SELECTIVE PROSECUTION: A VIABLE DEFENSE AGAINST A CHARGE OF TRANSMITTING AIDS?

In the past three years, the number of legislative proposals[1] relating to Acquired Immune Deficiency Syndrome (AIDS)[2] and its predecessor forms has increased dramatically.[3] Provisions that make transmitting the AIDS virus a crime prevail among the newly proposed AIDS-related laws.[4] These criminal statutes involve a variety of elements, intent requirements and penalties.[5] Public hysteria motivates some legislatures; others desire to deter communication of disease.

1. *See* AIDS Law & Litigation Reporter at 1-37 (summarizing AIDS laws from the 1987 State Legislative Sessions).

2. The Center for Disease Control (CDC) defines AIDS as a disease characterized by the presence of one or more of four opportunistic infections or Kaposi's sarcoma. AIDS involves extreme impairment to the immune system and is acquired through the exchange of bodily fluids particularly blood and semen. Schultz, *AIDS and the Criminal Law*, 7 ST. LOUIS U. PUB. L. REV. 65, 65-67 (1988).

3. *Id.* A virus originally termed HTLV-III (Human T-cell Lymphotropic Virus Type III) and now commonly referred to as HIV (Human Immunodeficiency Virus) is present in the blood of AIDS victims. As of yet, scientists are unsure whether the virus alone causes AIDS or whether the virus in conjunction with other factors causes AIDS. In any event, scientists estimate that at least one-half of those who carry the virus will ultimately contract AIDS. *Id.*

4. The proposals reach direct person to person transmission as well as acts which facilitate indirect transmission such as donation of infected blood. *See* TENN. CODE ANN. § 68-32-102 (1986); California SB 2384. Some proposals reach conduct which does not actually or potentially transmit AIDS but is related to the spread of disease. *See* Tennessee HB 1827 (withholding information from a health care provider by anyone diagnosed as carrying AIDS is a crime); Louisiana H.B. 1640, Act 878, 1987 Laws (it is a misdemeanor for a physician or other person reporting the death of a patient known or diagnosed as having AIDS or the AIDS virus to fail to notify the coroner). *See* 1 AIDS Law and Litigation Reporter, 9-23.

5. *See supra* note 4 and *infra* notes 20-22.

The prevalence of AIDS among homosexual men creates the potential for selective enforcement of criminal laws against homosexual men.[6] At some level, the possibility of discriminatory application has influenced adoption of legislation criminalizing transmission, both in terms of content and enactment decisions. Some policy makers resist enacting transmission statutes because of their concern about bias against homosexuality. Other policy makers support such legislation due to their own, or their constituency's, bias against homosexuality.

AIDS exists among both homosexual and heterosexual persons.[7] Consequently, the laws which are not facially specific to homosexual men are enforceable against both homosexuals and heterosexuals. Furthermore, regardless of the underlying purposes of these laws,[8] they purport to serve the interests of both homosexual and heterosexual people because both groups are at risk of contracting the AIDS virus.

Criminal sanctions against AIDS transmission presents a policy dilemma. On the one hand, AIDS is a communicable and fatal disease that can be used as a weapon. The potential use of the disease to inflict physical and emotional harm warrants criminal proscription. On the other hand, prosecutorial abuse of such sanctions may lead to unfair persecution of an already-beleaguered homosexual community. This Article will assess whether policy makers should address the potential for discriminatory prosecution when homosexuals can utilize the defense of selective prosecution. The answer to this question requires an assessment of the viability of the selective prosecution defense under the Constitution. State law may provide additional protections against selective prosecution. The availability of such additional protection, however, is beyond the scope of this Article.[9]

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6. Field and Sullivan, *AIDS and the Criminal Law*, 15 LAW MED. & HEALTH CARE 46, 55 (1987) (hereinafter Field); *See also* Schultz, *supra* note 2, at 70 n.29; *cf.* Robinson, *AIDS and the Criminal Law: Traditional Approaches and a New Statutory Proposal*, 14 HOFSTRA L.REV. 91 (1985) (addressing the role of criminal laws in encouraging behavior modification to limit the spread of AIDS).

7. *See* Redfield, Markham, Salahuddin, Wright, Sarngadharn & Gallo, *Heterosexually Acquired HTLV-III/LAV Disease, AIDS-Related Complex and AIDS*, 254 J. A.M.A. 2094 (1985).

8. *See* Field, *supra* note 6, at 55 (criminal laws would not be effective as a public health measure; in fact, they would be counterproductive in that they could potentially discourage testing and revealing health status to partners). *See also* Schultz, *supra* note 2, at 110 n.212 (discussing problems of proof and the statute's effect of discouraging AIDS victims from revealing the disease to physicians, public health authorities and partners).

9. *See* Schultz, *supra* note 2, at 71 n.34, listing the following: Brennan, *State Consti-*

Part I describes the various statutes, both proposed and enacted, criminalizing AIDS transmission. Because these laws are novel, no reported cases of prosecutions exist thereunder. Prosecutors, however, have brought a handful of cases involving potential AIDS transmission under traditional criminal statutes that proscribe offenses against the person. Part II surveys fact patterns in these cases to illustrate the circumstances giving rise to the charges. Part III defines the requirements for establishing a defense of selective prosecution. Finally, Part IV examines cases where defendants have raised the defense of selective prosecution on the basis of homosexuality.

PART I

While some commentators disfavor laws which criminalize the transmission or potential transmission of the AIDS virus,[10] at least one-third of the states are considering such legislation.[11] Some states have already adopted such criminal statutes.[12] Those legislators view criminal laws prohibiting AIDS transmission as a logical extension of existing laws[13] criminalizing the transmission of venereal disease.[14] Although violation of laws relating to venereal disease usually constitutes a misdemeanor, law enforcement officers argue that AIDS transmission should be a felony because it is, in most cases, fatal.[15] With few exceptions,[16] the proposed and adopted laws characterize AIDS

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tutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1977); Linde, *E. Pluribus-Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983).

10. *See* Field, *supra* note 6, at 55-56 (tort law is preferable to criminal sanctions as a means of inhibiting transmission of AIDS because criminal sanctions involve a greater degree of state intrusion into a sensitive area of private life); *see also* Schultz, *supra* note 2, at 113 (criminal sanctions are an expensive, ineffective and counterproductive means of reducing the spread of AIDS; however, prosecution may be appropriate in limited circumstances where the defendant intended to transmit the disease and chose an effective way to do so).

11. *See infra* notes 20-22 for a discussion about some of these proposals.

12. M. DAVIS, LOVERS, DOCTORS, AND THE LAW: YOUR LEGAL RIGHTS AND RESPONSIBILITIES IN TODAY'S SEX-HEALTH CRISIS, 88-89 (1988).

13. *See infra* note 25 (listing state criminal laws relating to venereal disease).

14. *See* DAVIS, *supra* note 12, at 88-89.

15. *Id.* at 70.

16. *E.g.* Pennsylvania HB 1787 (a person who knows that he has AIDS and trans-

transmission as a felony.[17]

AIDS is transmitted by an exchange of bodily fluids containing the AIDS virus (HIV). Consequently, any exchange of bodily fluids can potentially transmit the AIDS virus.[18] Still, a great deal of uncertainty exists as to the relative risk of transmission posed by different activities.[19] One recognized means of transmitting AIDS is sexual intercourse, both anal and vaginal. Hence, some laws prohibit transmission by sexual contact.[20] Other laws do not specify the means of transmission or attempted transmission,[21] while others are specific to blood or organ donation.[22]

Recently, Missouri adopted legislation criminalizing the conduct of any individual knowingly infected with HIV who: (1) is or attempts to be a blood, organ, sperm or tissue donor except as deemed necessary for medical research; or (2) deliberately creates a grave and unjustifiable risk of infecting another with HIV through sexual or other contact.[23] This law represents a class D felony and carries a potential

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mits it to another person through sexual contact commits a first degree misdemeanor) (as cited in AIDS Law and Litigation Reporter, II).

17. *See infra* notes 20-21 for a description of felony provisions.

18. *See supra* note 3 for information about HIV. The virus is generally concentrated in blood and semen, but lower concentrations exist in other bodily fluids such as saliva and tears. Effective transmission occurs only when the virus reaches another's blood. Schultz, *supra* note 2, at 67 n.12.

19. *Id.*

20. A Hawaii bill would make it a felony for anyone diagnosed as suffering from AIDS to knowingly expose another person to the AIDS virus through sexual contact. Hawaii HB 2289-86. An Idaho bill, which the legislature defeated, prohibited donating blood or plasma, biting, spitting and sexual intercourse by one who had or has a significant likelihood of carrying the AIDS virus. Idaho HB 662. A Pennsylvania bill would make it a misdemeanor for anyone who knows he is infected by AIDS to transmit the disease to another person through sexual contact. Pennsylvania HB 1787. As cited in AIDS Law and Litigation Reporter, 9-10.

21. A Colorado bill would make it a felony for anyone with knowledge or reasonable grounds to suspect that he is infected with a deadly or disabling disease to willfully or knowingly perform an act which exposes another to or infects another with the disease. Colorado HB 1144. An Idaho bill would make it unlawful for anyone infected with AIDS, ARC or other manifestations of HTLV-III infection to knowingly or willfully expose another person to the disease. Idaho HB 653 as cited in AIDS Law and Litigation Reporter, 9-10.

22. A California proposal makes it a felony for any person who knows that he or she has AIDS or the AIDS virus to donate blood, whether on a paid or volunteer basis. California SB 2384 as cited in AIDS Law and Litigation Reporter, 9-10.

23. MO. REV. STAT. § 191.677 (1988). *See generally* Schultz & Reuter, *AIDS Leg-*

penalty of a maximum of five years imprisonment.[24]

In addition, AIDS transmission is potentially punishable under laws criminalizing the sexual transmission of disease[25] and laws criminalizing certain types of sexual conduct.[26] Furthermore, traditional laws proscribing offenses against the person such as murder,[27] manslaughter,[28] negligent homicide,[29] attempted murder[30] and assault[31] may also

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islation in Missouri: An Analysis and a Proposal, 53 MO. L. REV. 599 (1988) (analysis of anticipated issues arising under Missouri AIDS law).

24. MO. REV. STAT. § 558.011 (1986).

25. *See* Note, *Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law*, 70 CORNELL L. REV. 101, 116 n.95 (1984) which cites: ALA. CODE § 22-16-17 (1977) (misdemeanor); COLO. REV. STAT. §§ 25-4-401(2)-407 (1982) (misdemeanor); DEL. CODE ANN. tit. 16 §§ 701, 709 (1983) (fine up to $1,000 or imprisonment up to one year, or both); FLA. STAT. ANN. §§ 384.01, 384.03 (1986) (misdemeanor); IDAHO CODE §§ 39-601-607 (1985) (misdemeanor); N.Y. PUB. HEALTH LAW § 2307 (McKinney 1985) (misdemeanor); OKLA. STAT. ANN. tit. 63, § 1-519 (West 1984) (felony); UTAH CODE ANN. § 26-6-5 (1989) (misdemeanor); VT. STAT. ANN. tit. 18, § 1106 (1982) (fine up to $500, or imprisonment up to two years, or both).

The following make it a misdemeanor to expose another to venereal disease: COLO. REV. STAT. § 25-4-401(2) (1982) (misdemeanor to willfully expose); NEV. REV. STAT. § 441.290 (1987) (misdemeanor to knowingly expose); S.C. CODE ANN. §§ 44-29-60-140 (Law. Co-op. 1985) (misdemeanor to expose another); S.D. CODIFIED LAWS ANN. § 34-23-1 (1986) (misdemeanor to expose another); TENN CODE ANN. §§ 68-10-107 - 111 (1987) (misdemeanor to expose another). *See also* DAVIS, *supra* note 12, at 72-80 (stating contents of 24 state laws making it a crime to infect another with venereal disease).

26. *See* Schultz, *supra* note 2, at 70 n.29. Almost half of the states make voluntary sodomy a crime. *See* ALA. CODE § 13A-6-65(a)(3) (1977); ARIZ. REV. STAT. ANN. §§ 13-1411, 13-1412 (Supp. 1989); ARK. STAT. ANN. § 41-1813 (1977); D.C. CODE ANN. § 22-35-0 (1989); FLA. STAT. § 800.02 (1976); GA. CODE ANN. § 16-6-2 (1988); IDAHO CODE § 18-6605 (1987); KAN. STAT. ANN. § 21-2505 (Supp. 1986); KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1985); LA. REV. STAT. ANN. § 14.89 (West Supp. 1986); MD. ANN. CODE art. 27, §§ 553-554 (1988); MICH. COMP. LAWS §§ 750.158 (1981), 750.338a, 750.338b (1985); MINN. STAT. § 609.293 (Supp. 1987); MISS. CODE ANN. § 97-29-59 (1972); MO. REV. STAT. § 566.090 (1986); MONT. CODE ANN. § 45-5-505 (1985); NEV. REV. STAT. § 201.190 (1987); N.C. GEN. STAT. § 14.177 (1986); OKLA. STAT. tit. 21, § 886 (1983 & Supp. 1989); R.I. GEN. LAWS § 11-10-1 (1981 & Supp. 1988); S.C. CODE § 16-15-120 (1985); TENN. CODE ANN. § 39-2-612 (1982); TEX. PENAL CODE ANN. § 21.06 (Vernon 1989); UTAH CODE ANN. § 76-5-403 (1984 & Supp. 1989); VA. CODE ANN. § 18.2-361 (1988); WIS. STAT. § 944.17 (1982 & Supp. 1989).

27. Field, *supra* note 6, at 47.

28. *Id.*

29. *Id.* at 48.

30. *Id.*

31. *Id.* at 49.

apply.

PART II

Because the majority of legislation criminalizing the transmission of the AIDS virus is pending consideration or has been adopted only recently, case law is nonexistent. Prosecutors traditionally bring cases involving the transmission of AIDS under either traditional offenses against the person such as aggravated assault or under laws which criminalize the transmission of venereal disease. Because the AIDS epidemic is relatively recent, the number of criminal transmission cases is scant and the fact patterns vary greatly. Accordingly, no recognizable pattern emerges. On the surface, prosecutors have not appeared to use criminal sanctions to selectively prosecute homosexual men.

In California, a Los Angeles district attorney indicted a man for attempted murder for selling his blood after learning he had AIDS. The man subsequently pleaded guilty.[32] In a military case, an Army soldier knowingly exposed both a male and a female partner to the AIDS virus through sexual intercourse. Neither partner knew that the accused was infected with the AIDS virus.[33] He was charged with two counts of aggravated assault and court-martialed.[34]

A number of cases involve AIDS carriers biting or spitting at others. In Michigan, a prosecutor charged an individual with assault and attempt to commit murder, alleging that the defendant spit on two policemen.[35] The trial judge dismissed the case.[36] Likewise, prosecutors in San Francisco obtained a guilty plea of misdemeanor assault from a man who bit a police officer.[37] The court sentenced the defendant to ninety days in jail.[38] Prosecutors dropped a charge of felony assault after discovering that the police officer, the alleged victim, was homosexual and had a former lover with AIDS.[39]

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32. DAVIS, *supra* note 12, at 86-87.

33. The Army dropped a separate count for aggravated assault relating to the offender's sexual relations with another soldier. That soldier knew the defendant carried the AIDS virus. *Id. Army will try AIDS carrier*, NAT'L L.J., June 15, 1987, at 7, col. 1.

34. *Id.*

35. DAVIS, *supra* note 12, at 87.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* This case suggests another potential manifestation of prosecutor's discrimi-

In *U.S. v. Moore*,[40] a jury convicted a heroin addict on two counts of assault with a deadly or dangerous weapon after a biting incident.[41] Defendant, an inmate at a federal medical center, bit two federal correctional officers[42] but did not transmit the virus. The defendant moved for acquittal on the grounds that his mouth and teeth did not constitute a deadly or dangerous weapon because of insufficient evidence that human bites by AIDS carriers are likely to produce death or great bodily harm.[43] The district court denied defendant's motion and held that, under the circumstances, the defendant's mouth and teeth were deadly and dangerous weapons. The Court of Appeals affirmed the conviction.[44]

In three of these five cases, the intended victims were public officials carrying out their public duties. These individuals probably reported the incidents to prosecutors, suggesting that neither law enforcement officers nor prosecutors are initiating investigations relating to AIDS transmission. Rather, in the context of AIDS transmission, prosecutors and law enforcement officials thus far are relying on a system of passive enforcement. In other contexts, however, law enforcement officers have actively initiated investigation and sting operations which target homosexuals.[45]

PART III

Laws criminalizing transmission of venereal disease and certain types of sexual behavior have withstood facial constitutional attacks,[46] but they have not always withstood constitutional attacks regarding

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nation against homosexuals, specifically, the systematic refusal to pursue prosecution where the victim is homosexual.

40. 846 F.2d 1163 (8th Cir. 1988).

41. *Id.* at 1164; *see* 18 U.S.C. §§ 111 (1982) and 1114 (Supp. IV 1987).

42. 846 F.2d at 1164-65.

43. *Id.*

44. *Id.* at 1166-68.

45. *See, e.g.*, HOMOSEXUAL ACTIVITY IS TARGETED, St. Louis Post-Dispatch, May 14, 1989, § C, at 1, col. 2 (undercover operation to halt overt homosexual activity); St. Louis Post-Dispatch, November 29, 1988, at 1, col. 3 (St. Louis City Vice squad conducted sting operation arresting over 200 homosexual men for indecent exposure).

46. Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding Georgia statute prohibiting voluntary sodomy, reasoning that the statute does not violate privacy interests granted by the constitution); State v. Walsh, 713 S.W.2d 508 (Mo. 1986) (en banc) (Missouri Supreme upholds voluntary sodomy statute under equal protection analysis finding that statute rationally reduces transmission of AIDS virus).

their application. Courts have upheld the constitutional validity of such laws, suggesting that they would approve criminalizing AIDS transmission.

Unlike a facial attack, a selective prosecution challenge is premised on unconstitutional application of law. When a defendant prevails in a selective prosecution challenge, the ruling affects the law only in cases where enforcement decisions are factually similar. The statute, of course, remains enforceable.

The Constitution is the primary constraint on prosecutorial conduct.[47] Generally, a prosecutor has broad prosecutorial discretion. In *Bordenkircher v. Hayes*,[48] the Supreme Court held that "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[49] However, when a prosecutor brings charges under a rarely enforced law or brings charges against one class of violators while ignoring others, a court may review the charging decision.[50] In such a case, the defendant may raise the defense of selective prosecution.[51]

A selective prosecution defense does not challenge the merits of the government's case against a defendant.[52] Rather, it challenges the constitutionality of the prosecutor's charging decision.[53] Although a selective prosecution defense raises a number of constitutional problems, including due process and the exercise of other guaranteed rights,[54] courts generally review selective prosecution claims utilizing equal protection standards.[55]

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47. Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1366 (1987).

48. 434 U.S. 357, *reh'g. denied*, 435 U.S. 918 (1978).

49. *Id.* at 364.

50. Reiss, *supra* note 47, at 1369.

51. A challenge premised on selective prosecution is different from one alleging prosecutorial vindictiveness. The latter involves a prosecutor's decision, on some impermissible basis, to charge under a more severe law or seek a more severe penalty. *Id.* at 1374.

52. *Id.* at 1369.

53. *Id.*

54. *Id.* at 1370. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 605 (1985) (defendant alleged selective prosecution on the basis of his exercise of his first amendment right).

55. Wayte, 470 U.S. at 608. The fourteenth amendment states in part: "No state

In order to challenge the prosecutorial decision, a defendant must first establish that the prosecutor in fact prosecuted the defendant but did not prosecute similarly situated violators. Second, the defendant must show that the prosecutor selected the defendant based upon an impermissible consideration.[56] The presumption that prosecutors act in good faith and in a nondiscriminatory manner in fulfilling their duty to enforce the laws[57] charges the defendant with the burdens of proof and persuasion with respect to both elements.[58] Once a defendant establishes a prima facia case of selective prosecution, the burden shifts to the prosecutor to show that he acted in a non-discriminatory manner.[59]

In order to show the first element of selective prosecution, a defendant will typically present statistical evidence showing a lack of prosecutions of others similarly situated.[60] This requirement presents two problems. First, it is unclear whether defendant must prove only that the government did not charge other violators, or further show that the government was aware of specific violations which it chose not to prosecute.[61] At the very least, the defendant must identify specific similarly situated violators that have not been prosecuted.[62] Second, the

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shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

56. United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974) (stating elements of selective prosecution claim, including selection of defendant for prosecution based on such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights).

57. United States v. Falk, 479 F.2d 616, 620 (7th Cir. 1973).

58. United States v. Jennings, 724 F.2d 436, 445 (5th Cir. 1984), *cert. denied*, 467 U.S. 1227 (1984); United States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978).

59. *Falk*, 479 F.2d at 621. Some courts suggest that both the burden of proof and the burden of production shift at this point. *See* United States v. Crowthers, 456 F.2d 1074, 1078 (4th Cir. 1972).

60. *See, e.g.*, United States v. Eklund, 733 F.2d 1287, 1289 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985); Wayte v. United States, 470 U.S. 598, 604 n.3 (1985) (defendant established that the government was aware of 286 non-registrants out of an estimated 674,000 nonregistrants and of these had indicted or intended to indict 16); State v. Smith, 422 S.W.2d 50 (Mo. 1967) (en banc), *cert. denied*, 393 U.S. 895 (1968). *See also* Herbrand, *What Constitutes Such Discriminatory Prosecution or Enforcement of Laws as to Provide Valid Defense in State Criminal Proceedings*, 95 A.L.R. 3d 280, 290-93 (listing state cases supporting proposition that defendant must show that others similarly situated are not generally prosecuted).

61. Reiss, *supra* note 47, at 1371 n.18.

62. United States v. Berrios, 501 F.2d 1207, 1211-12 (defendant's allegation that other violators existed was not sufficient to meet first element because defendant did not identify the individuals with sufficient particularity).

defendant must obtain evidence to demonstrate the prosecutor's failure to prosecute similarly situated violators. Such evidence includes similarly situated violators engaged in the same act as the defendant.[63] The difficulty arises because of the non-existence[64] or inaccessibility[65] of such evidence.

Many selective prosecution claimants have failed to establish the first requirement[66] although the second requirement, prosecutorial intent, presents a more formidable hurdle.[67] The second element requires a showing that an impermissible factor influenced the prosecutor.[68] Courts have identified three potentially impermissible prosecutorial motives: (1) race, religion, or other suspect classification;[69] (2) a desire to impede the exercise of constitutional rights;[70] and (3) personal vindictiveness towards the defendant.[71] The Supreme Court has never held that homosexuality is a quasi-suspect classification for purposes of

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63. Reiss, *supra* note 47, at 1371 n.19. *See also* United States v. Cantu, 557 F.2d 1173, 1177-78 (5th Cir. 1977).

64. Reiss, *supra* note 47 at 1373 (noting that prosecutors do not have guidelines governing charging decisions and hence, there is usually no documented administrative decision-making for defendant to use).

65. *Id.* (noting that courts are generally reluctant to allow discovery necessary to prove intent because such discovery is deemed overly intrusive with respect to the law enforcement function.) *See* Note, *Defense Access to Evidence of Discriminatory Prosecution*, 1974 U. ILL. L.F. 648, 661-62 (proposing that defendants through discovery should have access to enforcement statistics).

66. *See* United States v. Kelly, 556 F.2d 257, 264-65 (5th Cir. 1977), *cert. denied*, 434 U.S. 1017 (1978); United States v. Bourque, 541 F.2d 290, 292-93 (1st Cir. 1976); United States v. Banks, 368 F. Supp. 1245, 1251-52 (D.S.D. 1973).

67. Reiss, *supra* note 47, at 1372.

68. The extent to which the impermissible basis represents a factor is unclear. The impermissible basis could be (1) the sole or dominant factor in the charging decision; (2) a lesser "but for" cause of the prosecutor's selection of the defendant; or (3) only one of a number of reasons. Reiss, *supra* note 47, at 1372 n.25. *See also* Herbrand, *supra* note 60, at 293 (listing state cases supporting proposition that discrimination must be intentional or purposeful).

Recently, the Supreme Court indicated that where the defendant establishes a facially discriminatory enforcement classification, discriminatory intent is presumed. Wayte v. United States, 470 U.S. 598, 608 n.10 (1985) ("A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification.").

69. *See* United States v. Cammisano, 546 F.2d 238, 241 (8th Cir. 1976) (quoting United States v. Berrios, 501 F.2d 1207, 1209 (2d Cir. 1974)) (Italian defendant).

70. *See Wayte*, 470 U.S. at 610-14 (first amendment rights); United States v. Eklund, 733 F.2d 1287, 1291 (8th Cir. 1984) (first amendment rights).

71. United States v. Mangieri, 694 F.2d 1270, 1275 n.6 (D.C. Cir. 1982) (citing United States v. Bourque, 541 F.2d 290, 293 (1st Cir. 1976)).

equal protection guarantees.[72]

Furthermore, with respect to prosecutorial intent, the Supreme Court has recently held that where the prosecutor utilizes a system of passive enforcement,[73] the prosecutor manifested discriminatory intent. In *Wayte v. United States*,[74] prosecutors charged the defendant with knowingly and willfully failing to register with the Selective Service System. The defendant asserted a selective prosecution defense on the grounds that the prosecutor impermissibly based the charging decision on the defendant's exercise of his first amendment right to free speech.[75] The Court rejected the defendant's argument because the government did not proceed against all "vocal" non-registrants.[76] The *Wayte* case highlights the court's unwillingness to find discriminatory intent where the enforcement decision is in part a function of the information available to the prosecution.

While nondiscriminatory enforcement is the ideal, discriminatory enforcement remains because of the defendant's heavy burden in establishing a prima facia case of selective prosecution and then rebutting any subsequent governmental justifications. Indeed, commentators note that selective prosecution claims rarely succeed.[77]

PART IV

Despite the futility in raising a selective prosecution claim, male homosexual defendants have raised the defense. These cases typically arise in the context of a prosecution under a jurisdiction's sodomy law. The defendants in these cases do not necessarily allege that prosecutors

72. Race, religion, illegitimacy and national origin are suspect classifications warranting strict scrutiny. Sex is a quasi-suspect classification warranting an intermediate level of scrutiny. *See* Bowers v. Hardwick, 474 U.S. 1039 (1986) (homosexuals do not have fundamental right to private consensual sodomy under substantive due process law).

73. Under a system of "passive enforcement," the government prosecuted only those violators who advised the Selective Service that they failed to register or whom others reported as having failed to register. *Wayte*, 470 U.S. at 608-9 (1985).

74. 470 U.S. 598 (1985).

75. *Id.* at 604-05.

76. *Id.* at 609. The government had a "beg" policy under which it gave "vocal" nonregistrants a final opportunity to register and thereby avoid prosecution. The government did not prosecute those who protested registration but later registered. *Id.*

77. Reiss, *supra* note 47, at 1373; Herbrand, *supra* note 60, at 288 (noting comparatively small number of cases where courts have found that a defendant established a case of selective prosecution).

are charging homosexual violators while excluding similarly situated heterosexual violators.

In *State v. Rhinehart*,[78] for example, the defendant alleged that he was singled out for prosecution under a state sodomy law because the prosecution failed to charge other known homosexual violators. The court rejected the defendant's allegation that he was "singled out" by noting that the prosecutor brought between twelve to twenty-four sodomy cases annually.[79]

In *United States v. Cozart*,[80] the defendant alleged gender classification discrimination rather than discrimination based on sexual preference. The defendant alleged that prosecutors charged male homosexual violators under the District of Columbia's law proscribing solicitation to commit sodomy, but not similarly situated female violators.[81] The court rejected the defendant's claim and held that the defendant did not establish a selective prosecution defense when evidence manifested no indication of police knowledge of female homosexual violators.[82] The court noted that the failure to prosecute similarly situated violators owing to a mere lack of knowledge does not constitute a denial of equal protection.[83]

Cases exist, however, in which homosexual defendants rely on the classification of sexual preference to assert a selective prosecution defense. In *Stewart v. United States*,[84] a defendant charged with attempted sodomy challenged the decision to prosecute on the grounds that district attorneys enforced the sodomy law against homosexual violators but not against heterosexual violators.[85] The court rejected the defendant's selective prosecution defense because of law enforcement's lack of knowledge concerning heterosexual acts of sodomy.[86] The *Stewart* court noted that a facially neutral law having a disparate impact on homosexuals does not necessarily violate equal protection

78. 70 Wash. 2d 649, 424 P.2d 906, *cert. denied*, 389 U.S. 832 (1967), *aff'd sub nom.* Rhinehart v. Rhay, 440 F.2d 718 (9th Cir.), *cert. denied*, 404 U.S. 825 (1971) (denying habeas corpus petition).

79. *Id.*

80. 321 A.2d 342 (D.C. 1974).

81. *Id.*

82. *Id.*

83. *Id.* at 344.

84. 364 A.2d 1205 (D.C. 1976).

85. *Id.*

86. *Id.*

guarantees.[87]

In each of these cases, the courts noted that the mere failure to prosecute similarly situated violators did not by itself constitute a denial of equal protection. The courts rejected the defendants' selective prosecution challenge because the defendants did not sufficiently show intentional or purposeful discrimination. In *Stewart* and *Cozart*, specifically, the prosecutors' lack of knowledge of similarly situated violators was critical.

CONCLUSION

As previously noted, proof of discriminatory intent is the major barrier defendants face when asserting a selective prosecution defense. Because of the difficulty in establishing a prima facia case of discriminatory prosecution, the unprotected status of homosexual persons under equal protection law, and the relative prevalence of AIDS in the homosexual male community, it is extremely unlikely that a homosexual person charged with violating an AIDS transmission law would prevail on a selective prosecution defense. Thus, laws criminalizing AIDS transmission create potential for discriminatory anti-homosexual conduct by law enforcement officers.

Theoretically, government enforcement can vary greatly in terms of the extent to which it initiates and pursues an investigation of potential violations. For example, the government may actively gather information about AIDS cases from public health officials, then initiate investigation on the basis of this information.[88] Government could also actively initiate and utilize investigative techniques aimed at homosexual violators as it has with respect to sodomy laws.[89] The government could also seek prosecution only on the basis of victim-initiated complaints. Clearly, the third scenario is the most passive means of enforcement and involves the least amount of discretion with respect to discovering complaints upon which to base a prosecution.

To counter the potential danger of anti-homosexual conduct by law enforcement, legislators should consider adding provisions to the new

87. *Id.* at 1208 (*citing* Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947) and Tigner v. Texas, 310 U.S. 141, 147 (1940)).

88. The possibility of this type of enforcement policy would greatly depend on the jurisdiction's confidentiality laws.

89. An example of techniques aimed at homosexual violators is the recent numerous raids on public rest rooms in Forest Park in St. Louis, Missouri where over 200 arrests of homosexual men were made. St. Louis Post-Dispatch, Nov. 29, 1988, at 1, col. 3.

criminal statutes limiting prosecutorial discretion. For example, policy makers could include a provision limiting enforcement to cases in which a victim brings the alleged violation to the attention of law enforcement personnel. Legislatures could also require the state attorney general to issue regulations governing enforcement of the AIDS transmission laws which promote nondiscriminatory decision-making. While policy makers will continue to debate the merits of laws criminalizing AIDS transmission, provisions limiting prosecutorial discretion alleviate some of the concern about the potential for discrimination against homosexual people.

*Anne R. Spiegelman**

* J.D. 1989, Washington University.