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Equal Protection and the Prosecution and Conviction of Crime

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Equal Protection and the Prosecution and Conviction of Crime

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Imagine a county somewhere in the United States with a large and diverse population. Assume the following facts about it:

(1) There is a particular crime—say, cockfighting—that is committed disproportionately more by one ethnic group than by others. Assume for the purposes of this hypothetical that the group is Guatemalan.

(2) Not only do members of that ethnic group disproportionately commit the crime, but the prosecution and conviction rates mirror the commission rate. That is, if Guatemalans commit 50 percent of the cockfighting crimes in the county (although they are but 10 percent of the population), they also make up approximately 50 percent of those prosecuted for the crime and approximately 50 percent of those convicted of it.

(3) Every prosecutor but one prosecutes cockfighting without regard to the ethnicity of the defendant. One prosecutor, "P," is prejudiced against Guatemalans, however, and in one case failed to prosecute a non-Guatemalan in circumstances where, counterfactually, had the defendant been Guatemalan, he would have prosecuted him. Assume counterfactuals like this can be true, and that this one is. On the other hand, P has never prosecuted a Guatemalan defendant for cockfighting whom he did not believe was guilty.

(4) Every jury but one has convicted or acquitted defendants of cockfighting charges without regard to ethnicity. One jury, however, acquitted a non-Guatemalan defendant

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on facts on which, counterfactually, it would have convicted a Guatemalan defendant.

(5) A criminal statute that contained the ethnic classifications "Guatemalan" and "non-Guatemalan," and that in some cases made guilt turn on the ethnicity of the defendant, would violate the Equal Protection Clause of the Fourteenth Amendment.

Given these five assumptions, what can we say about the guarantee of equal protection in our imaginary county as it pertains to Guatemalans? My thesis is that standard equal protection analysis, which focuses on government's reasons for comparatively burdening or benefiting some vis-à-vis others, (1) has a more limited scope of application within the area of selective criminal prosecutions and discriminatory convictions than one might imagine and (2) has problematic remedial implications in the cases in which it does apply.

To demonstrate these points, I shall analyze the foregoing examples of discriminatory nonprosecution and acquittal. First, of what significance is it that Guatemalans are prosecuted and convicted of cockfighting at a higher rate than others? Well, to begin with, if disproportionately more Guatemalans commit the crime it is of no constitutional import that more are prosecuted and convicted. To say otherwise would be to de-link moral and legal responsibility from individuals and to assume that what matters morally and legally is how reified "groups" are faring. This assumption would entail that if Guatemalans count as a "group," and if they are 10 percent of the population, they should make up no more (and no less) than 10 percent of the prison population, the CEO population, the attorney population, and so forth. This model of proportional representation is a nightmarish vision and surely not our constitutional one. I trust I do not need to belabor this point.[1]

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[1] The Supreme Court has rightly rejected the notion that a law that is racially neutral on its face and in terms of the legislative intent behind it can violate equal protection merely by virtue of having a racially disparate impact. See, for example, *Personnel Administrator of Massachusetts v Feeney*, 442 US 256, 274 (1979) (applying intent requirement to allegation of gender discrimination); *Washington v Davis*, 426 US 229, 239 (1976) (finding facially neutral hiring practices lacking discriminatory intent constitutional despite disparate impact). The same principle applies to crimes that are disproportionately committed by one racial, ethnic, religious, etc. "group." See Lawrence A. Alexander, *Equal Protection and the Irrelevance of "Groups"*, Issues in Legal Scholarship, The Origins and Fate of Antisubordination Theory (2002): Article 1, available online at

Second, and more interestingly, of what significance is it that Guatemalans are disproportionately (by one person) prosecuted and convicted of cockfighting relative to their commission of it? We have assumed that Guatemalans commit 50 percent of the crime of cockfighting, but they have been prosecuted and convicted of it at a rate of 50 percent "plus one." Is the "plus one" significant because it creates a disproportion between commission and prosecution/conviction?

The answer, I believe, is that the "plus one" is constitutionally significant, but not because it creates disproportion in the ratio of prosecutions and convictions to commissions. To see this, keep in mind that prosecutions and convictions occur over time and across space. By "over time" I mean that the statistics on Guatemalans' commission of, prosecution for, and conviction of cockfighting are compiled over a temporal period. The crimes, the prosecutions, and the convictions are diachronic, not synchronic. And the relevance of "over time" can be seen if we imagine that for twenty years the county has a prosecutor who prosecutes only Guatemalans for cockfighting because he is virulently prejudiced against Guatemalans. Then an unprejudiced prosecutor, perhaps even one of Guatemalan ethnicity, replaces him and prosecutes cockfighting evenhandedly. If at any time during the term of the new prosecutor we assemble commission, prosecution, and conviction data on Guatemalans that spans the terms of both prosecutors, the prosecution and conviction rates will be disproportionate to the commission rate for that combined period. Yet that disproportionate rate will be immaterial to the constitutionality of the present prosecutor's conduct, for no Guatemalan defendant has been denied equal protection *by her*. To deny this would be another example of de-linking moral and legal responsibility from individuals and assigning it to reified groups. Moreover, even if the old, prejudiced prosecutor is not replaced by a new one but persists in the job, his current prosecutions should not be tainted

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<http://www.bepress.com/ils/iss2/art1> (visited Nov 25, 2002) [on file with U Chi Legal F]. Disparate impact can be evidence of discriminatory racial, ethnic, etc. intent—as, for example, it was in *Yick Wo v Hopkins*, 118 US 356, 374 (1886)—but it is not in itself violative of equal protection. To reject this principle (that "group impact" is morally and constitutionally immaterial) is to reject the underpinnings of liberal morality, be that morality Kantian, utilitarian, or contractarian, namely, that the ultimate locus of moral concern and moral responsibility is the individual person. For only individual persons, and not the indefinite number of ascriptive groups to which they can be assigned, can choose, plan, and suffer. See, for example, Alexander, Issues in Legal Scholarship; Kevin Graham, *Autonomy, Individualism, and Social Justice*, 36 J Value Inquiry 43, 46–47 (2002).

by his past ones.[2] If he has had a change of heart, if he is *now* prosecuting evenhandedly, it is constitutionally as if he were a new prosecutor.

By "across space" I mean that even if two cockfighting prosecutions are proceeding (relatively) synchronically, if one reflects prejudice and the other does not, the former cannot infect the latter and undermine its constitutionality. Thus, if two prosecutors are simultaneously prosecuting Guatemalans for cockfighting, the first on evidence on which he *would not* prosecute non-Guatemalans; the second on evidence on which he *would* prosecute non-Guatemalans, the presumed unconstitutionality of the first prosecution will not affect the constitutionality of the second. This is true even if both prosecutors are in the same D.A.'s office, so long as there is no overarching policy of the D.A. to be tougher on Guatemalans that might taint the second prosecutor's conduct. If decentralization of prosecution decisions is itself constitutional, then one unconstitutional decentralized decision does not contaminate every other decentralized decision.[3] The fact that equal protection violations by some agents of the state do not extend synchronically or diachronically to other agents supports the Supreme Court's decision in *McCleskey v Kemp*[4] not to reverse a death penalty conviction on the basis that statistical evidence demonstrated the likelihood that some death penalty convictions at other times and involving other agents of the state of Georgia were based in part on the race of the victim. To deny this would again be to reify Guatemalans as a group and would make prosecutions and convictions of any group member by any prosecutor and any jury hostage to the misconduct of one prosecutor or jury.

It appears, then, that the most obvious candidate for an equal protection violation is the discrete event of a particular prosecutor's prosecuting or jury's convicting a particular defendant in circumstances in which, counterfactually, he would not

[2] Which is not to say that his past practices are not *evidence* of his present ones, only that they are not conclusive evidence, and that they are not themselves material to the legality of his present practice.

[3] The Supreme Court has recognized this point in its decisions deeming municipalities to be subject to federal damages claims arising from the unconstitutional acts of their agents only in cases where the agents were acting in pursuance of an unconstitutional municipal *policy*. See, for example, *Monell v Department of Social Services*, 436 US 658, 694 (1978) (finding municipality not immune where it had policy of forcing pregnant employees to take leaves of absence). Nor has the Court ever suggested that unconstitutional arrests by a rogue cop in contravention of department policy contaminate otherwise proper arrests by other cops in the same department.

[4] 481 US 279 (1987).

have prosecuted or it convicted members of a different ethnic group. And while this, I believe, is doctrinally correct, this conclusion raises its own conceptual difficulties. For remember that in the cases we are assuming that P *failed* to prosecute, and the jury *failed* to convict, *non*-Guatemalan defendants in circumstances in which they would have prosecuted and convicted Guatemalans. If, then, P and the jury denied equal protection, to whom did they deny it, and what is the appropriate remedy for the denial?

One possibility, at least with respect to P (though not the jury, which is a one-case only body), is to say that Guatemalans previously prosecuted by P (at least during his prejudiced period) have been denied equal protection and should be released from jail and compensated. The problem is that all of these defendants *were* guilty of cockfighting and properly convicted. Should they all be released merely because the prosecutor who prosecuted them did prosecute another person for an unconstitutional reason? Suppose, for example, that a prosecutor has prosecuted thirty murderers who were duly convicted and are serving time. He now fails to prosecute someone for murder merely because the murderer is his brother-in-law. And suppose that a statute that proscribed murder unless committed by the prosecutor's brother-in-law would violate equal protection.[5] Would we then conclude that, despite their guilt, the thirty murderers previously prosecuted should be released and compensated because they would not have been prosecuted had they been related to the prosecutor? That result seems extreme, and I cannot envision a court's ordering it.[6]

One alternative to releasing the properly convicted Guatemalans would be to give P a choice: either prosecute the non-Guatemalan or suffer the release of those previously convicted.[7]

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[5] A classification can violate equal protection even if the "class" comparatively benefited or burdened is a class of one. *Village of Willowbrook v Olech*, 528 US 562, 564–565 (2000) (per curiam).

[6] Richard McAdams endorses dismissing charges against guilty defendants who would not have been prosecuted had they possessed a characteristic—such as being the prosecutor's brother-in-law, or being non-Guatemalan—that is not a constitutionally permissible criterion on which to base a decision to prosecute. Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 Chi Kent L Rev 605, 653–66 (1998). He does so, however, on the assumption that a decision not to prosecute would be legitimate because the crime is a minor one for which nonprosecution is proper. *Id* at 662–64. His endorsement of dismissals does not extend to crimes for which nonprosecution would be improper. *Id* at 660–61.

[7] The possibility should be noted that of the thirty Guatemalans previously convicted, only some would not have been prosecuted had they *not* been Guatemalans. There may be some against whom the evidence is so compelling that P would have prosecuted

The same would hold for not prosecuting the brother-in-law: either prosecute or have all murderers you did prosecute be released. The problem with this remedy is that it is quite difficult to enforce. A prosecution is not a simple algorithm that a court can easily monitor to see whether the prosecutor is pulling punches for improper reasons.[8] Further, when we turn from P to the prejudiced jury that improperly acquits, we run into insuperable problems. First, the acquittal is a one-off affair. There are no Guatemalans currently in jail who were convicted by *this* jury. Second, as a doctrinal matter, an acquittal cannot be overturned no matter how constitutionally improper.[9] Nor can the non-Guatemalan be retried.

Most selective prosecution arguments, the name given to equal protection objections to enforcement of the criminal law, arise in the context of defenses to ongoing prosecutions.[10] The defendant claims that he would not be subjected to the present prosecution but for his race, his views, or other constitutionally impermissible factors, and he asks the trial court to dismiss the case on that ground (or asks another court to enjoin or reverse the trial court).[11] As the Supreme Court stated in *United States v Armstrong*:

> The requirements for a selective-prosecution claim draw on "ordinary equal protection standards. . . ." The claimant must demonstrate that the . . . prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose."[12]

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them regardless of their ethnicity. In such a case, only some of the thirty should be considered for release if P fails to prosecute the non-Guatemalan.

[8] See McAdams, 73 Chi Kent L Rev at 653 n 144 (cited in note 6).

[9] See, for example, *United States v Martin Linen Supply Co*, 430 US 564, 575 (1977) (finding that acquittal after discharge of deadlocked jury not subject to further review); *Fong Foo v United States*, 369 US 141, 143 (1962) (per curiam) (refusing to overturn an acquittal improperly granted by the district court).

[10] In other words, defendants raise selective prosecution arguments in order to enjoin prosecution, defend against conviction, or reverse a conviction on appeal. See cases cited in McAdams, 73 Chi Kent L Rev at 662–64 nn 167–77 (cited in note 6).

[11] See, for example, *United States v Wayte*, 470 US 598 (1985). See also *Oyler v Boles*, 368 US 448, 456 (1962) (holding that equal protection violation based on selective prosecution requires that there be a selection based on discriminatory classification). Accord *United States v Armstrong*, 517 US 456, 464 (1996).

[12] *Armstrong*, 517 US at 465 (citations omitted).

And occasionally courts do dismiss or enjoin prosecutions because of constitutionally impermissible selectivity.[13] Negative injunctions—those prohibiting prosecution—do not after all pose the same problems as those affirmatively compelling prosecution.

If, however, a prosecution that would not have occurred but for some constitutionally impermissible reason can be enjoined or dismissed, it would seem to follow that those who uncover evidence of that impermissible reason after their convictions should be able to obtain release from jail and compensation.[14] Thus, the thirty murderers who would not have been prosecuted but for the fact that they were not closely related to the prosecutor should theoretically be able both to enjoin their prosecutions while they occur and to gain release from prison after conviction if the prosecutions proceed. But as previously stated, this result seems far too extreme to expect courts to dictate it. It is notable that almost every successful selective prosecution defense has occurred in cases in which the offense in question was relatively minor, and the prospect of the defendant's going unpunished not particularly unsettling.[15]

Viewing the prosecuted defendant as the party who has been denied equal protection, therefore, creates serious remedial problems. It is a hallmark of true equal protection violations that they can be remedied either by making the relatively worse off class better off or by making the relatively better off class worse off.[16]

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[13] See, for example, *Wayte*, 549 F Supp 1376, 1380–83 (C D Ca 1982), revd 710 F2d 1385 (9th Cir 1983), affd 470 US 598 (1985). See also cases cited in McAdams, 73 Chi Kent L Rev at 662–64 nn 167–77 (cited in note 6).

[14] In *Yick Wo*, for example, the fact that all two hundred or so Chinese applicants for laundry licenses had been denied them by the authorities was strong evidence that Yick Wo's application had been denied because he was Chinese, an unconstitutional reason. 118 US at 374. (It was not conclusive evidence, however, for had new authorities taken office just before Yick Wo applied—perhaps on a program of nondiscrimination—the link between the past denials and Yick Wo's would have been greatly attenuated. Because no such explanation was offered, the Court inferred a persisting anti-Chinese policy behind all the denials, including Yick Wo's.) If there was in fact an unconstitutional policy that had been applied both to Yick Wo and to his two hundred Chinese predecessors, then the latter were also unconstitutionally denied licenses and should have been eligible to seek some sort of relief.

[15] See, for example, *Wayte*, where the district court did find in the defendant's favor. 549 F Supp at 1380–84. Wayte was charged with willfully failing to register for the draft, a serious crime to be sure, but not one involving major violations of others' rights of bodily integrity or property. See generally McAdams, 73 Chi Kent L Rev at 662–64 (cited in note 6).

[16] See, for example, *Orr v Orr*, 440 US 268, 272 (1979) ("In every equal protection attack upon a statute challenged as underinclusive, the State may satisfy the Constitution's demands either by extending benefits to the previously disfavored class or by denying benefits to both parties.").

In other words, the government can fix the constitutionally forbidden inequality by ratcheting one group up or ratcheting the comparison group down. In the criminal context, however, ratcheting the unequally treated defendant up—releasing him—will frequently be unpalatable. On the other hand, ratcheting the comparison group down—prosecuting and convicting them—will frequently be impossible, or at least beyond the judiciary's control.

Nor does it help matters if we view those whose constitutional interests have been infringed as consisting of those victimized by the nonprosecuted defendants rather than the Guatemalans (or murderers) serving time. Those victimized are not affected by the current unconstitutional nonprosecutions. *Their* victimization is in the past. Future victims of those non-Guatemalans (or non-brothers-in-law) not deterred because of their hope for improper nonprosecution are another matter; but even if we could identify such possible future victims, their remedy would seem to be an order to P and to juries not to violate equal protection in the future—an order that is redundant of the command of the Equal Protection Clause itself.

Equal protection—and the "equal protection" components of substantive due process rights, such as freedom of speech,[17] freedom of religion,[18] privacy,[19] and so forth—has a troublesome application to the criminal law. When properly conceptualized, its focus is on the *reasons* why police, prosecutors, and juries act in particular cases, not on group effects over time and space. But when properly focused on reasons rather than effects, it creates a remedial quandary. And none of the ways out of that quandary look both appealing and possible.[20]

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[17] See, for example, *Police Department of the City of Chicago v Mosley*, 408 US 92 (1972) (finding anti-picketing statute unconstitutional under Equal Protection Clause because of impermissible distinction between labor picketing and other peaceful picketing).

[18] See, for example, *Church of the Lukumi Babalu Aye, Inc v City of Hialeah*, 508 US 520, 540 (1993) (applying equal protection analysis to ordinance designed to suppress practices of Santeria religion).

[19] See, for example, *Maher v Roe*, 432 US 464 (1977) (finding state provision limiting Medicaid funding of abortions to those that are "medically necessary" not in violation of Equal Protection Clause).

[20] For a discussion of the theoretical puzzles raised by a reasons-focused jurisprudence, see Larry Alexander, *Rules, Rights, Options, and Time*, 6 Legal Theory 391 (2000).