

### The Crime of “Causing Traffic”: Can the Criminal Civil Rights Statutes Target Public Corruption?

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*An unlikely statutory candidate has recently emerged to aid the federal prosecution of state and local public corruption: the criminal civil rights statutes. In the wake of newly placed limitations on other sources of criminal liability in this area, the government’s reliance on these statutes may increase in the future. Given the contentious nature of the debate concerning the Justice Department’s role in prosecuting both public corruption and civil rights crimes, the potential employment of this old statutory tool in a new area deserves more considerable attention.*

*While a great deal of scholarship focuses on the qualified immunity doctrine surrounding 18 U.S.C. § 1983, very little study has been devoted to its criminal cousins, 28 U.S.C. §§ 242 and 241. This essay canvasses the rare but storied employment of the criminal civil rights statutes in a variety of contexts, and the doctrinal confusion surrounding them. It ultimately answers the question posed in its title in both the affirmative and the negative. While § 242 might present a viable candidate for targeting public corruption, § 241 presents substantial constitutional concerns if used in this context.*

#### INTRODUCTION

On March 27, 2017, Bridget Kelly and Bill Baroni, two former aides of New Jersey Governor Chris Christie, were each sentenced to terms in federal prison for their roles in the infamous “Bridgegate” scandal.<sup>1</sup> The government demonstrated at trial that Baroni and Kelly shut down two access lanes from Fort Lee, N.J. onto the George Washington Bridge to exact retribution on Mayor Mark Sokolich for refusing to endorse Governor Christie for re-election.<sup>2</sup> Most of the

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1. Nick Corasanti, *Two Christie Allies Are Sentenced in George Washington Bridge Scandal*, N.Y. TIMES (Mar. 19, 2017), <http://www.nytimes.com/2017/03/29/nyregion/christie-bridgegate-baroni-bridget-anne-kelly.html> [<http://perma.cc/662H-V8VD>].

2. *Id.*

coverage of the sordid Bridgegate scandal and ensuing trial focused on whether Governor Christie played any role in the series of events that resulted in 2,800 vehicle hours of delay on the Fort Lee lanes each day.<sup>3</sup>

From the perspective of both federal criminal and civil rights law, however, the Bridgegate prosecution is notable not for leaving Governor Christie out of the courtroom, but instead for the manner in which it forced his aides into it. The jury convicted Baroni and Kelly of violating a statute the casual observer might be surprised to see used in this context: the criminal civil rights statutes.<sup>4</sup>

The criminal civil rights statutes trace their origins back to the post-Reconstruction era. 18 U.S.C. § 242, rooted in the Civil Rights Act of 1866<sup>5</sup> makes it a federal crime to “under color of any law . . . willfully subject any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”<sup>6</sup> Section 241, rooted in the Ku Klux Klan Act of 1871 and entitled “Conspiracy Against Rights,” does not require that a person be acting “under color of law,” and instead targets “two or more persons [who] conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege.”<sup>7</sup>

The jury convicted Baroni and Kelly of violating § 242 under a theory that they acted under “color of law” to deprive the residents of Fort Lee of their constitutional “right to localized travel on public roadways free from restrictions unrelated to legitimate government objectives.”<sup>8</sup> Similarly they were convicted of violating § 241 under a theory that they “conspired” to “oppress” the residents of Fort Lee of their “right to localized travel.”<sup>9</sup> This was a novel way to frame an indictment. As defense counsel noted with great derision in a pre-trial motion, “[t]here has never been a criminal *civil rights* prosecution where a defendant is alleged to have caused traffic.”<sup>10</sup>

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3. Kate Zernike, *The Bridgegate Scandal, Explained*, N.Y. TIMES (May 1, 2015), <http://www.nytimes.com/2016/11/04/nyregion/george-washington-bridge-scandal-what-you-need-to-know.html> [http://perma.cc/YA2Z-ES6A].

4. 18 U.S.C. §§ 241, 242 (2012).

5. Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2138 (1993).

6. See 18 U.S.C. § 242. This provision also created a private civil cause of action.

7. 18 U.S.C. § 241.

8. Indictment at 36, *United States v. Baroni*, No. 15-193 (D.N.J. Apr. 23, 2015), 2015 WL 2127949 [hereinafter Indictment].

9. *Id.*

10. Memorandum of Law in Support of Ms. Kelly’s Motion to Dismiss the Indictment in its Entirety at 3, *United States v. Baroni*, No. 15-193 (D.N.J. Feb. 1, 2016), 2016 WL 614325 (emphasis added). Of course many citizens of New Jersey would probably welcome a constitutionally protected freedom from both traffic and corruption.

To be sure, Baroni and Kelly were also convicted of violating several statutes often employed to combat public corruption, ranging from wire fraud to federal program bribery.<sup>11</sup> Yet the Supreme Court's narrowing of these avenues of criminal liability has raised questions about their continued viability in the public corruption area.<sup>12</sup> Given the increasingly dramatic tenor over the debate concerning the federal prosecution of local corruption,<sup>13</sup> the emergence of a new statutory tool in this much-debated area deserves more attention.

The doctrine surrounding the criminal civil rights statutes has generated a great deal of confusion among courts and scholars alike.<sup>14</sup> The literature on these statutes is itself limited, and the potential use of the statutes in the public corruption context has gone largely unstudied.<sup>15</sup> The lack of scholarly commen-

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11. See *United States v. Kelly*, No. 15-193, 2017 WL 1233891, at \*1 (D.N.J. Mar. 30, 2017). Baroni and Kelly were charged and convicted under the federal program bribery statute pursuant to the theory that they "misapplied" the federal funds devoted to the Port Authority in using Port Authority personnel and resources to "facilitate and conceal the causing of traffic problems in Fort Lee as punishment of Mayor Sokolich." They were also charged and convicted of violating the wire fraud statute under the theory that they "obtain[ed] money and property from the Port Authority and deprive[d] the Port Authority of its right to control its own assets by falsely representing and causing false representations to be made that the lane and toll booth reductions were for the purpose of a traffic study." See Indictment, *supra* note 8, at 5, 28-29.
  12. *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (overturning the conviction of Governor of Virginia Robert McDonnell of violating the federal bribery statute and narrowing the interpretation of the term "official act" in the statute). The *McDonnell* decision has been cited in several recent decisions overturning convictions on public corruption-related charges. See, e.g., *United States v. Skelos*, 707 F. App'x 733, 737 (2d Cir. 2017) (holding that the jury instruction "invites conviction on acts outside Dean Skelos's official duties as defined by *McDonnell*"); *United States v. Silver*, 864 F.3d 102, 118 (2d Cir. 2017) ("[T]he Government's own summation confirms that the jury instructions conveyed an erroneous understanding of the law as clarified by *McDonnell*."); see also *United States v. Skilling*, 561 U.S. 358 (2010) (limiting viability of the mail and wire fraud statutes in this context); Mark J. Stein & Joshua A. Levine, *Skilling: Is it Really a Game-Changer for Mail and Wire Fraud Cases?*, 1831 CORP. L. & PRAC. COURSE HANDBOOK 933, 938-39 (2010) (surveying 600 published decisions under the honest services statute and concluding that "the overwhelming majority of [public corruption] cases involved allegations of a bribe or kickback").
  13. Justice Thomas, for example, has consistently decried the "stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials." *United States v. Evans*, 504 U.S. 255, 290 (1992) (Thomas, J., dissenting).
  14. See *infra* Part II.
  15. Literature on the statutes' employment in the criminal context has either tracked its use from a historical perspective, see sources cited *infra* Part II, or focused on its employment in the police brutality context, see, for example, Jack M. Beer-mann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*,

tary concerning the criminal civil rights statutes remains all the more surprising given the voluminous scholarship concerning their civil counterpart, 18 U.S.C. § 1983.<sup>16</sup>

Furthermore, the criminal civil rights statutes have always retained enormous political valence. As Judge Paul Watford has noted, “the survival of Section 242 meant that the federal government would have a role in combating the widespread problem of police brutality toward African Americans and other minorities, particularly in the South.”<sup>17</sup> And, former Attorney General Eric Holder’s “parting shot” upon leaving office was a call for the imposition of “new standards” for prosecuting criminal civil rights offenses.<sup>18</sup> These calls have been echoed with greater force in recent years, with the controversy over the potential federal prosecution of Officer Dan Pantaleo for the killing of Eric Garner providing but one particularly prominent example.<sup>19</sup>

Just as the criminal civil rights statutes have attracted controversy, so too has federal prosecution of state and local corruption remained a contested enterprise. The tension inherent in attempting to provide external oversight of local governments while safeguarding the states’ traditional police power is reflected in federal legislation. Only one federal statute refers explicitly to the corruption of state and local officials, that which criminalizes the bribery of such officials in connection with the receipt of federal funds.<sup>20</sup> Yet federal offi-

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42 STAN. L. REV. 51 (1989); Arthur B. Caldwell & Sydney Brodie, *Enforcement of the Criminal Civil Rights Statute, 18 U.S.C. Section 242, in Prison Brutality Cases*, 52 GEO. L.J. 706 (1964); and David Dante Troutt, *Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18 (1999).

16. See, e.g., Will Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 101 (2016); John C. Jeffries, *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851 (2010); Joanna Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).
17. Paul J. Watford, *Screws v. United States and the Birth of Federal Civil Rights Enforcement*, 98 MARQ. L. REV. 465, 483 (2014).
18. Mike Allan, *Holder’s Parting Shot: It’s Too Hard to Bring Civil Rights Cases*, POLITICO (Feb. 27, 2015), <http://www.politico.com/story/2015/02/eric-holder-civil-rights-interview-mike-allen-115575> [<http://perma.cc/ZB7V-8HLG>].
19. Matt Apuzzo, Adam Goldman & William K. Rashbaum, *Justice Department Shapes up Inquiry into the Eric Garner Choke Hold*, N.Y. TIMES (Oct. 24, 2016), <http://www.nytimes.com/2016/10/25/nyregion/justice-dept-replaces-investigators-on-eric-garner-case.html> [<http://perma.cc/M9C3-RSU7>].
20. 18 U.S.C. § 666 (2012); see Sarah Sun Beale, *Comparing the Scope of the Federal Government’s Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L. J. 699, 705 (2000).

cials are regularly called upon to investigate and prosecute local misconduct, leading to creative uses of available statutes.<sup>21</sup>

This Comment argues that the evolving use of the criminal civil rights statutes to supplement public corruption prosecutions at the local level threatens a tenuous equilibrium struck between the Department of Justice, federal courts, and state and local prosecutors. Part I analyzes the history of the criminal civil rights statutes, noting that they have always been surrounded by doctrinal confusion. Part II assesses the statutes' evolving uses, highlighting the ways in which they have been and can be used to punish public corruption especially at the state and local level. Finally, Part III offers suggestions for ways in which prosecutors can use the statutes in a manner that respects contested boundaries between local and federal law enforcement. It ultimately argues that while § 242 can be employed successfully in discrete circumstances in the public corruption context, § 241 presents grave constitutional concerns if used in this domain.

## I. THE CRIMINAL CIVIL RIGHTS STATUTES

The criminal civil rights statutes' origins date back to the Reconstruction era. Following the Civil War, Congress passed the Civil Rights Act of 1866, a response to the widespread violence and atrocities committed against recently freed populations.<sup>22</sup> In the early 1870s, Congress passed a series of statutes that created civil and criminal penalties designed to secure the rights established by the Fourteenth and Fifteenth Amendments.<sup>23</sup> Taken collectively, these statutes represented, to borrow from Milton Konvitz, "the first attempt in the history of mankind to destroy the branches of slavery after its root had been destroyed."<sup>24</sup>

The origins of §§ 242 and 241 can be found in these early efforts to ensure racial equality.<sup>25</sup> Responding to a major threat to federal power, the criminal civil rights statutes create a potentially breathtakingly broad source of federal criminal liability. Given that the specific contours of constitutional and statutory rights are subject to continuous revision by the federal courts and legislature, the statutes essentially subject defendants to a federal criminal common law.<sup>26</sup>

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21. See Beale, *supra* note 20, at 699-700 (documenting the rise of federal prosecution of local public corruption in the post-Watergate era and noting that, "Federal jurisdiction over political corruption at the state and local level is gradually expanding to fulfill the same functions as the statutes punishing corruption within the federal system"); see also sources and cases cited *supra* note 12, which provide prominent examples of federal prosecution of state and local public corruption.
  22. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323 (1952).
  23. *Id.* at 1333-34.
  24. MILTON R. KONVITZ, *THE CONSTITUTION AND CIVIL RIGHTS* 8 (1947).
  25. Lawrence, *supra* note 5, at 2138.
  26. *Id.*; see also DANIEL C. RICHMAN, KATE STITH & WILLIAM J. STUNTZ, *DEFINING FEDERAL CRIMES* 409 (2014).

Until the latter half of the twentieth century, however, federal enforcement of criminal law was “practically moribund,”<sup>27</sup> and thus the statutes were “more aspirational than substantive.”<sup>28</sup> Today, however, their uses have transformed a great deal.

The waxing and waning of the utilization of the criminal civil rights statutes tracks the federal government’s evolving commitment to protecting civil rights more broadly. Courts initially took a very restrictive view of the constitutional rights protected by the statutes,<sup>29</sup> and the executive branch exhibited reluctance to use them as a mechanism in enforcing civil rights.<sup>30</sup> Before the creation of the Civil Rights Division in the U.S. Department of Justice in 1939, the federal government only twice pursued criminal convictions under § 242.<sup>31</sup>

Despite these inauspicious beginnings, during the mid-twentieth century, the Justice Department began placing a renewed emphasis on civil rights enforcement.<sup>32</sup> This period witnessed the enactment of the Civil Rights Act of 1964 and the creation of the Department’s Civil Rights Division.<sup>33</sup> Soon, proponents of federal criminal enforcement of civil rights secured their first major victory in the Supreme Court.<sup>34</sup> Even amidst this first doctrinal victory, however, dissenting Justice William O. Douglas offered substantial vagueness and breadth concerns.<sup>35</sup>

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27. Lawrence, *supra* note 5, at 2162.

28. *Id.*

29. Slaughter-House Cases, 83 U.S. 36 (1872) (holding that the federal government does not have plenary power to enforce unenumerated fundamental rights); *United States v. Cruikshank*, 92 U.S. 542 (1876) (overturning the defendants’ convictions for involvement in an attack on African Americans attempting to vote and holding that the Fourteenth Amendment authorized federal enforcement action only where a state had violated an existing right).

30. ROBERT J. KACZOROWSKY, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876* at xxiv (1985); Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 608 (1993).

31. Brian R. Johnson & Phillip B. Bridgmon, *Depriving Civil Rights*, 34 CRIM. JUS. REV. 196, 198 (2000).

32. See, e.g., RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); BRIAN K. LANDSBERG, *ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE* (1997).

33. LANDSBERG, *supra* note 32.

34. *United States v. Classic*, 313 U.S. 299 (1941) (holding that the right of a qualified voter in a state congressional primary election to have his vote cast is a right “secured by the Constitution,” and that “willful action” in falsely counting ballots in such an election deprives voters of that right in violation of the precursor to § 242).

35. *Id.* at 330-41 (Douglas, J., dissenting).

As enforcement of the criminal civil rights statutes has evolved, the Supreme Court's attempts to more clearly define their limitations have generated substantial confusion. First, the Court has never outlined a clear standard for proving the requisite mens rea for the offense. In the landmark case on the subject, *United States v. Screws*, the Court held that a violation of § 242 requires proof of "willfulness," meaning "bad purpose";<sup>36</sup> though not merely a "generally bad purpose," elaborated the Court, but rather a purpose "to deprive [someone] of a constitutional right."<sup>37</sup> At the same time, the defendant need not be thinking precisely in "constitutional terms."<sup>38</sup>

Some have argued that *Screws* too severely narrowed the application of the statute in trying to assuage vagueness concerns, while others that it failed to allay these concerns at all.<sup>39</sup> Many civil rights advocates hoped that the federal government would use *Screws* to more forcefully prosecute civil rights crimes, while others, including the dissenting justices in the *Screws* decision, worried that federal enforcement would lead to the deflection of state responsibility in this area.<sup>40</sup>

Regardless of whether one believes *Screws* went too far or not far enough, no consensus has emerged on how to apply its holding in practice. As one appellate judge noted dryly in attempting to discern a culpability standard from the holding, "*Screws* is not a model of clarity."<sup>41</sup>

In defining the "rights protected" by the statutes, the Supreme Court has tried to clarify their contours by tethering them to the qualified immunity doctrine.<sup>42</sup> In the foundational case providing a new standard for the "rights protected" under § 242 (and soon extended to § 241), the Court concluded that, "[s]o conceived, the object of the 'clearly established' immunity standard is not different from that of 'fair warning' as it relates to law 'made specific' for the purpose of validly applying § 242."<sup>43</sup> Courts of Appeals have taken the Court at

36. *Screws v. United States*, 325 U.S. 91, 101 (1945).

37. *Id.* at 107.

38. *Id.* at 106.

39. Compare Harry M. Shapiro, *Limitations in Prosecuting Civil Rights Violations*, 46 CORNELL L. REV. 532, 534 (1961) ("[T]he emphasis which [*Screws*] placed upon the requirement of willful intent, necessitated by the challenge of vagueness brought against the statute, has drained the section of its strength."), with Edward F. Malone, *Legacy of the Reconstruction: The Vagueness of the Criminal Civil Rights Statutes*, 38 UCLA L. REV. 163, 170 (1990) ("This Comment concludes that the *Screws* framework has never effectively solved the vagueness problem.").

40. *Screws*, 325 U.S. at 139 (Roberts, J., dissenting).

41. *United States v. Johnstone*, 107 F.3d 200, 208 (3d Cir. 1997).

42. See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) ("Officers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242.").

43. *United States v. Lanier*, 520 U.S. 259, 267 (1997).

its word and continued to assume that the “rights protected” by §§ 242, 241 and 1983 are synonymous.<sup>44</sup>

This connection to qualified immunity has not generated an entirely consistent case law on the subject across jurisdictions. In the context of analyzing both of these statutes, the Courts of Appeals diverge on what constitutes “made specific” just as they do on what constitutes “clearly established.” Some circuits look to Supreme Court doctrine, some to the relevant circuit precedent, and still others to the relevant state court doctrine.<sup>45</sup> As Erwin Chemerinsky and Karen M. Blum have noted, “The Supreme Court has been very inconsistent, and certainly the lower courts are very inconsistent” with respect to the analysis of whether a right was clearly established.<sup>46</sup>

Perhaps reflecting the doctrinal difficulties surrounding the statutes, prosecutions under either criminal civil rights statute remain subject to strict centralized control by The Department of Justice.<sup>47</sup> The Department of Justice, for its part, only rarely authorizes prosecutions under the statutes. In 2016, for exam-

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44. See, e.g., *L.R. v. Sch. Dist. of Philadelphia*, 836 F.3d 235, 248 (3d Cir. 2016) (demonstrating the connection between qualified immunity and § 242).

45. See, e.g., *Hope*, 536 U.S. at 739-41 (stating that “officials can still be on notice that their conduct violates established law even in novel factual circumstances,” and further noting that “binding . . . Circuit precedent” is such notice). But compare *Townes v. City of New York*, 176 F.3d 138, 144 (2d Cir. 1999) (considering “whether a particular right was clearly established as of a particular time” by examining whether the right had been “defined with reasonable clarity” and whether the Supreme Court or Circuit Court “had affirmed the existence of the right”), with *United States v. Morris*, 494 F. App’x 574, 581 (6th Cir. 2012) (looking to Supreme Court case law and the doctrine of other circuits and noting that “even if specific case law did not exist,” Morris’s “conduct lies so obviously at the very core of what the Fourth Amendment prohibits”), *Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011) (stating that in determining “whether a new scenario is sufficiently analogous to previously established law to warn an official that his/her conduct is unconstitutional,” a court may look to “closely analogous case[s]” or to evidence “that the Defendant’s conduct was so patently violative of the constitutional right that reasonable officials would know without guidance from a court”), and *United States v. Praisner*, No. 09-264, 2010 WL 2574103, at \*4 (D. Conn. Apr. 27, 2010) (“Although the Court cannot look to rulings in other circuits to determine fair notice within the Second Circuit, it is instructive that other circuits have held that the use of pepper spray can constitute excessive force in certain circumstances.”).

46. Erwin Chemerinsky & Karen M. Blum, *Fourth Amendment Stops, Arrests and Searches in the Context of Qualified Immunity*, 25 *TOURO L. REV.* 781, 787-88 (2009).

47. *U.S. Attorneys’ Manual* § 8-3.100, U.S. DEP’T JUST. (Mar. 2018), <http://www.justice.gov/usam/usam-8-3000-enforcement-civil-rights-criminal-statutes#8-3.130> [<http://perma.cc/V4Q3-F5SH>].

ple, 137 civil rights prosecutions were brought against 224 defendants.<sup>48</sup> The next Part will demonstrate that while always subject to such oversight, the uses of the statutes have evolved a great deal, placing them on a potential collision course with doctrinal developments concerning federal oversight of state and local public corruption.

## II. EVOLVING USES AND POTENTIAL IN CONTESTED DOMAINS

Though the government does not often employ §§ 242 or 241, its use of the statutes has evolved over their histories. For over a century, prosecutors used § 242 almost entirely to prosecute racially motivated attacks and electoral intimidation perpetrated by public officials.<sup>49</sup> The vast majority of § 242 cases today involve the agents of local criminal justice bodies.<sup>50</sup> By the early 2000s, the highest number of § 242 cases involved police personnel followed by correctional personnel.<sup>51</sup> Following a statutory amendment to expressly include crimes of sexual violence, the statute has increasingly been used to prosecute acts of sexual assault committed by public officials.<sup>52</sup> Employment of § 241, however, has been even more rare than that of § 242, and almost all prosecutions under the statute have involved deprivation of rights on account of race.<sup>53</sup>

Throughout their existences, however, both of the modern criminal civil rights statutes have sometimes been applied in more unorthodox contexts. For example, the statutes have been used in ferreting out civil fraud schemes,<sup>54</sup> and in prosecuting a variety of extortion related crimes.<sup>55</sup>

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48. *U.S. Attorneys' Annual Statistical Report, Fiscal Year 2015*, U.S. DEP'T JUST., 11 tbl. 3A (2016), <http://www.justice.gov/usao/page/file/988896/download> [<http://perma.cc/Y74T-FJMB>].

49. *See, e.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1876); Lawrence, *supra* note 5, at 2172. For a recent example of § 242's application to the police brutality context, see *United States v. Pendergrass*, 648 F. App'x 29 (2d Cir. 2016) (affirming conviction of a probationary captain in the New York City Department of Correction for violating § 242 after failing to act when an inmate housed in the mental health unit ingested a ball of soap and eventually died).

50. *Johnson & Bridgmon*, *supra* note 31, at 201.

51. *Id.*

52. *United States v. Giordano*, 442 F.3d 30, 30 (2d Cir. 2006) (upholding conviction of Connecticut mayor under § 242 for engaging in sexual acts with a minor while in office); *United States v. Lanier*, 520 U.S. 259, 259 (1997) (upholding constitutionality of the statute in the context of the conviction of a state court judge under 18 U.S.C. § 242 for violating the constitutional rights of five women by sexually assaulting them).

53. *See* RICHMAN, STITH, & STUNTZ, *supra* note 26, at 445.

54. *United States v. Wiseman*, 445 F.2d 792 (2d Cir. 1971).

55. *United States v. Senak*, 477 F.2d 304, 306 (7th Cir. 1973); *see also* *United States v. Senak*, 527 F.2d 129 (7th Cir. 1975) (affirming conviction).

Though neglected in the literature, federal prosecutors also employed § 241 in the successful prosecution of President Nixon's Special Assistant John Ehrlichman for the covert operation to break into the office of Daniel Ellsberg's psychiatrist, Dr. Lewis Fielding.<sup>56</sup> This break-in was the first task for Nixon's "plumbers" in a series of failed burglaries that culminated in the Watergate scandal.<sup>57</sup> Specifically, Ehrlichman was convicted of violating Fielding's "right to be free from unreasonable search and seizure."<sup>58</sup> These more unusual applications of the criminal civil rights statutes declined, however, following the early 1970s, as prosecutors began applying other statutes to such crimes.<sup>59</sup>

But recent developments in federal criminal law have paved the way for their potential resurgence. Most notably, in the 2016 *McDonnell* decision, the Supreme Court narrowed the scope of the existing statutes used by prosecutors to target public corruption at the state level.<sup>60</sup> The ultimate import of *McDonnell* continues to be a source of debate as it percolates through the lower courts, but the decision has already been applied in reversing several prominent convictions on public corruption-related charges, including New York State Assemblymen Dean Skelos and Sheldon Silver.<sup>61</sup>

In recent years, prosecutors have tested the waters for filling this void by employing §§ 242 and 241 in the public corruption context. In Washington, for example, a former attorney for United States Immigrations and Customs Enforcement recently pled guilty to violating § 242 after committing fraud during an immigration proceeding.<sup>62</sup> In Georgia, the Eleventh Circuit recently affirmed the conviction of a state court judge for violating § 242, in part for planting methamphetamine in an employee's car and having her arrested.<sup>63</sup> In 2016, the

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56. Linda Charlton, *Ehrlichman Is Convicted of Plot and Perjury in Ellsberg Break In; Liddy and 2 Others Also Guilty*, N.Y. TIMES (July 13, 1974), <http://www.nytimes.com/1974/07/13/archives/ehrllichman-is-convicted-of-plot-and-perjury-in-ellsberg-breakin.html> [<http://perma.cc/RJG7-TVW2>]; Egil Krogh, *The Break-in that History Forgot*, N.Y. TIMES (June 30, 2007), <http://www.nytimes.com/2007/06/30/opinion/30krogh.html> [<http://perma.cc/2EDC-X2RC>].
57. For a notable history of this period, see BOB WOODWARD & CARL BERNSTEIN, *ALL THE PRESIDENT'S MEN* (1974).
58. *United States v. Ehrlichman*, 546 F.2d 910, 919-29 (D.C. Cir. 1976).
59. *See McCormick v. United States*, 500 U.S. 257, 277-80 (1991) (Scalia, J., concurring) (noting that "not until 1972 did any court apply the Hobbs Act to bribery").
60. *McDonnell v. United States*, 136 S. Ct. 2355, 2371-72 (2016).
61. *See supra* note 12 and accompanying text. The Boston Globe "Spotlight Team" of Oscar fame uncovered the hiring scheme. *See* Scott Allen, *Agency Where Patronage Is Job One*, BOS. GLOBE (May 23, 2010), <http://www.bostonglobe.com/metro/2010/05/23/agency-where-patronage-job-one/pTGEMsjOCbgePJdVaxC9NJ/story.html> [<http://perma.cc/DS88-CGGW>].
62. Defendant Jonathan Love's Sentencing Memorandum at 1, *United States v. Love*, No. 16-0005 (W.D. Wash. Apr. 13, 2016), 2016 WL 2607127.
63. *United States v. Cochran*, 682 F. App'x 828 (11th Cir. 2017).

Sixth Circuit upheld the conviction of the Mayor Ruth Robinson of Martin, Kentucky, along with her family members for violating § 241. The government successfully convicted Robinson of violating § 241 for engaging in vote buying during her reelection campaign.<sup>64</sup>

The statutes can potentially be employed to tackle all manner of illicit conduct at the state, local, or even national level. Some have argued, for example, that § 242 should be used against prosecutors themselves as a means of punishing prosecutorial misconduct.<sup>65</sup> Indeed, the Supreme Court has “emphasize[d] that the immunity of prosecutors from liability in suits under section 1983 does not leave the public powerless to deter misconduct or to punish that which occurs . . . Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242, the criminal analog of section 1983.”<sup>66</sup>

The potential use of the criminal civil rights statutes to monitor state and local officials, however, plunges them into a contentious debate regarding the nature and reach of federal oversight. Since the 1970s, criminal law in the United States has undergone a notable “federalization,” and the realm of state and local political corruption has been no exception.<sup>67</sup>

In many ways, local public corruption in particular seems to provide an ideal candidate for federal oversight. Federal prosecutors have argued that federal enforcement efforts are required to “fill a vacuum created by the inability or unwillingness of state and local law enforcement agencies to deal adequately with the task of ferreting out corruption.”<sup>68</sup> Under this line of reasoning, if corruption has permeated multiple local government institutions, it seems unrealistic to rely on local authorities to investigate and prosecute corruption that may have permeated into the very mechanisms meant to police it.

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64. *United States v. Robinson*, 813 F.3d 251 (6th Cir. 2016). Their efforts—which included bribery, coercion, and intimidation of voters—fell just short of their goal, as Robinson lost the general election by three votes. *Id.* at 254.
65. Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, N.Y.U. ANN. SURVEY AM. LAW 83-84 (2005) (arguing that prosecuting prosecutorial misconduct under § 242 might be most effective in the context of Brady violations).
66. *Imbler v. Pachtman*, 424 U.S. 409, 428-29 (1976).
67. See Charles Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171 (1977); see also RICHMAN, STITH & STUNTZ, *supra* note 26, at 2-8 (describing the growth of federal criminal jurisdiction); Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or “Crying Wolf?”*, 50 SYRACUSE L. REV. 1317 (2000) (cataloguing the federalization of criminal law); Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127 (1997) (examining the justifications for and drawbacks of the increasing federalization of criminal law).
68. RICHMAN, STITH & STUNTZ, *supra* note 26, at 2-8.

As the federal government has enhanced its role in the prosecution of local officials, however, a growing chorus of commentators and jurists have also voiced separation of powers and federalism concerns.<sup>69</sup> While the federal courts at first acquiesced to federal prosecution in this area, the Supreme Court itself has become increasingly alarmed by this federal intervention.<sup>70</sup> Justice Thomas, for example, has consistently decried the “stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials.”<sup>71</sup>

The Supreme Court’s concern about federal intrusion into the local police power appears to have reached a high point of late. The Court noted in the *McDonnell* decision, for example, that federalism “includes the prerogative to regulate the permissible scope of interactions between state officials and their constitutions.”<sup>72</sup> And it cautioned against the federal government’s “setting the standards [of] good government for local and state officials.”<sup>73</sup> The Court has also invoked the federalism canon in recent years in the service of narrowing the application of other relatively broad federal criminal statutes.<sup>74</sup>

### III. PATHS FORWARD

As outlined above, two prominent statutes surrounded by a great deal of doctrinal confusion seem poised to play a role in a variant of federal oversight that has attracted a great deal of controversy. This Part argues that the Supreme Court’s recent pronouncements on qualified immunity will limit the use of and assuage any constitutional concerns surrounding § 242, but the same cannot be

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69. Andrew T. Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPPERDINE L. REV. 321, 334-45 (1983) (“[T]he broad discretion of federal prosecutors to develop law enforcement policy in the local corruption context is inconsistent with fundamental notions of federalism and separation of powers.”).
70. See, e.g., *Evans v. United States*, 504 U.S. 255, 294 (1992) (Thomas, J., dissenting) (“[E]ven when Congress has clearly decided to [regulate] state government officials, concerns of federalism play a vital role in evaluating the *scope* of the regulation.”); *McCormick v. United States*, 500 U.S. 257, 277-80 (1991) (Scalia, J., concurring) (“Not until 1972 did any court apply the Hobbs Act to bribery . . . the Courts of Appeals accepted the expansion with little disagreement, and this Court has never had occasion to consider the matter.”).
71. *Evans*, 504 U.S. at 290 (Thomas, J., dissenting).
72. *McDonnell v. United States*, 136 S. Ct. 2355, 2374 (2016).
73. *Id.*
74. See, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2081-82 (2014) (holding that a federal statute imposing criminal sanctions for the use of a chemical weapon did not apply to a woman’s attempt to poison her husband’s mistress and reasoning that “[t]his Court can reasonably insist on a clear indication that Congress intended to reach purely local crimes before interpreting Section 229’s expansive language in a way that intrudes on the States’ police power”).

said of §241, which poses more serious constitutional issues if employed in this area.

With regards to § 242, the necessity of demonstrating that the accused acted “under color of law” already negates many of the potential constitutional concerns about the statute. First, Congress’s power to enact § 242 can be traced back to the Fourteenth Amendment because it satisfies the state action requirement.<sup>75</sup> And, because the statute targets those acting under color of law, it arguably only punishes those who are already held to a higher standard of conduct.

Section 241, in contrast, was originally passed to target racially motivated crimes committed by private actors, such as the Ku Klux Klan and similar organizations.<sup>76</sup> Given its lack of a state action element, its constitutional justification has been lodged in the Thirteenth Amendment, pursuant to Congress’s power to redress the “badges and incidents of slavery.”<sup>77</sup> This distinction remains significant. Courts have ignored the fact that § 241 cannot be classified as merely the conspiracy provision of § 242. Rather, it targets a distinct offense: *racially motivated* crimes perpetrated by *non-state* actors. Therefore, cases like *Baroni*, where prosecutors tack on a § 241 charge to punish illicit acts committed by public officials devoid of racial motivation, pose significant constitutional concerns.

The Supreme Court’s recent pronouncements on the qualified immunity doctrine, however, may limit the viability of either statute’s use in cases like *Baroni*. In the past five years the Court has reversed several qualified immunity decisions, pointing to the Courts of Appeals’ failures to apply the correct “clearly established” analysis.<sup>78</sup> The Court has moved from a standard that to be clearly established “a right [must be] sufficiently clear that [a] ‘reasonable official would have understood that what he is doing violates that right,’”<sup>79</sup> to a standard that “every reasonable official would have understood that he violated a right.”<sup>80</sup> Furthermore, it has cast doubt on whether to be “clearly established law” a relevant circuit court decision—without Supreme Court precedent on point—suffices.<sup>81</sup> The Court has also clarified that a circuit split regarding the

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75. See generally *Virginia v. Rives*, 100 U.S. 313 (1879).

76. See, e.g., *United States v. Price*, 383 U.S. 787, 800-02 (1987).

77. See Charles H. Jones, Jr., *An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment*, 21 HARV. C.R.-C.L.L. REV. 689, 718-19 (1986).

78. See, e.g., *White v. Pauly*, 137 S. Ct. 548 (2017) (reversing the Tenth Circuit’s denial of qualified immunity because of an erroneously applied “clearly established” standard); see also *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (collecting recent cases).

79. *Ashcroft v. al-Kidd*, 563 U.S. 731, 739 (2011).

80. *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015).

constitutional “right” in question demonstrates that it has not been “clearly established.”<sup>82</sup>

Indeed, a recent application of § 242 demonstrates the importance of these pronouncements. In *United States v. Cochran*, the defendant was a former state magistrate judge who was convicted on multiple § 242 counts of sexual assault.<sup>83</sup> Cochran protested that he did not have “fair warning” that some of the counts charged against him violated his secretary’s “clearly established” Fourth Amendment rights.<sup>84</sup>

The Court of Appeals found the defendant’s argument persuasive, and it relied on the Supreme Court’s qualified immunity doctrine in doing so. It looked to whether “binding opinions from the United States Supreme Court, the Eleventh Circuit Court of Appeals, and the highest court in the state where the action is filed . . . gave [the defendant] fair warning that his [action] was unconstitutional.”<sup>85</sup> The Court held that even though the Fourth Amendment was “implicated . . . no such decision has addressed a sufficiently similar factual situation so as to provide reasonable warning to Cochran that his conduct violated the constitutional rights of [the victim].”<sup>86</sup>

Consider also the employment of § 242 in *Baroni*, in which Baroni and Kelly were convicted of depriving the residents of Fort Lee of their “right to localized travel.”<sup>87</sup> As the New Jersey District Court noted, the Supreme Court has never recognized a constitutional right to localized travel.<sup>88</sup> Meanwhile, federal Courts of Appeals across the country have been divided on the issue for decades.<sup>89</sup> Given the Supreme Court’s migration in its qualified immunity doctrine, convictions such as Baroni’s will likely prove vulnerable on appeal.<sup>90</sup>

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81. *Id.* at 2045 (“Assuming for the sake of argument that a right can be ‘clearly established’ by circuit precedent despite disagreement in the Courts of Appeals.”); *Reichle v. Howards*, 566 U.S. 658, 665–66 (2012) (“Assuming arguendo that controlling Court of Appeals’ authority could be a dispositive source of clearly established law in the circumstances of this case.”).
82. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1868 (2017) (“[T]he fact that the courts are divided . . . demonstrates that the law on the point is not well established.”).
83. 682 F. App’x 828 (11th Cir. 2017) (per curiam).
84. *Id.* at 834.
85. *Id.* at 839–40.
86. *Id.*
87. *United States v. Baroni*, No. 15-193, 2016 WL 3388302 (D.N.J. June 13, 2016); *see also United States v. Baroni*, No. 15-193, 2017 WL 787122 (D.N.J. Mar. 1, 2017) (denial of motion for acquittal on the § 242 counts).
88. *Baroni*, 2016 WL 3388302, at \*9 (“[T]he Supreme Court has not yet recognized a constitutional right to localized travel.”).
89. *See, e.g., King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971) (recognizing the right); *Cole v. Housing Auth. of Newport*, 435 F.2d 807, 809 (1st Cir. 1970) (same). *But see, e.g., Eldridge v. Bouchard*, 645 F. Supp. 749

Of course, those hoping to encourage additional prosecutions under either statute could argue that they should be untethered from the qualified immunity standard. Many argue that qualified immunity derives from a common-law defense that existed when § 1983 was adopted.<sup>91</sup> Yet whatever the merits of this reliance on common law tort doctrine, there has never been any indication that such a defense was available in the *criminal* context before the adoption of the statutes.<sup>92</sup> Others have urged that this limitation on § 1983 is necessary given that it is written in strict liability terms.<sup>93</sup> The fair notice concern, however, does not carry the same weight in the context of the criminal civil rights statutes for the simple reason that they *do* contain an explicit mens rea requirement.<sup>94</sup>

Despite the force of these arguments, the doctrinal confusion surrounding § 242 urges caution in its application. The federal government's parsimonious use of the statute reflects a balance that has been struck between federal officials, the judiciary, and state and local law enforcement. That is not to say that § 242 should *never* be used to regulate the conduct of state and local officials. While this Comment has cast doubt on the continued viability of § 242's use in the context of protecting rights that have not been "clearly established," such as was the case in *Baroni*, uses of § 242 to punish other acts of misconduct committed by officials, in particular acts of sexual misconduct, remain quite clearly within the ambit of the statute. The Department of Justice's petite policy reflects the current reality that state and local officials are the primary law enforcement agents,<sup>95</sup> but in some instances federal law enforcement oversight is likely need-

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(W.D. Va. 1986), *aff'd*, 823 F.2d 596, 755 (4th Cir. 1987) (rejecting the existence of the right); *Wright v. City of Jackson*, 506 F.2d 900, 902-03 (5th Cir. 1975) (validating an ordinance which required city employees to live within the city, because of no fundamental "right to commute").

90. The defendants are currently appealing their convictions on the § 242 counts to the Third Circuit.
91. Baude, *supra* note 16, at 52-55; *see also id.* at 55-60 (questioning the historical validity of this claim).
92. Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401 (1993) (arguing for the creation of a good faith defense in the criminal context).
93. Baude, *supra* note 16, at 105.
94. *Id.*; *see, e.g.*, *United States v. Kerley*, 643 F.2d 299, 303 (5th Cir. 1981) (reversing § 242 conviction based on the trial court's failure to properly instruct jury as to the meaning and requirements of willfulness, noting willfulness is one essential element of § 242 and crucial to jury deliberation).
95. *U.S. Attorneys' Manual* § 9-2.031, U.S. DEPT. JUST. (July 2009) ("This policy precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless three substantive prerequisites are satisfied: first, the matter must involve a substantial federal interest."), <http://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals> [<http://perma.cc/VNV8-KNFY>].

ed to monitor state and local agents when the mechanisms of local enforcement have broken down.

The same cannot be said, however, of § 241, which has always presented constitutional concerns and whose utility has been significantly diminished given the passage of more targeted federal hate crime statutes.<sup>96</sup> Using a statute predicated on Congress's powers derived from the Thirteenth Amendment to punish any person for all manner of crimes subverts the Amendment's meaning. The current equilibrium that has been struck between federal and local law enforcement reflects centuries of negotiated boundaries.<sup>97</sup> We would do wisely to exercise caution in threatening that equilibrium via the haphazard migration of deeply contested statutes.

## CONCLUSION

This Comment has assessed the contested arenas of both federal oversight of state and local officials and civil rights enforcement in the criminal sphere. It has revealed that recent developments in both domains have set the two on a veritable collision course. Proscribing the ideal level of federal oversight of state and local officials remains a difficult task, but our Constitution does provide guidance. This Comment has ultimately urged caution in applying the criminal civil rights statutes to the crime of public corruption and has been particularly skeptical of § 241's use in this area, given its constitutional grounding in the Thirteenth Amendment.

This is not to say that the officials described above, such as the *Baroni* defendants, are innocent of all crimes (and indeed they were convicted of others). But, as Justice Black most famously put it, “[b]ad men, like good men, are entitled to be tried and sentenced in accordance with law.”<sup>98</sup> Whether one agrees with this Comment or not, it hopes more modestly to provide a greater understanding of what the “law” at issue here really is. For before suggesting areas in which civil rights law can go, we need a greater collective understanding of where it has been and the purposes it should serve.

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96. See, e.g., 18 U.S.C. § 245 (2012) (providing criminal sanctions for anyone who “willfully injures, intimidates or interferes with, any person . . . participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States . . . because of his race, color, religion or national origin”).

97. Richman, Stith, & Stuntz, *supra* note 26.

98. *Green v. United States*, 365 U.S. 301, 309 (1961) (Black, J., dissenting).