a greater deterrent effect, since a pattern of prosecuting only vocal offenders may contribute to an accurate assumption on the part of would-be violators that they can ignore the law with impunity as long as they keep quiet.

c. *Evidentiary Value.* — Reliance on first amendment-protected statements for their evidentiary value in establishing a knowing violation is in many respects a cost-saving measure. The government refuses to spend what it would take to establish a knowing violation without reference to protected expression. As such, this justification is subject to the objections voiced in *Schneider*: minor cost savings alone fail to justify the infringement of first amendment rights.[177] In addition, one can easily imagine less restrictive alternatives. For example, once nonregistrants are identified through ordinary administrative means, they could be notified by registered mail of their noncompliance; such notification could be used as evidence of their subsequent "knowing" failure to comply. Certainly, "knowledge" is no more difficult to establish for nonregistration than for other crimes for which passive enforcement has never been attempted.

C. *The Dismissal Remedy*

Given the degree of the burden on the protected first amendment interest and the inadequacy of the asserted governmental interests, a passive enforce-

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175. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 769-70 (1976); Bigelow v. Virginia, 421 U.S. 809, 827-28 (1975); cf. Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech").

176. See, e.g., United States v. Wayte, 549 F. Supp. 1376, 1384 (C.D. Cal. 1982), rev'd, 710 F.2d 1385 (9th Cir. 1983); United States v. Catlett, 584 F.2d 864, 868 (8th Cir. 1978).

177. See supra note 173 and accompanying text; cf. Speiser v. Randall, 357 U.S. 513, 529 (1958) ("The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech.").

ment policy that selects vocal violators for prosecution is inconsistent with the first amendment's guarantee of freedom of expression.[178] The Supreme Court has recognized that selective prosecution, in the proper circumstances, is a valid defense,[179] and the circuit courts of appeals have so treated it by dismissing cases against those who successfully establish selective prosecution.[180] Nevertheless, some commentators have criticized the dismissal remedy.[181]

These commentators base their criticism on the perceived disutility of allowing an acknowledged offender to escape punishment. However, two arguments support the remedy of dismissal. First, a policy that infringes first amendment rights taints the statute, rendering prosecutions unconstitutional even if the underlying statute is otherwise valid. Viewed in this light, the nonregistrant has not violated a valid statute at all. *Yick Wo* suggests such an approach. The discriminatory application of the laundry permit statute rendered convictions under that statute invalid.[182] Moreover, the offenders need not be immunized from prosecution and allowed to escape punishment. The same defendant can be prosecuted again under a valid enforcement policy.[183]

The second argument for the dismissal remedy is based on the need to deter prosecutors from following policies that infringe first amendment freedoms.[184] Such an argument draws support from the exclusionary rule, another situation in which acknowledged violators are released in order to deter government enforcement officials from violating constitutional provisions.[185] The deterrence rationale is even stronger in the case of selective enforcement than in the fourth amendment context. So few vocal violators are prosecuted that the societal costs of dismissal are vastly less than those associated with the exclusionary rule. Moreover, the selection policy itself indicates that the offense is not considered socially injurious, since the vast majority of violators are allowed to go unpunished. It is no more unfair to allow the thirteen

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178. Such a challenge does not raise a standing problem despite the fact that the defendant is claiming a chilling of first amendment rights while he has not himself been deterred. In the first amendment context, standing to challenge a government action for its chilling effects on the rights of others has been held to exist where the claimant is himself being prosecuted. Bigelow v. Virginia, 421 U.S. 809, 815-16 (1975); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458-59 (1958).

179. See Oyler v. Boles, 368 U.S. 448 (1962); Two Guys, Inc. v. McGinley, 366 U.S. 582, 589-90 (1961); cf. Yick Wo v. Hopkins, 118 U.S. 356 (1886) (release of prisoners convicted under statute discriminatorily applied).

180. See, e.g., United States v. Steele, 461 F.2d 1148 (9th Cir. 1972); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972).

181. Abrams, supra note 84, at 52-53; Cardinale & Feldman, supra note 9, at 680-81.

182. Yick Wo v. Hopkins, 118 U.S. 356 (1886); cf. Speiser v. Randall, 357 U.S. 513, 529 (1958) (part of statutory process invalid as against first amendment rights not separable from remainder of statutory provisions). See generally Comment, supra note 9, at 1105-22.

183. Cox, supra note 84, at 406. A valid enforcement system is now used by the Selective Service. See supra note 1.

184. See Robinson, Criminal Law Defenses: A Systematic Analysis, 82 Colum. L. Rev. 199, 229-32 (1982).

185. See United States v. Calandra, 414 U.S. 338 (1974); Robinson, supra note 184, at 231; Comment, supra note 3, at 1131-33.

violators selected for prosecution to go free than to allow the 500,000 violators not so selected to go unprosecuted. Thus, the public policy in favor of enforcement does not outweigh the constitutional values served by dismissal.[186]

CONCLUSION

Federal courts currently apply a test that requires a defendant to establish a prosecutorial motive to deter or punish the defendant's expression in order to make out a first amendment selective prosecution defense. This motive requirement reflects the historical development of the selective prosecution defense, which is rooted in the equal protection analysis of administrative action. However, neither equal protection jurisprudence, nor the judicial deference traditionally paid to exercises of administrative discretion, justify requiring a showing of hostile motives as an essential component of a first amendment–selective prosecution defense. When prosecutorial policy is applied in such a way as to disproportionately select those critical of the government, a court must apply either the test approporiate for content-based regulations or the balancing approach that is applicable whenever a general regulation incidentally infringes first amendment rights. Application of either approach reveals that passive enforcement policy such as the one previously used by Selective Service violates the first amendment.

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186. See Comment, supra note 9, at 1140–41.