

The Enduring Virtues of Deferential Federalism: The Federal Government's Proper Role in Prosecuting Law Enforcement Officers for Civil Rights Offenses

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The protection of civil rights is the duty of every government which derives its powers from the consent of the people. This is equally true of local, state, and national governments. There is much that the states can and should do at this time to extend their protection of civil rights. Wherever the law-enforcement measures of state and local governments are inadequate to discharge this primary function of government, these measures should be strengthened and improved.¹

INTRODUCTION

Since the ratification of the civil rights amendments in the aftermath of the Civil War, the federal government has possessed the solemn obligation to protect civil rights. This obligation has never been the sole responsibility of the federal government, as the states share the responsibility to protect the civil rights of all persons within their respective jurisdictions. With the enactment of various federal criminal civil rights legislation beginning in 1866, including what has evolved into present-day Title 18, § 242 of the United States Code,² the federal and state governments possess concurrent jurisdiction to prosecute excessive force incidents undertaken “under color of law.”³ At the time of its enactment in 1866, it represented, by far, the most substantial congressional effort to date to criminalize conduct already criminal under state law.⁴ Although this congressional action raised significant federalism concerns,⁵ it served as a harbinger for subsequent twentieth and twenty-first century legislative actions that created even more federal crimes for conduct already criminal under state

1. Harry S. Truman, *Civil Rights Message of 1948*, in SELECTED READINGS ON GREAT ISSUES IN AMERICAN HISTORY 1620–1968, at I-23 (1969), cited in Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 510 (1994). Her article remains one of the seminal articles on dual sovereignty and double jeopardy in the civil rights context.

2. 18 U.S.C. § 242 (2012), which provides in relevant part:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both; [and that in certain circumstances resulting in bodily injury or death the maximum penalty may be ten years, life imprisonment, or death].

3. *Id.*

4. See Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2120 (1993) (explaining that federalism problems in civil rights criminal statutes “relate[] to the respective roles and limits of state and federal criminal law enforcement”). The jurisdictional overlap was not without precedent. The original Crimes Act of 1790 and the 1792 enactment of criminal statutes based on the Postal Clause recognized that “substantive federal criminal law was potentially very broad in scope. . . . [and] necessarily would overlap with state criminal statutes to varying, and significant, degrees.” Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 61 (1996).

5. See TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASS’N, THE FEDERALIZATION OF CRIMINAL LAW, 26–51 (James A. Strazzella rptr. 1998) [hereinafter A.B.A. FEDERALIZATION REPORT] (discussing the “adverse effects of federalization” on federal criminal law).

law—a contemporary legislative avalanche made possible by expansive judicial interpretation of the Commerce Clause.⁶

Under the dual sovereignty doctrine,⁷ the states and the federal government each possess constitutional authority to prosecute the same underlying conduct without running afoul of the Double Jeopardy Clause. The dual sovereignty principle was arguably consistent with the original intent of the Framers.⁸ Nevertheless, the federal government’s role in prosecuting local law enforcement misconduct cases has, from the outset, been particularly controversial. That controversy remains evident today and has intensified as a result of several controversial and highly publicized fatal police shootings of African-Americans in the last several years. In addition, the determination of which sovereign should prosecute first has always been controversial and remains so today.⁹

Federal prosecutions of local law enforcement misconduct “were conceived as a rare federal intrusion on the sovereign police power a state exercises within its territory,”¹⁰ and have almost always been considered auxiliary to state law enforcement efforts. Thus, from the outset, for pragmatic, as well as federalism reasons, federal criminal civil rights prosecutors generally recognized that a vigorous, good faith and competent state prosecution should proceed first, with federal intervention available for those extraordinary cases where the state refused to investigate and/or prosecute in good faith. These

6. U.S. CONST. art. 1, § 8, cl. 3; *see also* United States v. Darby, 312 U.S. 100, 119 (1941) (upholding legislation under the Commerce Clause so long as “intrastate activities . . . have a substantial effect on interstate commerce”).

7. Heath v. Alabama, 474 U.S. 82, 88 (1975) (“The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the ‘peace and dignity’ of two sovereigns by breaking the laws of each, he has committed two distinct ‘offences.’”).

8. Kurland, *supra* note 4, at 55–61. *See generally* Fox v. Ohio, 46 U.S. 410 (1847) (upholding propriety of jurisdictional overlap in rejecting automatic preemption argument and affirming state conviction for using false money to obtain property despite existence of federal counterfeiting statutes). The Supreme Court recently granted certiorari in Gamble v. United States, 694 F. App’x 750 (11th Cir. 2017), *cert. granted*, 138 S. Ct. 2707 (2018), which will be heard in the 2018–19 term. The case seeks to overrule the dual sovereignty doctrine. Many DOJ policies discussed herein would not necessarily be affected by such a result. The Supreme Court’s framework to determine what constitutes the “same offense” will ultimately determine how the principles and policies discussed herein would apply should dual sovereignty be overruled. *See infra* Part II & Postscript. At minimum, abolishment of the dual sovereignty doctrine would create some degree of uncertainty and inevitably result in further litigation to conclusively resolve many of the ancillary interpretive double jeopardy issues that would necessarily arise.

9. This topic is further discussed *infra* Part I and notes 101, 177–182, 235–251, 304–310 and accompanying text. For a comprehensive overview of how concurrent jurisdictional issues are negotiated between the states and the federal government in an age of expansive federal criminal law, see Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 31–32 (2011), and *infra* Postscript.

10. Andrew C. McCarthy, *What’s Really Going on with Holder’s Civil-Rights Crusade Against Police Departments*, NAT’L REV. (Dec. 6, 2014, 8:00 AM), nationalreview.com/2014/whats-really-going-holders-civil-rights-crusade-against-police-departments; *see also* ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876*, at 80–81 (John H. Baker et al. eds., 1985) (describing Radical Republicans enactment of federal criminal civil right statutes as a necessary radical expansion of federal jurisdiction).

principles were sorely tested, and in most circumstances proved woefully deficient, in the tumultuous, lawless and violent decades in the aftermath of the Civil War. Aided by reactionary Supreme Court decisions and the end of Reconstruction, this state of affairs continued for almost a century.¹¹

The principle of federal prosecutorial deference to state authorities still pertains today. Despite the current dissatisfaction concerning the lack of convictions in several recent fatal police shooting and excessive force cases, federal prosecutions and federal prosecutorial deference today stand—as they have since the end of the tumultuous 1960s, and on much sounder footing—and are situated to credibly address present day circumstances.

This Article examines a number of important and often difficult issues in determining how these concurrent prosecutorial obligations should be best allocated between the states and the federal government. This Article focuses on two interrelated issues concerning federal criminal civil rights enforcement of police misconduct and whether the current “bar is too high” to authorize a federal criminal civil rights prosecution. The first concerns the statutory “willfulness” requirement of § 242, which, in police brutality cases, effectively limits the federal statute to egregious misconduct of constitutional dimension. The second concerns a variety of Department of Justice (DOJ) guidelines and policies which generally endorse federal deference to vigorous state prosecutions.

This Article first examines the history of § 242 of Title 18 of the United States Code, the federal civil rights statute most often used to prosecute police excessive force cases, which contains a statutory “willfulness” requirement.¹² Next, the Article analyzes the development of the relevant federal policies, including the *Petite* Policy, which supports federal deference and the utility of federal prosecutions serving as a “backstop” to state police misconduct prosecutions. The Article then analyzes several recent high profile police excessive force cases, including the federal government’s response and involvement. It then analyzes the resulting new changes in DOJ policy that reflect an increase in public disclosure of the details of particular prosecutorial decisions in these high profile cases and discusses the problematic consequences of these changes. Finally, the Article critiques the major proposals for statutory reform.

The Article concludes that current DOJ policy still provides that, absent extraordinary circumstances, federal prosecutors should generally defer to vigorous state police misconduct prosecutions undertaken in good faith and no successive federal prosecution should go forward unless the prior state prosecution left a substantial federal interest demonstrably unvindicated. The

11. See, e.g., Robert L. Spurrier, Jr., *McAlester and After: Section 242, Title 18 of the United States Code and the Protection of Civil Rights*, 11 TULSA L.J. 347, 348 (1976) (noting that Radical Republicans who enacted the precursor to § 242 were “[u]nwilling to rely on local authorities (who all too often were personally involved in racially motivated acts of terror) to enforce state law for the protection of federal rights”).

12. 18 U.S.C. § 242 (2012).

“backstop” policy remains sound today, and the DOJ should unambiguously recommit to those policies. However, because increased transparency revealing federal prosecutorial decision-making is wrought with complications and is unlikely to meaningfully ameliorate public outcry, the DOJ should reconsider whether these recent policy changes are worth the effort.

Similarly, proposals to amend federal criminal law to “lower the bar” so that it is easier to prosecute these types of cases should not be adopted. Much of the disappointment over the lack of criminal convictions is rooted in the reality that juries often are favorably inclined to side with law enforcement officers who raise self-defense claims, particularly where the police were lawfully attempting to effectuate an arrest and faced some resistance. Moreover, given the breadth of applicable state charges, which often contain lesser culpability requirements and thus, in some sense, are easier to prove beyond a reasonable doubt, vigorous state prosecution should remain the preferred first prosecutorial alternative. Federal criminal prosecution of police excessive force cases should remain reserved for those rare cases of “willful” misconduct where a meritorious prior state prosecution was either not pursued for illegitimate reasons, or was pursued but resulted in an abject miscarriage of justice of constitutional dimension.

These conclusions do not represent an abdication of federal responsibility. Rather, they respect federalism, recognize that states are in a superior position than the federal government to ensure properly functioning police forces, support a sensible allocation of criminal justice resources, permit more flexibility of criminal charges to prosecute reckless or negligent conduct, and preserve the option of a successive federal prosecution when extraordinary facts and circumstances warrant it.

I. THE “HIGH BAR” FOR FEDERAL PROSECUTION

In the final years of the Obama Administration, President Obama and Attorney General Eric Holder—anticipating impending DOJ determinations to decline federal prosecution in the fatal shootings of Trayvon Martin in Florida and Michael Brown in Ferguson, Missouri—ruminated that, under current federal law and applicable DOJ guidelines, the “bar” to authorize federal involvement in these types of cases was set too high.¹³ They both suggested that the “bar” should be lowered.¹⁴ Holder even promised that reform proposals lowering the threshold would be presented before he left office, but such proposals never materialized.¹⁵ Holder acknowledged the extreme dissatisfaction expressed by some segments of the public that the federal

13. *Attorney General Holder to Call for Lower Bar in Civil Rights Prosecutions*, NBC NEWS (Feb. 27, 2015, 5:14 AM), <https://www.nbcnews.com/news/us-news/attorney-general-holder-call-lower-bar-civil-rights-prosecutions-n313856>.

14. *Id.*

15. *Id.* (“I’m going to have some specific proposals that we will share with the American people and with Congress.”).

government would not choose to commence a federal criminal prosecution in these cases.¹⁶

The genesis of the “bar” that must be cleared to trigger a federal civil rights prosecution, and what purpose it serves, does not lend itself to simple explanation. It derives not only from the relevant statute but is also informed by core constitutional principles that go to the heart of “Our Federalism”¹⁷ as well as the sensible exercise of federal prosecutorial discretion.

The oft-criticized “too high” or “too difficult to clear” bar actually is a series of legal thresholds required to be cleared before federal prosecution is deemed appropriate. There are at least two distinct, albeit interrelated, legal thresholds that must be addressed. The first concerns the significant statutory mens rea requirement found in 18 U.S.C. § 242,¹⁸ the most pertinent statute for prosecutions of police brutality. Since 1909, that statute has required “willful” conduct to justify federal prosecution.¹⁹ This controversial “willful” intent requirement which, in this context, arguably embodies a constitutional dimension, generates significant criticism when the federal government declines to pursue prosecution in a particular case. Critics contend that if the statute contained a less onerous mens rea it would be easier to bring, and win, such cases.²⁰ Undoubtedly, it is easier to establish negligence or “mere” recklessness as opposed to a higher mens rea such as willfulness or specific intent, but whether a lower standard best serves the interests of justice in this context remains in dispute.²¹

16. Mike Allen, *Holder's Parting Shot: It's Too Hard to Bring Civil Rights Cases*, POLITICO (Feb. 27, 2015, 7:00 AM), <https://www.politico.com/story/2015/02/eric-holder-civil-rights-interview-mike-allen-115575> (discussing Holder acknowledging young African American frustration due to lack of federal prosecution in Trayvon Martin case); Russell Berman, *Obama's Missing Police-Reform Proposal*, ATLANTIC (May 18, 2015), <https://www.theatlantic.com/politics/archive/2015/05/the-limits-of-police-reform/393530/> (stating that Holder police reform proposals are devoid of any mention of a legislative proposal to alter the mens rea standard); Cristian Farias, *Eric Holder Wants to Lower the Bar for Civil Rights Prosecutions. That's Trickier than It Sounds*, NEW REPUBLIC (Feb. 27, 2015), <https://newrepublic.com/article/121177/eric-holder-we-might-lower-bar-civil-rights-prosecutions>; *Attorney General Holder to Call for Lower Bar in Civil Rights Prosecutions*, *supra* note 13 (quoting Holder as stating, “There needs to be a change with regard to the standard of proof.”). The Reverend Al Sharpton summed up the lay frustration when he referred to legally distinct hate crimes and police misconduct cases and stated he planned to work to “lower the threshold,” and that “[a]s we . . . continue to fight from [Trayvon Martin to] Staten Island to Ferguson, we must change the threshold that you qualify a civil rights case for, or we will keep having these moments of activism that end up with cases . . . being [a] disappoint[ment].” Pam Key, *Sharpton: We Must Lower Legal Threshold for Federal Hate Crime*, BREITBART (Feb. 25, 2015), <https://www.breitbart.com/clips/2015/02/25/sharpton-we-must-lower-legal-threshold-for-federal-hate-crime/> (internal quotation marks omitted) (quoting Rev. Al Sharpton).

17. See generally Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012) (examining “Our Federalism” and analyzing why it should be discussed as a plural term).

18. 18 U.S.C. § 242 (2012).

19. See discussion of “willfulness” *infra* text accompanying notes 57–83.

20. See *infra* Subpart V.C.

21. In addition, a less obtuse but somewhat controversial additional statutory element threshold in 18 U.S.C. § 242 prosecutions requires that the conduct be undertaken “under color of law.” This requirement—also of constitutional dimension—means that private actors, such as George Zimmerman in the Trayvon Martin shooting, could not be prosecuted under § 242 because Zimmerman was a private citizen not acting in concert with any state actors and thus not acting “under color of law.” Adam Harris Kurland, *Not the Last Word, but*

In addition, a variety of internal DOJ policies and guidelines create other thresholds that must be cleared in order to establish the order of prosecution and the evaluation of how a prior state court prosecution was resolved before a successive federal prosecution will be authorized. In deciding to pursue any federal prosecution, federal prosecutors must adhere to the Principles of Federal Prosecution.²² These general principles require prosecutors to analyze not only whether a substantial federal interest exists, but also whether federal prosecution should nevertheless be declined because the person is subject to effective prosecution in another jurisdiction.²³ An additional distinct threshold comes into play only when a prior state prosecution has been undertaken and has resulted in an acquittal or conviction. In those circumstances, in addition to determining whether there is an applicable federal statute that could be charged and reasonable cause to believe the violation could be proved at trial beyond a reasonable doubt, the *Petite* Policy, an internal DOJ policy, must be addressed. The *Petite* Policy requires that, in order for a successive prosecution to be undertaken by the federal government for essentially the same conduct that was at issue in the prior state prosecution, the prior prosecution must have left a “substantial federal interest demonstrably unvindicated.”²⁴

Finally, in addition to the general policy applicable to all federal prosecutions concerning whether the person is subject to effective prosecution in another jurisdiction, DOJ policy and practice imply that, in cases of allegations of police misconduct, the federal government usually defers to local prosecution in the first instance. This preserves the option of federal prosecution as an essential auxiliary “backstop” to state prosecutorial efforts.

As will be further explained, the thresholds embodied in these policies do not constitute a diminution or abdication of the federal government’s obligation to protect civil rights. Neither do they represent a claimed rigid federalism-based constitutional limitation on the federal government’s ability to prosecute police excessive force cases.²⁵ Rather, properly understood, they represent a prudent, sensible and responsible exercise of federal prosecutorial discretion.

Likely the Last Prosecution: Understanding the U.S. Department of Justice’s Evaluation of Whether to Authorize a Successive Prosecution in the Trayvon Martin Killing, 61 UCLA L. REV. DISC. 206, 211 (2013) (noting that Zimmerman was a private citizen on neighborhood patrol but not acting under color of law); *see also* Sharon Finegan, *Watching the Watchers: The Growing Privatization of Criminal Law Enforcement and the Need for Limits on Neighborhood Watch Associations*, 8 U. MASS. L. REV. 88, 133 (2013) (discussing problems of non-governmental actors exercising quasi law enforcement responsibilities). *See generally* Leigh J. Jahnig, Note, *Under School Colors: Private University Police as State Actors Under § 1983*, 110 NW. U. L. REV. 249 (2015) (discussing analogous problems in § 1983 civil litigation).

22. U.S. DEP’T OF JUSTICE, JUSTICE MANUAL §§ 9-27.000–760 (2018) [hereinafter JUSTICE MANUAL].

23. *Id.* § 9-27.220.

24. U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 9-2.031 (provision last revised 2009) [hereinafter JUSTICE MANUAL 9-2.000].

25. *See* Peter J. Henning, *Misguided Federalism*, 68 MO. L. REV. 389, 448 (2003) (contending that invoking federalism as an independent constitutional basis to invalidate federal criminal legislation is an “unfortunate misreading” of relevant Supreme Court case law).

II. DUAL SOVEREIGNTY AND CIVIL RIGHTS PROSECUTIONS

Police excessive force cases concern criminal conduct subject to the concurrent jurisdiction of both the federal and state governments. These cases are often controversial and subject to intense public scrutiny. As discussed below, DOJ policy generally directs that the federal government defer to local authorities and that federal investigative and prosecutorial authorities assist local law enforcement. The DOJ usually waits until the state case is completed before determining whether to initiate a federal prosecution.²⁶

A fatal police shooting may be chargeable as some form of homicide under state law. Other state charges, such as reckless endangerment and various firearms offenses often are available as well. The same act may also constitute an alleged federal criminal civil rights violation. As noted, the dual sovereignty doctrine provides that prosecutions by different sovereigns are not prosecutions for the “same offense” and thus a successive prosecution by a different sovereign for the same underlying act does not violate the federal Double Jeopardy Clause.²⁷

The Supreme Court has recognized that “[f]oremost among the prerogatives of sovereignty is the power to create and enforce a criminal code.”²⁸ This cardinal obligation of sovereignty cannot be extinguished by actions of another sovereign. The doctrine yields the practical benefit of avoiding intractable inter-sovereign constitutional squabbles to determine whether two prosecutions concerning the same or similar underlying conduct, or a part thereof, constitute the “same offense” for double jeopardy purposes.²⁹ Such a

26. See *infra* Part IV.

27. U.S. CONST. amend. V; *Heath v. Alabama*, 474 U.S. 82, 92 (1985) (“[The dual sovereignty doctrine] finds weighty support in the historical understanding and political realities of the States’ role in the federal system . . .”). Another relevant case is *United States v. Lanza*, 260 U.S. 377 (1922). *Lanza* was a Prohibition-era bootlegger who was first prosecuted by Washington State for violation of state liquor laws. *Id.* at 379. Thereafter, he was subsequently federally prosecuted under the Volstead Act based on the same underlying conduct. *Id.* The Supreme Court upheld the propriety of the successive federal prosecution based on dual sovereignty principles which did not violate the double jeopardy clause. *Id.* at 385; see also THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 571–72 (Kermit L. Hall et al. eds., 2d ed. 2005).

“[T]he doctrine [of dual sovereignty] is almost certainly consistent with the original intent of the framers, although dual sovereignty issues arose infrequently during the nation’s first century because of the limited scope of federal criminal jurisdiction.” ADAM HARRIS KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS: THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY IN STATE AND FEDERAL COURTS 2 (2001) [hereinafter KURLAND, DUAL SOVEREIGNTY] (footnote omitted). “With the advent of Prohibition, the issue achieved greater prominence as both the states and the federal government stepped up criminal enforcement of the liquor laws pursuant to the concurrent police powers granted to them under the eighteenth amendment.” *Id.*; see also Kurland, *supra* note 4, at 32 n.102 (discussing debate over legitimacy and historical pedigree of dual sovereignty doctrine).

28. *Heath*, 474 U.S. at 93. For a further discussion of the foremost prerogatives of sovereignty, see Kurland, *supra* note 4, at 8–10.

29. As noted earlier, the Supreme Court has recently granted certiorari to determine whether the dual sovereignty doctrine should be abolished. *Gamble v. United States*, 694 F. App’x 750 (11th Cir. 2017), *cert. granted*, 138 S. Ct. 2707 (2018); see also text accompanying *supra* note 8. For the reasons discussed later in this Article regarding the *Petite* Policy and the Court’s governing standard for determining what constitutes the same offense under the double jeopardy clause, most § 242 prosecutions would likely qualify as a different offense

determination is difficult even when intra-sovereign prosecutions are at issue, and would create even more vexing judicial problems when trying to weigh competing sovereign interests for facially identical conduct—bank robbery for instance³⁰—that often do not contain identical statutory elements. The dual sovereignty doctrine wisely eliminates the proverbial race to the courthouse as a method of constitutional resolution, instead transforming the determination into one of the exercise of comity and prosecutorial discretion.³¹

The United States Constitution imposes no impediment to these prosecutions and federal law imposes virtually no limitations either.³² However, the same cannot be said for the converse situation where the federal prosecution proceeds first. Several states prohibit a subsequent prosecution where the same conduct has already been prosecuted by another sovereign, such as another state or the federal government.³³ By having the state proceed first, the option of a subsequent federal prosecution remains in play as a “backstop” in the event of some type of grave miscarriage of justice or some other “rare” circumstance where the prior state prosecution left a substantial federal interest demonstrably unvindicated. Given the unfortunate history of many states’ refusal to seriously investigate and prosecute racial violence perpetrated by law enforcement, this backstop is essential.³⁴

from state prosecutions for the same underlying conduct. *See infra* Parts III & IV (discussing federal prosecutorial policy); *infra* Postscript (discussing the Court’s “same offense” jurisprudence). Thus, the analysis of relevant DOJ prosecution policies set forth herein should remain pertinent even if dual sovereignty is abolished.

30. Unlike the federal bank robbery statute, 18 U.S.C. § 2113(a)(f) (2012), state bank robbery statutes do not require proof that the bank was federally insured. How substantively significant is the FDIC insurance element, or is it “exclusively” jurisdictional even if constitutionally essential to establish federal jurisdiction? *Cf.* MODEL PENAL CODE § 1.13(10) (AM. LAW INST. 1962) (stating that “material element” excludes elements that are “exclusively” jurisdictional, and thus provable without a culpable mental state, but leaves for judicial interpretation whether a particular element is, in fact, exclusively jurisdictional); *see also id.* § 2.02(1) (stating that companion culpable mental state must be proven with respect to “each material element of the offense”).

31. *See Heath*, 474 U.S. at 93 (“To deny a State its power to enforce its criminal laws because another State has won the race to the courthouse ‘would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines.’” (quoting *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959))). Justice Scalia has described the exercise of prosecutorial discretion as the “core” of the prosecution function. *Morrison v. Olson*, 487 U.S. 654, 697, 706–08 (1988) (Scalia, J., dissenting); *see also* text accompanying *supra* note 29; *infra* Postscript.

32. Federal law imposes a handful of specific statutory limitations prohibiting a federal prosecution for the same underlying acts previously prosecuted to verdict in state court based on a legislative determination that no remaining federal interest exists. None are federal criminal civil rights statutes. *See, e.g.*, 18 U.S.C. § 659 (2012) (proscribing theft of interstate shipments and further providing that “[a] judgment of conviction or acquittal on the merits under the laws on any State shall be a bar to any prosecution under this section for the same act or acts”). The relevant original 1912 legislative history is set forth in KURLAND, DUAL SOVEREIGNTY, *supra* note 27, at 7 n.11.

33. KURLAND, DUAL SOVEREIGNTY, *supra* note 27, at 87–291 (providing a compilation and analysis of state statutes governing and sometimes limiting successive state prosecution for “acts” or “conduct” already prosecuted by another sovereign); *see also* Carolyn Kelly MacWilliam, Annotation, *Conviction or Acquittal in Federal Court as Bar to Prosecution in State Court for State Offense Based on Same Facts—Modern View*, 97 A.L.R. 5th 201 (2002).

34. *See* discussion *infra* notes 61–83 and accompanying text.

Nevertheless, multiple prosecutions based on the same or similar underlying acts, if routinely undertaken, are wasteful, burdensome, largely unnecessary and potentially erosive of core fairness principles which underlie the spirit of double jeopardy protections, even if not technically violative of the double jeopardy clause. Fortunately, as further discussed below, governing legal principles and the sensible exercise of prosecutorial discretion militate against these prosecutions running amok.

First and foremost, general principles of federalism militate toward providing state prosecutors with the first opportunity to prosecute. Even where there is a significant federal interest in a particular prosecution, the maintenance of law and order is the primary responsibility of state and local government. This principle, enshrined in the *Federalist No. 45*³⁵ and routinely reinforced by the Supreme Court,³⁶ is particularly true with respect to law enforcement misconduct. State and local governments possess the primary and acute moral responsibility to ensure that their law enforcement officers are acting lawfully and constitutionally. This is logical, efficient and respectful of federalism. Even with the adoption of the Civil War amendments, it is illogical to invest the federal government with the primary responsibility to monitor and oversee state and local police departments, which would invariably include supervising wide swaths of conduct not of federal constitutional dimension.

Next, state prosecutors have at their disposal a far wider range of laws to prosecute alleged police misconduct than are available to federal prosecutors. As previously noted and further discussed below, in police misconduct cases, the federal prosecution must allege willful conduct—essentially federal prosecutors must prove a species of a specific intent to deprive an individual of a constitutional right. On the other hand, state prosecutors may charge, in addition to murder, a wide array of reckless or negligent conduct, including manslaughter, depending on the statutes available in a particular jurisdiction. Notwithstanding, recent state court jury verdicts in police misconduct cases demonstrate the difficulty in obtaining convictions, even for charges less serious than murder³⁷ that, theoretically, should be easier to prove than a federal criminal civil rights charge.

35. THE FEDERALIST NO. 45 (James Madison).

36. In *United States v. Morrison*, the Supreme Court noted that “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.” 529 U.S. 598, 618 (2000). The Court further noted that it could “think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.” *Id. Morrison* built upon the principle enunciated in *United States v. Lopez*, that “[t]he Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation.” 514 U.S. 549, 566 (1995).

37. See discussion *infra* notes 304–317 and accompanying text. See generally Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567 (2011) (noting that lesser offenses may tip off jurors that main charge is weak and not even believed by prosecution, perhaps raising reasonable doubt on lesser charges as well).

As will be further explained, long-standing DOJ practices and guidelines, most notably the Principles of Federal Prosecution and the *Petite* Policy, establish that federal prosecutors should generally defer to state prosecutors and only get involved when the State has demonstrated that it is either unwilling or unable to undertake a zealous and competent prosecution. This preference order remains sound today. In most cases, this initial threshold of federal deference to local criminal investigation and prosecution is not a significant source of criticism because it is generally understood that federal prosecutors are “waiting in the wings”³⁸ if the state prosecution implodes. However, when federal intervention occurs at the outset, this rare event often results in both criticism and acclaim.³⁹ As will be explained, existing DOJ guidelines have sufficient flexibility to permit federal prosecutors to proceed first, based on a determination that the case constitutes a sufficiently urgent national priority. With this backdrop, a detailed analysis of the history and development of the federal criminal civil rights statutes and the particular DOJ guidelines which govern the order and manner of the investigation and prosecution of law enforcement misconduct now can be more comprehensively addressed.

III. FEDERAL CIVIL RIGHTS PROSECUTIONS FOR CONDUCT TAKEN “UNDER COLOR OF LAW”⁴⁰

The Civil War outcome and the resulting constitutional amendments altered the fundamental constitutional relationship between the states and the federal government.⁴¹ Despite the Supreme Court’s contorted historical odyssey interpreting these amendments, federalism principles continue to inform the interpretation of federal criminal civil rights statutes. The limitations, many imposed by narrow Supreme Court interpretations of Reconstruction-era statutes

38. See, e.g., Goldie Taylor, *Why Are the Feds Charging Michael Slager, the Cop Who Killed Walter Scott?*, DAILY BEAST (May 12, 2016, 4:19 PM), <https://www.thedailybeast.com/goldie-taylorwhy-are-the-feds-charging-michael-slager-the-cop-who-killed-walter-scott> (“[T]here were few if any voices calling for a federal investigation or charges because, presumably, people trust that there is a strong local case moving forward.”). For a further discussion of the Slager case, see *infra* notes 235–262 and accompanying text.

39. For example, in the Walter Scott fatal shooting in North Carolina, Scott’s family lawyer and some family members were particularly outspoken and grateful that federal prosecutors did not wait for the completion of a state prosecution. Valerie Bauerlein & Zusha Elinson, *Ex-Police Officer Faces Federal Civil-Rights Charges over Walter Scott Shooting*, WALL ST. J. (May 11, 2016, 5:49 PM), <http://www.wsj.com/articles/ex-police-officer-faces-federal-civil-rights-charges-in-black-motorists-death-1462980668> (noting that victim’s lawyer and family members expressed gratitude that federal prosecutors swiftly acted without waiting for conclusion of state trial). For criticism of the federal government’s unusually quick action in the Slager case, see *infra* notes 240–292 and accompanying text.

40. This Article focuses on the history of 18 U.S.C. § 242 (2012). For a comprehensive historical analysis of all of the Reconstruction-era civil rights statutes, see Lawrence, *supra* note 4, at 2122–70.

41. See, e.g., Jack M. Balkin, *History Lesson: Five Supreme Court Justices Think Congress Doesn’t Have the Power to Pass New Laws Against Discrimination. They’re Forgetting About the Civil Rights Movements of the 19th and 20th Centuries.*, LEGAL AFF. (July/August 2002), www.legalaffairs.org/issues/July-August2002/review_balkin_julyaug2002.msp (discussing the notion that the Fourteenth Amendment fundamentally altered the balance of state and federal power and reflected very different conceptions from the founding generation).

that are still important today, played a central role in how the statutes were applied and how the general deference to state criminal justice systems developed and endured.

The Fourteenth Amendment, by its terms, limits state action.⁴² After the Civil War, the Radical Republican Congress passed the Civil Rights Act of 1866, which contained the modern day precursor to present § 242, proscribing the deprivation of “any inhabitant’[s]” civil rights under the Act, by any person acting “under color of any law.”⁴³ The conduct was punishable as a misdemeanor with a maximum of one year imprisonment.⁴⁴ In 1870, the statute was broadened to apply to “any inhabitant of any State or Territory” and to bolster its constitutionality after the 1868 ratification of the Fourteenth Amendment.⁴⁵ The original “under color of law” element now provided the statute with a clear constitutional jurisdictional “state action” anchor.

In 1874, Congress, as part of its first comprehensive revision of the federal criminal code, adopted language modeled from the Ku Klux Klan Act of 1871⁴⁶ to give the statute its modern nomenclature. This revision broadened coverage to provide:

Every person, who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States . . . shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both.⁴⁷

These congressional enactments recognized that southern state authorities were unlikely to consistently protect the newly freed blacks from racial violence, and that those same authorities were, in many cases, directly complicit in such acts. The broadened coverage to include the denial of all rights and privileges secured by the Constitution would prove to be a double-edged sword.

Federal prosecutors in the Grant Administration, many operating out of the newly created Justice Department in Washington, D.C., aggressively prosecuted Klan racial violence under these statutes and achieved significant initial success.⁴⁸ Professor Robert Kaczorowski has contended that the extreme Klan violence and reign of terror in the immediate post-Civil War period was actually guerilla warfare and a continuation of the Civil War, and should not have been

42. U.S. CONST. amend XIV, § 1 (“No State shall . . . nor shall any State deprive any person . . .”).

43. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

44. *Id.* § 2.

45. Enforcement Act of 1870, ch. 114, 16 Stat. 140–46 (1870).

46. Compare Rev. Stat. of the United States, 43d Congress, 1st Sess. ch. 7 § 5510, at 1068 (1874) (Govt. Printing Office 1878), with Enforcement Act of 1871, ch. 31, 17 Stat. 13 (1871).

47. Rev. Stat. of the United States, 43d Congress, 1st Sess. ch. 7 § 5510, at 1068 (emphasis added).

48. See RON CHERNOW, GRANT 701 (2017) (“The new Justice Department would forge its identity in the battle to slay the Ku Klux Klan . . .”); HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 218–46 (1937) (discussing the 1870 creation of the Justice Department).

dealt with as a civilian law enforcement effort.⁴⁹ The Grant Administration, as with other administrations almost a century later, was unwilling to proceed on a war footing and proved reluctant to routinely involve the military in the protection against racial violence.⁵⁰

However, relatively soon thereafter, a combination of Radical Republican political fatigue, the election of 1876 and the end of Reconstruction,⁵¹ coupled with Supreme Court decisions in the *Slaughterhouse Cases*,⁵² *United States v. Cruikshank*,⁵³ and the *Civil Rights Cases*,⁵⁴ all decided between 1873 to 1883, effectively gutted federal protection of civil rights for nearly a century.⁵⁵ “The result was the virtual reenslavement of Southern blacks . . . [as][t]he supremacy of national authority and black emancipation were replaced by states rights and black peonage.”⁵⁶ This disgraceful reality would last well into the next century.

In 1909, the Federal Criminal Code was comprehensively revised to what eventually became the Title 18 we recognize today. The statute was redesignated section 20 and was modified by adding the term “willfully” to provide:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State . . . to the deprivation of any rights . . . secured or protected by the Constitution and laws of the United States . . . shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.⁵⁷

The sparse legislative history consisted of a brief statement from Democratic Senator John W. Daniel of Virginia, who cryptically noted that “the insertion of the word ‘willfully,’ thus mak[es] it less severe.”⁵⁸ The statute remained a misdemeanor. Virtually no prosecutions had occurred under the

49. KACZOROWSKI, *supra* note 10, at 54–55.

50. *See infra* text accompanying notes 93–94 (noting reluctance of Kennedy Administration to use military to quell large scale racial violence).

51. CHERNOW, *supra* note 48, at 710 (“Despite Grant’s stunning success [against the Klan], a certain moral fatigue began to afflict the North, where racism remained widespread.”). *See generally* C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1951) (detailing the Compromise of 1877 ending Reconstruction).

52. 83 U.S. (16 Wall.) 36, 75–77 (1873) (stripping privileges and immunities clause of significant meaning and individual rights protection).

53. 92 U.S. 542, 555 (1876) (holding that Fourteenth Amendment protections do not apply to actions of individuals and providing limited view of federal rights).

54. 109 U.S. 3, 25 (1883) (striking down portions of Civil Rights Act of 1875 as an impermissible congressional attempt to regulate private conduct of individuals).

55. *See* Spurrier, *supra* note 11, at 349 (noting that after Supreme Court decisions in 1883, “for all practical purposes” the federal criminal civil rights statute “remained dormant” for the next sixty years).

56. KACZOROWSKI, *supra* note 10, at xiii.

57. An Act to Codify, Revise, and Amend the Penal Laws of the United States, ch. 321 § 20, Pub. L. No. 60-350, 35 Stat. 1092 (1909); *see also id.* § 19 (“Conspiring to injure, etc., persons in the exercise of civil rights.”).

58. 43 CONG. REC. 3599 (1909) (statement of Sen. Daniel). Senator Daniel’s biography offers a clue regarding his interest in this amendment. Daniel served as a Major in the Confederacy during the Civil War. He was an ardent advocate of “the Lost Cause” version of Civil War history, and in 1883 gave a major speech at the unveiling of a Robert E. Lee monument at Washington & Lee University. *John W. Daniel*, WIKIPEDIA, https://en.wikipedia.org/wiki/John_W._Daniel (last visited Mar. 17, 2019).

statute in the preceding quarter century, making it somewhat perplexing that in the midst of a comprehensive statutory revision anyone would single-out this then moribund statute as unduly draconian.⁵⁹

In the twentieth century, the Supreme Court gradually held that most of the major protections of the Bill of Rights applied to the states, having been incorporated through the Due Process Clause of the Fourteenth Amendment.⁶⁰ Consequently, the legal foundation to support meaningful federal civil rights prosecutions for law enforcement misconduct had been resurrected.

A Civil Rights Section within the DOJ was first created in 1939.⁶¹ At the time, federal authority, federal criminal law included, was undergoing a New Deal transformation based largely on expanding notions of the Commerce Clause.⁶² Federal criminal law had already expanded beyond merely protecting the direct interests of the federal government and now also covered auxiliary interests that covered conduct also criminal under state law. This inexorably resulted in expansion of the concurrent jurisdictional overlap where even more conduct could now be prosecuted under both state and federal law.⁶³

59. Professor Lawrence has surmised that Senator Daniel's comment was directed toward "any aspect of the civil rights crimes statutes that might create a federal 'bias crime.'" Lawrence, *supra* note 4, at 2180 & n.306.

60. For an overview of the Supreme Court's "incorporation doctrine," see THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 27, at 426–27. The Fourth Amendment protection against an unreasonable search and seizure was held to apply to the states in *Wolf v. Colorado*, 338 U.S. 25 (1949). However, the contours of that protection remained uncertain. As such, murders by police officers often had to be awkwardly plead as willful deprivations of constitutional rights that no law enforcement officer could claim lack of knowledge of, such as the victim's due process right to life, right to judicially imposed punishment, or right to a trial upon the charge on which he was arrested. See generally *Screws v. United States*, 325 U.S. 91, 92–93 (1945) (describing indictment containing such allegations); see also *infra* text accompanying notes 67–77. In 1985, the Supreme Court held that excessive force claims were grounded in the Fourth Amendment's right to be free from unreasonable searches and seizures. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)); see also *Graham v. Connor*, 490 U.S. 386 (1989). Thus, in the last several decades, due process violations for excessive force during an arrest, now a clearly defined unconstitutional seizure under color of law, could be alleged in a § 242 indictment. See, e.g., *Indictment at 1, United States v. Slager*, No. 2:16-cr-00378-DCN (D.S.C. Jan. 16, 2018) (alleging willful deprivation of constitutional right to be free from the use of unreasonable force by law enforcement), *aff'd*, No. 18-4036, 2019 WL 124114 (4th Cir. Jan. 8, 2019); see also MICHAL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH 168 (1987) (discussing the 1965 "Mississippi Burning" § 242 indictment alleging that defendants acted under color of law "to deprive each murdered man of his constitutional right to be immune from punishment without due process of law and of his right to be secure in his person while in the custody of the State of Mississippi").

61. For a history of the Civil Rights Section in the Department of Justice, see RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 111–40 (2007).

62. See, e.g., THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 27, at 744–45 (discussing modern era New Deal revolution of the federal police power).

63. For example, in the 1930s, traditional state crimes such as bank robbery, auto theft, and extortion became federal crimes where the requisite federal jurisdictional element could be established. Adam Harris Kurland, *The Travel Act at Fifty: Reflections on the Robert F. Kennedy Justice Department and Modern Federal Criminal Law Enforcement at Middle Age*, 63 CATH. U. L. REV. 1, 13–16 (2013). The overlap of federal and state crimes further expanded with the 1961 enactment of the Travel Act, the first federal criminal statute to specifically incorporate state crimes into the federal definition of the offense. See *id.* at 27–28 (describing the Travel Act as a precursor of modern complex federal criminal statutes such as RICO). Justice Thomas described

In this era, the DOJ's limited interest in civil rights prosecutions was focused largely on peonage cases, which were more politically palatable at the time.⁶⁴ Prosecutions under the statutory predecessor to § 242 were relatively uncommon, as the status of such prosecutions remained constitutionally precarious and politically problematic. Although the dual sovereignty doctrine had long been established as not in conflict with the Double Jeopardy Clause,⁶⁵ federal prosecutors were reluctant to aggressively test the principle with respect to prosecutions concerning violence against blacks. Nonetheless, federal prosecutors successfully brought some § 242 prosecutions alleging police brutality.⁶⁶

The Department largely deferred to state authorities to prosecute alleged criminal misconduct of state law enforcement officials. It focused almost exclusively on the propriety of a federal prosecution in circumstances where state and local authorities had refused to act in the face of egregious circumstances, including law enforcement complicity in racial violence. In addition, as noted above, federal deference was also rooted in practical necessity; the relevant federal civil rights statute remained a misdemeanor carrying a maximum penalty of one-year imprisonment. A vigorous, good faith state homicide prosecution, if available, could theoretically result in a longer, more appropriate sentence.

Such was the state of affairs giving rise to the 1945 seminal case of *Screws v. United States*,⁶⁷ which presented such egregious circumstances. There, the federal government brought a rare federal criminal civil rights prosecution against a Georgia sheriff, policeman, and special deputy who had arrested a black male citizen and proceeded to beat him to death without provocation.⁶⁸ A three Justice dissent referenced then existing DOJ prosecutorial policy, circa 1939, as reflecting purported moderation:

The Department of Justice has established a policy of strict self-limitation with regard to prosecutions under the civil rights acts. When violations of such statutes are reported, the Department requires that efforts be made to encourage state officials to take appropriate action under state law. To assure consistent observance of this policy in the enforcement of the civil rights statutes, all United States Attorneys have been instructed to submit cases to the Department for approval before prosecutions or investigations are instituted.

the expansion of federal criminal jurisdiction into fields traditionally policed by state and local laws as "stunning." *Evans v. United States*, 504 U.S. 255, 290 (1992) (Thomas, J., dissenting).

64. GOLUBOFF, *supra* note 61, at 113.

65. *See supra* notes 8, 29 and accompanying text; *infra* Postscript (discussing recent Supreme Court dual sovereignty litigation).

66. *See* Lawrence, *supra* note 4, at 2170 (stating that brutality cases often utilized broader view of civil rights statute and conduct proscribed under statute).

67. 325 U.S. 91 (1945).

68. Justice Douglas, writing for the plurality, described the case as one "involv[ing] a shocking and revolting episode in law enforcement." *Id.* at 92 (opinion of Douglas, J.). For a more detailed factual analysis of the *Screws* case, including several references to the trial record, see Paul J. Watford, *Hallows Lecture: Screws v. United States and the Birth of Federal Civil Rights Enforcement*, 98 MARQ. L. REV. 465 (2014).

. . . .
But such a “policy of strict self-limitation” is not accompanied by assurance of permanent tenure and immortality of those who make it the policy. . . .

We are told local authorities cannot be relied upon for courageous and prompt action, that often they have personal or political reasons for refusing to prosecute. If it be significantly true that crimes against local law cannot be locally prosecuted, it is an ominous sign indeed. In any event, the cure is a re-energization of State responsibility. It is not an undue incursion of remote federal authority into local duties with consequent debilitation of local responsibility.⁶⁹

The dissenters were, at best, perniciously oblivious to their own irony. The defendants committed murder openly and with impunity, confident and correct in their beliefs that they would not be subject to any state prosecution.⁷⁰ However, the dissent was also prescient. Over the next quarter century, the federal government largely continued to adhere to the position that the state governments must accept their requisite responsibility for protecting all of their inhabitants, even if, as Attorney General Robert Kennedy would later observe, “maybe a lot of people are going to be killed in the meantime.”⁷¹ Simply put, federal law enforcement was not a national police force.⁷²

Although not necessarily apparent in its’ immediate aftermath, *Screws* was an enormously important case for the future of federal criminal civil rights enforcement. *Screws*’ conviction was reversed based on a jury instruction deficiency. Far more important, however, *Screws* held that the statutory willfulness requirement, added in 1909, was more than simply a *mens rea* element. Rather, it provided the statute with its federal constitutional jurisdictional anchor to avoid otherwise fatal “void for vagueness” concerns.⁷³

This had two profound interrelated consequences. First, the decision salvaged federal criminal civil rights prosecutions under the original Reconstruction-era statutes—albeit by establishing the requisite high bar of a “willful” constitutional violation.⁷⁴ Second, the statute’s vagueness problem was resolved with the Court’s interpretation that “willfully” meant that a defendant had to act with some variant of specific intent to deprive the victim of his constitutional rights.⁷⁵

69. *Screws*, 325 U.S. at 159–61 (Roberts, Frankfurter, Jackson, JJ., dissenting) (internal quotation marks omitted).

70. Watford, *supra* note 68, at 469.

71. BELKNAP, *supra* note 60, at 73.

72. *Id.*

73. The three dissenters observed sarcastically that, in light of the fact predecessor versions of the statute lacked this term, “these considerations of vagueness imply unconstitutionality of the Act at least until 1909.” *Screws*, 325 U.S. at 154 (Roberts, Frankfurter, Jackson, JJ., dissenting). However, the Court’s evisceration of civil rights protections in the preceding three decades had made the statute impotent, thereby rendering meaningless the hypothetical unconstitutionality of the statute in that period.

74. Watford, *supra* note 68, at 480–86.

75. *Screws*, 325 U.S. at 103 (opinion of Douglas, J.) (“[S]pecific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.”).

The *Screws* decision was far from a model of clarity. Justice Douglas' plurality opinion further proclaimed that a form of extreme recklessness or conscious disregard could also satisfy the willfulness requirement, amplifying that "[w]hen they act willfully in the sense in which we use the word, they act in open defiance *or in reckless disregard* of a constitutional requirement which has been made specific and definite."⁷⁶ One who acts with such conscious disregard to a known constitutional right is, in effect, acting in a manner indistinguishable from specific intent. Therefore, such a mens rea could also satisfy the statutory "willfulness" requirement where no sane person "may be heard to say that he knew not what he did."⁷⁷

If § 242 also applies to conduct undertaken in "reckless disregard" of a known constitutional right, this is "a *mens rea* standard significantly lower than specific intent and one that would likely permit more prosecutions to go forward."⁷⁸ The Third and Ninth Circuits have long held that forms of reckless conduct are already actionable under the § 242 "willfulness" standard.⁷⁹

76. *Id.* at 105 (emphasis added).

77. *Id.* Equating extreme recklessness with willful or intentional conduct is an established legal concept. "Today . . . most jurisdictions apply a . . . definition of 'recklessness': . . . requir[ing] proof that the actor disregarded a substantial and unjustifiable risk *of which he was aware.*" JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 130 & n.102 (8th ed. 2018) (citing *Farmer v. Brennan*, 511 U.S. 825, 837–38 (1994) (holding that deliberate indifference requirement for a state Eighth Amendment violation requires proof of subjective indifference)). Similarly, the influential Model Penal Code permits a murder conviction where the killing is undertaken recklessly, under circumstances manifesting extreme indifference to human life. MODEL PENAL CODE § 210.2(1)(b) (AM. LAW INST. 1962). The official commentary elaborates:

Whether recklessness is so extreme that it demonstrates similar indifference is not a question, it is submitted, that can be further clarified. It must be left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter.

MODEL PENAL CODE AND COMMENTARIES § 210.2 cmt. 4 (AM. LAW INST. 1980). This creates difficulties in crafting comprehensible jury instructions, but such challenges arise in other areas of the law as well. Ultimately, the trier of fact must determine whether the level of recklessness established at trial satisfies the statutory mens rea, focusing on the defendant's subjective awareness and indifference of the relevant constitutional right. *Cf.* Frederick W. Danforth, Jr., *The Model Penal Code and Degrees of Criminal Homicide*, 11 AM. U. L. REV. 147, 163 (1962) (discussing less extreme forms of recklessness that would constitute manslaughter "depending upon how extreme a view of the case the jury takes" (internal quotation marks omitted)).

78. RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R44256, POLICE USE OF FORCE: RULES, REMEDIES, AND REFORMS 16 (2015).

79. For a circuit-by-circuit breakdown, see *id.* at 16–20. The Congressional Research Service notes that the Third and Ninth Circuit already employ a reckless disregard standard "but it is not clear whether this less stringent burden of proof has prompted DOJ to bring more prosecutions in those circuits." *Id.* at 18–19; *see, e.g.*, *United States v. Johnstone*, 107 F.3d 200, 208 (3d Cir. 1997) (requiring a less stringent showing under § 242 by permitting a conviction under a reckless disregard standard); *United States v. Gwaltney*, 790 F.2d 1378, 1386 (9th Cir. 1986) (upholding a reckless disregard instruction that read "[i]t is not necessary for the government to prove the defendant was thinking in constitutional terms at the time of the incident, for a reckless disregard for a person's constitutional rights is evidence of specific intent to deprive that person of those rights"). DOJ has implied that it may be prepared to litigate to establish a nationwide recklessness standard. In explaining the *Screws* "willfulness" requirement, the Criminal section of the current DOJ Civil Rights Division website notes "[m]istake, fear, misperception, or even poor judgment does not constitute willful conduct prosecutable under the statute." *Law Enforcement Misconduct*, DOJ, www.justice.gov/crt/law-enforcement-misconduct (last

Nationwide utilization of this standard, requiring subjective awareness, should assuage some of the alarmist “bar is too high” complaints concerning the efficacy of § 242 prosecutions.

This aspect of *Screws* also reinforces that a § 242 indictment cannot be drafted as a straightforward murder allegation.⁸⁰ Rather, the indictment must allege a somewhat conceptually awkward willful deprivation of the victim’s constitutional right to life or liberty, right to a trial, or some other clearly established due process right.⁸¹ As a result of relatively recent Supreme Court decisions further defining “seizures” for Fourth Amendment purposes, indictments based on pre-arrest confrontations now allege a willful deprivation of the right to be free from unreasonable force.⁸² Given that it is unfathomable that a law enforcement officer would be unaware of the existence of these bedrock constitutional rights, any claim of such subjective ignorance invariably would be rebutted by evidence that the officer was well-versed in these principles, and would almost certainly be rejected by a rational trier of fact.

Second, *Screws* implicitly established that negligent, including grossly negligent conduct of law enforcement officers, even if death results, was beyond the constitutional reach of the existing civil rights statutes.⁸³ Such conduct could

updated Feb. 25, 2019). Instructively, reckless conduct is *not* included as non-prosecutable conduct—thus implying such conduct is prosecutable. *Id.*

80. Professor Kaczorowski, has summarized:

Congress thus sought to authorize the federal courts to punish crimes, such as murder, by broadly defining them as violations of federally enforceable civil rights in order to avoid the accusation that the federal courts were unconstitutionally supplanting state courts in punishing offenses against the criminal laws of the states.

KACZOROWSKI, *supra* note 10, at 57.

81. *See id.* In the Michael Slager case, *see infra* notes 235–262 and accompanying text, Slager ultimately pled guilty to a federal civil rights violation and the South Carolina murder prosecution was dropped. The resolution of the federal case was criticized, *inter alia*, because Slager was not even required to admit he intended to kill Walter Scott. Instead, the factual basis for the plea only stated that Slager acted “with the intent to do something the law forbids.” Caleb Mason, *Why Did South Carolina Punt on the Slager Case?*, CRIME REP. (May 8, 2017), <https://thecrimereport.org/2017/05/08/why-did-south-carolina-punt-on-the-slager-case/> (internal quotation marks omitted); *see also* United States v. Lanier, 520 U.S. 259, 268–71 (1997) (discussing inherent flexibility in parameters establishing a “clearly established” due process right).

82. *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985). These cases hold that seizures occurring during an arrest, investigatory stop or other “seizure of a free citizen” are governed by the Fourth Amendment, while allegations of post-arrest excessive force are governed by a “shocks the conscience” due process standard, which would also include willfully depriving an arrestee of his right to a trial by killing him. THOMPSON II, *supra* note 78, at 2 n.14 (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

83. In an analogous context, the Supreme Court has intimated that a state actor’s negligent conduct resulting in loss of life does not amount to a due process violation. *See Daniels v. Williams*, 474 U.S. 327, 328 (1986) (“We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life . . .”); *Davidson v. Cannon*, 474 U.S. 344, 347–48 (1986) (concluding that state official’s negligence does not constitute a deprivation of a liberty interest under the Due Process Clause). Therefore, when coupled with the void for vagueness concerns which necessitate the willfulness *mens rea*, such conduct cannot be reached under any statute enacted pursuant to Congress’s enforcement powers under the Civil War amendments. This is further illustrated by Congress’s reliance on the Commerce Clause and Spending Clause in enacting its most recent amendments to federal hate crimes legislation and in its recent proposals to “lower the bar” to criminalize “mere” reckless and negligent conduct of police officers. *See, e.g.,*

be prosecuted, of course, under state law. Because the federal charges required the government to prove “willful” conduct, proving these charges in a federal prosecution was more difficult than proving state charges such as reckless endangerment, manslaughter, or negligent homicide. As the dual sovereignty doctrine became even more firmly entrenched, and § 242 remained a misdemeanor, the administration of justice would continue to be best served by a federal prosecutorial policy generally deferring to state prosecution in the first instance.

The statute received its present § 242, Title 18, U.S. Code designation as part of the comprehensive 1948 Federal Criminal Code revision.⁸⁴ The newly minted § 242 remained a misdemeanor at this time, as the statutory language remained unchanged from its 1909 revision.⁸⁵ During the Eisenhower Administration, the Civil Rights Section became a formal division within the Justice Department in the aftermath of the passage of the Civil Rights Act of 1957.⁸⁶ Despite a handful of public pronouncements, “Eisenhower provided the nation with little leadership in the civil rights area.”⁸⁷ In one notable exception, President Eisenhower reluctantly sent troops to Little Rock, Arkansas in 1957 order to uphold the sanctity of federal court orders and to “avoid anarchy,” but otherwise evinced little interest in federal criminal civil rights prosecutions.⁸⁸

18 U.S.C. § 249(a)(2)(A)(B)(i)–(iv) (2012) (most recent amendments to federal hate crimes statute covering victims that are not members of a “suspect class” for constitutional purposes require reliance on federal jurisdictional provisions based on statutory permutations of the Commerce Clause); *see also infra* text accompanying notes 325–331 (discussing proposed legislation concerning reckless and negligent police misconduct). Thus, Professor Lawrence’s criticism that the *Screws* plurality holding effectively sets forth a negligence standard seems in error. Lawrence, *supra* note 4, at 2185 (“Justice Douglas slid from specific intent to violate a constitutional right to something akin to negligence.”).

84. Act of June 25, 1948, Pub. L. 80-772, § 242, 62 Stat. 696.

85. An Act to Codify, Revise, and Amend the Penal Laws of the United States, ch. 321 § 20, Pub. L. No. 60-350, 35 Stat. 1092 (1909).

86. Attorney General William Rogers established the Civil Rights Division by special order on December 9, 1957. The order transferred “all functions . . . of the Civil Rights Section of the Criminal Division . . . to the Civil Rights Division.” OFFICE OF THE ATTORNEY GEN., U.S. DEP’T OF JUSTICE, ORDER NO. 155-57, ESTABLISHMENT OF THE CIVIL RIGHTS DIVISION IN THE DEPARTMENT OF JUSTICE (1957).

87. BELKNAP, *supra* note 60, at 33.

88. *Id.* at 33–37. President Eisenhower sought to enforce a federal court desegregation order and to counter the obstructionist tactics of Arkansas Governor Orval Faubus. He stated on a national television address:

“Under the leadership of demagogic extremists, . . . disorderly mobs have deliberately prevented the carrying out of proper orders from a Federal court. Local authorities have not eliminated that violent opposition.”

. . . .

The very basis of our individual rights and freedoms, . . . is the certainty that the President . . . will support and insure the carrying out of the decisions of the Federal Courts, even, when necessary with all means at the President’s command.

Unless the President did so, anarchy would result.

. . . .

Mob rule cannot be allowed to override the decisions of the courts.”

Anthony Lewis, *President Sends Troops to Little Rock, Federalizes Arkansas National Guard; Tells Nation He Acted to Avoid Anarchy*, N.Y. TIMES (Sept. 25, 1957), <http://movies2.nytimes.com/learning/general/>

The federal criminal law landscape was sufficiently in a state of flux such that the Eisenhower Administration recognized the urgency of promulgating procedures to equitably govern prosecution of the expanding category of conduct that was criminal under both state and federal law. The issue moved to the forefront as a result of Supreme Court decisions unrelated to civil rights. However, the *Screws* decision, with its latent potential to significantly expand the utility of § 242, ultimately would require the Eisenhower Administration to address the allocation of responsibility to prosecute concurrent jurisdiction cases, including sensitive and high profile civil rights cases.⁸⁹

Such was the murky and volatile state of the law when John F. Kennedy narrowly won the presidency in 1960. President Kennedy and his brother, Attorney General Robert F. Kennedy, were reluctant figures in the Civil Rights movement, who at first occupied no moral high ground on civil rights.⁹⁰ For the most part, the Kennedy Administration reluctantly authorized federal action only to enforce federal court desegregation orders and preferred that general law enforcement issues—such as protecting freedom riders exercising their constitutional right to interstate travel and ensuring order in the integration of public universities—be protected by state law enforcement. The Kennedy Administration recognized that prosecution of violent law breakers was a vital law enforcement concern, and preferred that such prosecutions, if possible, be effectively undertaken by state law enforcement.⁹¹ Protecting civil rights activists from mob racial violence in situations where local law enforcement was often complicit, and preventing mass scale mayhem and murder, became the pressing immediate concern.⁹² Development of a federal prosecutorial strategy in civil rights matters was, necessarily, a subordinate concern.

This was an ugly insurrectionist era when southern governors spoke of secession and evinced an abject disrespect of not only blacks, but also of the President, the Attorney General, and federal authority.⁹³ The Kennedy Administration was reluctant to send in the military to ensure peace and protect blacks, civil rights workers, and protesters, believing that the use of the military

onthisday/big/0925.html (quoting President Dwight D. Eisenhower, Address on Little Rock, Arkansas (Sept. 24, 1957)).

89. See Watford, *supra* note 68, at 481–86 (discussing legacy of *Screws* as removing one potential barrier to further federal intervention in the South). In 1959, the Eisenhower Administration eventually promulgated such policies. See sources cited *infra* notes 106–17 and accompanying text (discussing origins and development of *Petite Policy*).

90. See BELKNAP, *supra* note 60, at 70–72; STEVEN LEVINGSTON, *KENNEDY AND KING: THE PRESIDENT, THE PASTOR, AND THE BATTLE OVER CIVIL RIGHTS* 61–63 (2017).

91. BELKNAP, *supra* note 60, at 71–76, 77–95 (noting that the Kennedy Administration’s initial position was that federal law enforcement did not constitute a national police force, so deference to state law enforcement was deemed a necessity, and federal action was authorized only after State failed to act).

92. See *id.* at 77–97.

93. See, e.g., LEVINGSTON, *supra* note 90, at 270–73 (discussing integration of University of Mississippi crisis, noting that it “posed the most serious conflict between state and federal authority since the Civil War” and Governor Barnett telling Attorney General Robert Kennedy that he did not know whether Mississippi was still part of the United States).

as an occupying force in the South would be politically disastrous and could result in outright armed insurrection. Instead, the Administration preferred a more subtle federal presence, and, among other things, hastily cobbled together a rag tag group of federal marshals, dressed in suits and bright colored “safety vests” to assist in the enforcement of court orders concerning interstate travel and school desegregation.⁹⁴

This tack met with predictably disastrous results. In Alabama, Attorney General Kennedy’s special Justice Department assistant John Seigenthaler was seriously wounded during a violent Klan attack on the Freedom Riders, where local law enforcement purposely offered no assistance.⁹⁵ To assist in the integration of the University of Mississippi, the Attorney General, sent Deputy Attorney General Nicholas Katzenbach to help oversee the “hasty deployment of about 170 [federal marshals] dressed in business suits, white helmets, and bright orange vests that gave them an unthreatening appearance.”⁹⁶ With no local law enforcement assistance, a full blown armed insurrection ensued, several of the marshals were injured, and President Kennedy had to activate the Mississippi National Guard, now under presidential command, to restore order.⁹⁷

Attorney General Kennedy and Assistant Attorney General for Civil Rights Burke Marshall were adamant that the civil rights issues would only be solved when local attitudes eventually changed, spurred, in no small part, when local law enforcement assumed responsibility for maintaining law and order by vigorously prosecuting law breakers and obtaining convictions rendered by local juries. They were not naïve. RFK recognized that this necessary route of deferential federalism and dual sovereignty would not be traversed easily and would, unfortunately, likely result in “a lot of people being killed in the meantime.”⁹⁸ But they also recognized that the concept of federal-state concurrent jurisdiction to protect civil rights was entrenched, logical, and

94. *Id.* at 168 (describing the deputized marshals as “a motley force . . . cobbled together from various federal agencies . . . identified by their bright yellow armbands,” and further described as “middle-aged, fat, lethargic people with no law enforcement experience” (internal quotation marks omitted)). Perhaps the most famous depiction of these events is reflected in Norman Rockwell’s iconic 1964 painting, *The Problem We All Live With*, where four faceless deputy U.S. marshals, wearing staid business suits with yellow armbands and armed with only a court order, venture through a racist graffiti-marked school hallway while escorting a six-year-old African American girl to class during the 1960 New Orleans desegregation crisis.

95. BELKNAP, *supra* note 60, at 82.

96. LEVINGSTON, *supra* note 90, at 281.

97. *Id.* at 280–89. Presidential mobilization of the National Guard is rare, having occurred only twelve times since the 1952 enactment of the Armed Forces Act. Jonathon Berlin & Kori Rumore, *12 Times the President Called in the Military Domestically*, CHL. TRIB. (Jan. 27, 2017), <https://www.chicagotribune.com/news/ct-national-guard-deployments-timeline-htmlstory.html>. “[Six] of these incidents were during the turbulent civil rights struggles in the 1960s [and 1950s],” which included anti-desegregation violence and urban riots in the aftermath of the 1968 King assassination. *Id.* For a discussion of the painful, violent but transformative year of 1968, see MARK KURLANSKY, *1968: THE YEAR THAT ROCKED THE WORLD* (2004). For a provocative analysis of the inadequate efforts to address the causes of the urban riots of the late 1960s, see STEVEN M. GILLON, *SEPARATE AND UNEQUAL: THE KERNER COMMISSION AND THE UNRAVELING OF AMERICAN LIBERALISM* (2018).

98. BELKNAP, *supra* note 60, at 72–73.

necessary, and that the federal government could not simply prosecute its way out of the problem by deploying profligate General Ulysses S. Grant-like waves⁹⁹ of DOJ personnel armed with subpoenas, arrest warrants, and indictments. They further understood that it was absurd to wholly ignore the prospect of state felony prosecutions for this type of violent activity. Given that § 242 remained a misdemeanor, federal prosecution was hardly the most satisfactory legal alternative to address the violence against blacks and civil rights workers committed by local law enforcement personnel and others.¹⁰⁰ Federal prosecution would have to continue to perform a vitally important backstop function where the State failed to act responsibly.¹⁰¹

Eventually Attorney General Kennedy's Justice Department realized that targeted federal civil rights prosecutions were essential, and that even if some of the prosecutions did not result in convictions they nevertheless had some salutary effect. Under Attorney General Kennedy's leadership, the DOJ cautiously increased the number of "routine" police brutality prosecutions, but civil rights leaders understandably were frustrated over the insufficient federal response to violent police attacks on activists.¹⁰² When the DOJ decided to act, it had little trouble complying with the relevant DOJ policies concerning initial deference to state prosecution. State prosecutions were either an obvious sham, or, in most cases, were not even undertaken. In Alabama in 1965, conventional wisdom held that "it was simply 'not a punishable crime to kill a Negro or a civil rights worker.'"¹⁰³ Because § 242 was a misdemeanor, the DOJ could avoid presenting a case to a federal grand jury, which would be populated by potentially unsympathetic local southerners, and proceed instead by information.¹⁰⁴ This route was chosen on occasion. However, because even a misdemeanor would ultimately result in a jury trial composed of local jurors drawn from essentially the same venire as grand jurors, federal prosecutors sometimes opted for the grand jury route in order to glean a preliminary sense of how the citizenry would react to the case.¹⁰⁵ Professor Michal Belknap has written:

99. For a discussion dispelling the stereotype of General Grant as a "filthy 'butcher'" who depleted his superior manpower advantage by launching crude brutal assaults resulting in mass Union casualties during the Civil War, see CHERNOW, *supra* note 48, at xxi, 394–95, 403–09.

100. For a discussion of the 1968 and 1988 amendments to § 242 that raised the statute to a felony, see *infra* text accompanying notes 113–114.

101. See generally Brian R. Johnson & Phillip B. Bridgmon, *Depriving Civil Rights: An Exploration of 18 U.S.C. 242 Criminal Prosecutions 2001–2006*, 34 CRIM. JUST. REV. 196, 198 (2009) (discussing federal encouragement of local officials to police their own, and if this goal fails, Civil Rights Division "performs its backstop function to ensure justice").

102. BELKNAP, *supra* note 60, at 72, 100–02, 115.

103. Michal R. Belknap, *The Vindication of Burke Marshall: The Southern Legal System and the Anti-Civil-Rights Violence of the 1960s*, 33 EMORY L.J. 93, 93 & n.1 (1984) (quoting JACK MINNIS, 1 LIFE WITH LYNDON IN THE GREAT SOCIETY NO. 35 (1965)).

104. FED. R. CRIM. P. 7(a)(2); FED. R. CRIM. P. 58(b)(1) (current provisions permitting prosecution of a misdemeanor to proceed by information or indictment).

105. See BELKNAP, *supra* note 60, at 76, 168 (discussing choice to proceed by information and describing misdemeanor indictment for law enforcement depriving murdered civil rights workers of their constitutional

[T]he assailants were rarely brought to justice [in state courts]. One trial of Ku Klux Klansman charged with murdering [Detroit housewife Viola Liuzzo who was assisting with Reverend King's Selma to Montgomery voting rights march] and two trials of Byron de la Beckwith, accused killer of Mississippi NAACP leader Medgar Evers, ended with hung juries. Georgia jurors found Lemuel Penn's killers not guilty, despite hearing a full confession from a conspirator. The . . . retrial of Mrs. Liuzzo's alleged killer, also ended in acquittal. Mississippi authorities prosecuted no one for the ["Mississippi Burning"] murder of the three civil rights workers

. . . .

There were limits to the injustice which the Department of Justice could endure. Finally, it prosecuted the killers of [civil rights workers] Schwerner, Goodman, and Chaney, of Lemuel Penn, and of Viola Liuzzo, using two laws enacted during Reconstruction, which made it a crime to deprive another person of his civil rights.¹⁰⁶

Subsequent federal prosecutions arising out of those events led to prosecution-favorable Supreme Court decisions on the breadth of civil rights enforcement, most notably *United States v. Guest*¹⁰⁷ and *United States v. Price*.¹⁰⁸ Coupled with the enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, which empowered minority communities, and even the 1971 integration of the iconic University of Alabama football team,¹⁰⁹ positive changes in public opinion toward integration and the enforcement of civil rights finally took root, and the white southern power structure eventually recognized the necessity of effectively prosecuting racial violence in order to prevent anarchy.¹¹⁰ The South began to warily accept integration and its attendant responsibility to properly prosecute racial violence—including criminal acts committed by law enforcement.¹¹¹

Thus, Attorney General Kennedy and Burke Marshall achieved a vindication of sorts. The end of the turbulent decade of the 1960's marked the arrival of the modern era of federal criminal civil rights enforcement, and the role of the federal government to serve as a backstop to state law enforcement became sounder in both theory and practice. No longer having to confront large scale local law enforcement complicity with racial violence on a regular basis,

right to be immune from punishment without due process); Harry H. Shapiro, *Limitations in Prosecuting Civil Rights Violations*, 46 CORNELL L.Q. 532, 547–49 (1961) (discussing choice to proceed by information or indictment).

106. Belknap, *supra* note 103, at 102–03, 104.

107. 383 U.S. 745 (1966).

108. 383 U.S. 787 (1966). For a comprehensive analysis of *Guest* and *Price*, see BELKNAP, *supra* note 60, at 159–82.

109. See CHARLES H. MARTIN, *BENCHING JIM CROW: THE RISE AND FALL OF THE COLOR LINE IN SOUTHERN COLLEGE SPORTS, 1890–1980*, at 273–78 (2010) (discussing integration of Bear Bryant's Alabama football team); see also *id.* at xv (discussing the importance of college athletics to southern white males, and recognizing that college football inspired "such fanatical passion . . . [to] unite[] masses of citizens from a region . . . in a collective emotional embrace").

110. BELKNAP, *supra* note 60, at 229–39.

111. *Id.* at 229–52 (discussing "restoration" of Southern order); see also KURLANSKY, *supra* note 97 (recognizing volatile 1960s decade that transformed American society).

the DOJ would eventually confront the “ordinary” textbook cases of police excessive force claims.¹¹² Deferring to state prosecution in the first instance as a matter of policy ensured that a potential federal prosecution would remain a legal alternative and serve as a “backstop” in the event the state trial constituted such a serious miscarriage of justice that the extraordinary remedy of a duplicative federal trial for the same conduct was necessary.

In 1968, Congress increased the maximum sentence for a § 242 violation to “any term of years or for life” where the alleged conduct resulted in death.¹¹³ This long overdue change to felony status further altered the dynamic between state and federal prosecution. Defendants and the state law enforcement apparatus could no longer blithely ignore the threat of a perceived insignificant federal misdemeanor. The 1968 amendment also reflected some increased faith in southern federal grand juries.

Curiously, all other instances of alleged police misconduct, even if resulting in serious physical injury, remained a misdemeanor. Two decades later, in 1988, Congress finally remedied this statutory vestige and raised § 242’s penalty to a maximum ten years imprisonment where the alleged victim suffered serious bodily injury not resulting in death.¹¹⁴ In 1994, Congress increased the maximum sentence to include the death penalty for certain specified egregious conduct, and these provisions set forth the current § 242 penalty structure.¹¹⁵

IV. DEPARTMENT OF JUSTICE GUIDELINES FOR SUCCESSIVE PROSECUTIONS BASED ON THE SAME UNDERLYING CONDUCT

A. ORIGINS OF THE *PETITE* POLICY

Section 242 evolved alongside the companion evolution of internal DOJ policies that provided additional guidance on how federal prosecutors would utilize these statutes. The first federal prosecutorial policies concerning the investigation of federal criminal civil rights cases were promulgated in 1866, and thus predate the 1870 creation of the Department of Justice. After the first Civil Rights Act was enacted over President Andrew Johnson’s veto, at least one

112. *Id.* at 115 (describing Attorney General Kennedy’s increase of § 242 prosecutions as “ordinary police brutality cases”); *see also* Johnson & Bridgmon, *supra* note 101, at 198 (noting the DOJ’s increased use of § 242 during the 1960s).

113. Civil Rights Act of 1968, Pub. L. No. 90-284, § 103(b), 82 Stat. 75 (codified as amended at 18 U.S.C. § 242 (2012)). The Civil Rights Conspiracy Statute, 18 U.S.C. § 241, which also reached private actors, contained a ten-year statutory maximum since at least 1909. An Act to Codify, Revise, and Amend the Penal Laws of the United States, ch. 321, § 19, 35 Stat. 1092 (1909). Because police brutality cases often concerned individual criminal acts only, a conspiracy charge was often unavailable. Accordingly, elevation of § 242 to felony status was significant.

114. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7019, 102 Stat. 4396.

115. 18 U.S.C. § 242; *see also* Violent Crime Control Act of 1994, Pub. L. No. 103-322, 108 Stat. 1970–71 (1994) (adding death penalty provisions to 18 U.S.C. §§ 241 and 242). In addition, §§ 241 and 242 were further amended by removing the “any inhabitant” language and adding the more inclusive and comprehensive “any person” language. Pub. L. 103-322, § 320201(b), 108 Stat. 2113. This language remains in current §§ 241 and 242.

United States attorney “instructed federal officers to assume primary criminal jurisdiction only after blacks were denied justice in the state courts.”¹¹⁶ A small Civil Rights Section within the DOJ was created in 1939 which afforded another opportunity to revisit relevant DOJ policies and to reinforce federal deference to state prosecutions.¹¹⁷

As noted above, the Civil Rights Act of 1957 established the Civil Rights Division within the Department of Justice. While this action theoretically raised the profile of civil rights enforcement, the Eisenhower Administration still did not view federal criminal civil rights prosecutions as a priority and thus these prosecutions were generally not considered as a particularly useful or effective alternative to state prosecution. This further fostered the attitude that prosecution for this type of violence was primarily the province of state law enforcement.¹¹⁸

B. THE *PETITE* POLICY

In 1959, the Supreme Court decided two cases that raised the profile of dual sovereignty and successive prosecutions—neither of which concerned civil rights. First, in *Bartkus v. Illinois*,¹¹⁹ the State of Illinois prosecuted Bartkus for robbery after he had been tried in federal court and acquitted for robbery of a federally insured savings and loan.¹²⁰ Both trials concerned identical conduct.¹²¹ The Supreme Court held, five to four, that the dual sovereignty doctrine permitted such successive prosecutions and did not violate the double jeopardy clause because prosecutions by separate sovereigns were not prosecutions for the “same offence.”¹²²

On the same day, the Court decided the companion case of *Abbate v. United States*.¹²³ There, the defendants were indicted and pled guilty to Illinois state charges of conspiring to injure or destroy property.¹²⁴ Each defendant received a sentence of three months’ imprisonment.¹²⁵ Thereafter, the defendants were indicted and ultimately convicted of violating §§ 1362 and 371 of Title 18 of the United States Code, for conspiring to destroy certain communications property.¹²⁶ The underlying charged acts concerned the identical property and acts at issue in the prior state prosecution.¹²⁷ By the same

116. KACZOROWSKI, *supra* note 10, at 52.

117. GOLUBOFF, *supra* note 61, at 111–12 (discussing creation of a Civil Liberties Unit within the Department of Justice in 1939, which was renamed the Civil Rights Section in 1941 in order to avoid confusion with the ACLU).

118. *See supra* text accompanying notes 86–88.

119. 359 U.S. 121 (1959).

120. *Id.* at 121–22.

121. *Id.* at 122.

122. *Id.* at 132 (citing *Moore v. Illinois*, 55 U.S. 13, 20 (1852)).

123. 359 U.S. 187 (1959).

124. *Id.* at 188.

125. *Id.*

126. *Id.* at 188–89.

127. *Id.*

five to four vote, the Court upheld the propriety of the federal prosecution as not violative of the double jeopardy clause.¹²⁸

Negative reaction was swift. Almost immediately, Congress introduced a bill to generally bar federal prosecution if a state had previously prosecuted a defendant for the same conduct.¹²⁹ On April 5, 1959, approximately a week after the *Abbate* and *Bartkus* decisions, Attorney General William Rogers issued a press release which later evolved and became known as the *Petite* Policy.¹³⁰ Rogers sought to avoid a possible judicial and legislative backlash if dual sovereignty principles resulted in perceived significant federal prosecutorial abuse that trammelled the spirit of, if not the literal scope of, constitutional double jeopardy protections.¹³¹ His press release, in the form of a directive to United States Attorneys, provided:

In two decisions on March 30, 1959, the Supreme Court . . . reaffirmed the existence of a power to prosecute a defendant under both federal and state law for the same act or acts. That power, which the Court held is inherent in our federal system, has been used sparingly by the Department of Justice in the past. The purpose of this memorandum is to insure that in the future we continue that policy. *After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling . . .*

It is our duty to observe not only the rulings of the Court but the spirit of the rulings as well. In effect, the Court said that although the rule of the *Lanza* case is sound law, enforcement officers should use care in applying it. Applied indiscriminately and with bad judgment it, like most rules of law, could cause considerable hardship. Applied wisely it is a rule that is in the public interest. Consequently—as the Court has clearly indicated—those of us charged with law enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area.

Cooperation between federal and state prosecutive officers is essential if the gears of the federal and state systems are to mesh properly. We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution very seldom should arise.

In such event I doubt that it is wise or practical to attempt to formulate detailed rules to deal with the complex situation which might develop, particularly because a series of related acts are often involved. However, no federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first

128. *Id.* at 195–96.

129. A Bill to Amend Title 18, United States Code, Entitled “Crimes and Criminal Procedure,” H.R. 6176, 86th Cong. (1959); *see also* NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 742–43 (2d ed. 1993) (discussing congressional reaction).

130. The policy is named after *Petite v. United States*, 361 U.S. 529 (1960) (per curiam), decided one year after Attorney General Rogers’ press release. *See id.* at 531 (discussing the press release); *see also infra* notes 133–134 and accompanying text.

131. *See* James E. King, Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 *STAN. L. REV.* 477, 489 & n.60 (1979) (citing Edward Levi, U.S. Attorney Gen., Address at the Ninth Circuit Judicial Conference (July 28, 1976)).

submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having it first brought to my attention.¹³²

The policy expressed the principle that federal coordination and cooperation with state authorities was expected, and successive prosecutions were to be undertaken sparingly and only in compelling circumstances. Directed toward members of Congress and the federal judiciary, the policy was made public in the form of a press release—a somewhat unusual state of affairs given that, at the time, directives and “bluesheets” to United States Attorneys were almost exclusively internal DOJ communications generally unavailable to the public.

Less than a year later, in *Petite v. United States*,¹³³ the Solicitor General filed a Supreme Court motion to vacate a conviction on the ground that the instant federal prosecution followed a prior federal prosecution for the same acts, invoking the Attorney General’s previously announced policy in support. Ever since the *Petite* decision, which concerned a successive federal prosecution, the policy has been referred to as the *Petite* Policy.¹³⁴

Thereafter, the *Petite* Policy became necessarily intertwined with the complexities of the civil rights struggles, which were unfolding at the same time. The specter of a federal civil rights prosecution following a state prosecution played some role in the development and refinement of the Policy over the next several decades, during which time the Principles of Federal Prosecution were promulgated and made publicly available in 1980.¹³⁵ However, it would be an overstatement to conclude that the further entrenchment of dual sovereignty doctrine was necessary to ensure that biased and sham state prosecutions resulting in acquittals would not bar subsequent federal civil rights prosecutions.¹³⁶ Even if the Supreme Court overruled the dual sovereignty

132. ABRAMS & BEALE, *supra* note 129, at 756–57 (second alteration in original) (emphasis added) (reprinting relevant excerpts of the press release).

133. 361 U.S. 529 (1960) (per curiam).

134. *Bartkus* and *Abatte* both concerned a subsequent prosecution based on essentially the same underlying acts as a prior trial undertaken by a different sovereign. This scenario is sometimes labeled a “dual” or “duplicative” prosecution. Similar equitable concerns arise when a federal prosecution follows an earlier federal prosecution, sometimes described as a “successive” prosecution. The *Petite* Policy covers both circumstances and the terms are now often used interchangeably.

135. Attorney General Benjamin Civiletti announced the promulgation of the Principles of Federal Prosecution in prepared remarks at the Ninth Circuit Judicial Conference in July 1980. They were intended to, *inter alia*, “bolster public confidence in the administration of [criminal] justice.” Benjamin R. Civiletti, U.S. Attorney Gen., Remarks at the Ninth Circuit Judicial Conference 7–8 (July 14, 1980). The Principles ultimately were incorporated into the United States Attorneys’ Manual, where they remain today. JUSTICE MANUAL, *supra* note 22, §§ 9-27.000–.760. They are specifically referenced in the *Petite* Policy as always applying to supplement all *Petite* inquiries. JUSTICE MANUAL 9-2.000, *supra* note 24, § 9-2.031(A). Civiletti considered establishing the Principles as his most significant accomplishment as Attorney General. *Legends in the Law: Benjamin R. Civiletti*, WASH. LAW., <https://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/legend-civiletti.cfm> (last visited Mar. 17, 2019).

136. On the last day of the 2017–18 Term, the Supreme Court granted certiorari to reconsider the dual sovereignty doctrine. *Gamble v. United States*, 694 F. App’x 750 (11th Cir. 2017), *cert. granted*, 138 S. Ct. 2707

doctrine, under the Double Jeopardy Clause, a federal criminal civil rights charge would almost invariably not constitute the “same offense” as a state homicide charge because each statute requires proof of a statutory element not found in the other.¹³⁷

In late 1963, the DOJ opposed a proposed amendment to Rule 8 of the Federal Rules of Criminal Procedure to require “compulsory joinder” of all related offenses.¹³⁸ Such a proposal, if enacted, would have become a judicially enforceable rule superseding any inconsistent discretionary DOJ policy. However, despite the timing of the proposal, which came in the midst of the violent civil rights flashpoints that punctuated the Kennedy years, the proposed amendment was unrelated to civil rights prosecution concerns because it only affected intra-sovereign successive federal prosecutions.¹³⁹

The civil rights struggle of the 1960s raised difficult and profound issues for federal law enforcement and society at large. The problems extended far beyond discrete instances of police brutality and whether the state would pursue criminal charges where an African-American or civil rights worker was killed

(2018). *Gamble* is the culmination of a decades-long effort to obtain Supreme Court review of this issue. For a detailed analysis of civil rights prosecutions and double jeopardy, see Special Issue, *The Rodney King Trials: Civil Rights Prosecutions and Double Jeopardy*, 41 UCLA L. REV. 509 (1994). For a brief summary of how federal police misconduct cases under § 242 and the *Petite* Policy would likely survive the abolishment of dual sovereignty based on application of the Supreme Court’s test to determine the “same offense” despite likely resulting uncertainty and confusion, see Brief of Howard University School of Law Thurgood Marshall Civil Rights Center as Amicus Curiae Supporting Neither Party at 5–20, *Gamble v. United States*, 138 S. Ct. 2707 (No. 17-646), https://www.supremecourt.gov/DocketPDF/17/17-646/62989/20180907101706930_17-646tsacHowardUniversitySchoolOfLaw.pdf [hereinafter Howard TMCRC Amicus Brief] (arguing that applying the *Blockburger* test, § 242, is not the “same offense” as state law homicide or assault statutes, and *Petite* Policy also permits successive prosecutions based on related conduct where the statutes at issue do not constitute the same offense) (the Author was principal author of the Brief); see also *infra* note 148 and *infra* Postscript.

137. *Blockburger v. United States*, 284 U.S. 299 (1932); see also text accompanying *supra* note 136. Moreover, “[i]t has been suggested that because the Fourteenth Amendment was adopted after the Fifth Amendment[] . . . Congressional enforcement authority under [section five of the Fourteenth Amendment] might be understood to create an exception to double jeopardy.” NORMAN ABRAMS ET AL., *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 117 (6th ed. 2015); see also Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights “Exception,”* 41 UCLA L. REV. 649, 671 (1994). The history of the drafting and ratification of the Fourteenth Amendment and the enactment of the original federal criminal civil rights statute suggest that federal prosecutions provided a remedy where the state criminal justice system failed. Howard TMCRC Amicus Brief, *supra* note 136, at 10–11, 20–24.

138. See Letter from Assistant Attorney Gen., Criminal Division re Proposed Amendments to Rule 8 (Dec. 23, 1963), reprinted in FRANK REMINGTON ET AL., *CRIMINAL JUSTICE ADMINISTRATION: CASES AND MATERIALS* 464–68 (1969).

139. *Id.* The Rule 8 proposal closely followed the publication of the influential Model Penal Code in 1962, which contained a similar compulsory joinder provision. MODEL PENAL CODE § 1.07(2) (AM. LAW INST. 1962). The proposed Rule 8 compulsory joinder provision impacted the *Petite* Policy because the Policy also applied to successive intra-sovereign federal prosecutions where dual sovereignty was inapplicable. The proposal would have required all known related federal charges to be brought in a single indictment, thereby eliminating all possibilities to bring related federal charges not barred by the Double Jeopardy Clause in a subsequent federal indictment. This scenario is unrelated to the dual sovereignty issues surrounding a “dual” federal civil rights prosecution following a state prosecution for the same underlying conduct. Compulsory joinder is a complex and controversial matter that substantially undercuts traditional notions of prosecutorial discretion. NEIL P. COHEN ET AL., *CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS* 300–01 (4th ed. 2014).

by either mob violence or local law enforcement. Rather, the overriding, immediate concern was the abject failure or unwillingness of state and local law enforcement to maintain law and order writ large, often based on their own complicity or outright refusal to protect blacks and other civil rights protesters from mob violence. As discussed above, the federal government had faced a somewhat similar problem a century earlier in the immediate aftermath of the Civil War.

C. THE *PETITE* POLICY AND THE INTERSECTION OF FEDERAL CIVIL RIGHTS ENFORCEMENT

After 1959, the *Petite* Policy underwent nearly two decades of modifications and detailed expansions, including the 1980 formal promulgation of the Principles of Federal Prosecution, which also impacted *Petite* Policy deliberations. By 1984, the *Petite* Policy had been made part of the U.S. Attorneys' Manual by name, where it has remained, with several modifications, to the present time.¹⁴⁰

As noted above, the Policy as first elucidated by Attorney General Rogers was brief and directed at mollifying the Supreme Court and Congress that federal dual or successive prosecutions—following a related federal or state prosecution for essentially the same conduct—would be highly extraordinary events. As such, the original directive contained no real guidance other than its general directive that such prosecutions were highly disfavored. As federal criminal prosecution evolved in the following decades and prosecutorial decision making became more complex, the need for more detailed and publicly available prosecutorial guidelines became more acute. The Policy transformed from a general assurance that successive prosecutions would be extraordinarily rare into one providing more detailed guidance setting forth the relevant factors to consider when a successive federal prosecution could be authorized based on a determination that a “substantial federal interest” has been left “demonstrably unvindicated” by the prior prosecution that was resolved on the merits.

These critical terms are now subject to several definitions that are part of the current Policy. As summarized by Professors Norman Abrams and Sara Sun Beale:

General exceptions were carved out early in the policy's history, and the authorization procedure has been changed from what it was originally. There was an early unpublicized exception to the policy. . . . [A 1963 DOJ memorandum provided] “[a]t the outset, the [*Petite*] policy was not applied to wagering tax,

140. The Justice Manual, formerly known as the U.S. Attorneys' Manual, of which the *Petite* Policy is a part, underwent a comprehensive revision in 2018. The *Petite* Policy was last revised in 2009, and apparently was not modified during the 2018 revision. See Zoe Tillman, *The Justice Department Deleted Language About Press Freedom and Racial Gerrymandering from Its Internal Manual*, BUZZFEED NEWS (Apr. 29, 2018, 3:10 PM), <https://www.buzzfeednews.com/article/zoetillman/the-justice-department-deleted-language-about-press-freedom> (discussing deputy Attorney General Rod Rosenstein's ordered comprehensive review of the U.S. Attorneys' Manual); see also *infra* note 265.

liquor tax and narcotics tax cases, but in 1965 the policy was extended to these cases also.”¹⁴¹

The 1970 U.S. Attorneys’ Manual provided:

[W]hen a U.S. Attorney becomes aware of outstanding State charges of a more serious nature or it, on balance, appears that offenses of an equal nature are determined to be primarily of State concern, he should as a matter of courtesy accommodate the interested State when that State demonstrates a desire to proceed with its local prosecution.

Furthermore, it is Department policy that after a State prosecution there should be no Federal trial for the same act or acts unless there are compelling Federal interests involved, in which case prior authorization should be obtained from the appropriate Assistant Attorney General¹⁴²

The statement, even when considered in conjunction with Attorney General Rogers’ 1959 press release, offered no real guidance concerning how to determine the relative seriousness of the relevant state and federal charges, what factors impacted the determination of a compelling federal interest, and made no specific reference to civil rights cases. In addition, it did not delineate how, if at all, the resolution of the state charges, either by dismissal, guilty verdict, or acquittal, should affect DOJ determination.

In a February 11, 1977 Memorandum to U.S. Attorneys, Attorney General Griffin Bell announced an exception to the policy for civil rights cases which “necessarily involve compelling federal interests.”¹⁴³ Bell specifically exempted all federal civil rights cases from the policy, stating “civil rights laws protect federal interest so vital in nature that they must be enforced independently of any related state actions.”¹⁴⁴ The exception had no applicability where the state had not prosecuted at all. In both circumstances, federal prosecutors would still have to determine whether the facts of a particular civil rights investigation warranted federal prosecution, based on the normal exercise of federal prosecutorial discretion.

The civil rights exception was modified indirectly in 1980 with the adoption of the Principles of Federal Prosecution, which provided guidance applicable to all federal cases to determine whether a prospective case concerned

141. ABRAMS & BEALE, *supra* note 129, at 773 (citations omitted).

142. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL 5 (1970) [hereinafter USAM 1970]. In 1977, the Policy was subject to a modification that added the word “substantially” to provide “[n]o Federal case should be tried when there has been a state prosecution for *substantially* the same act or acts without a recommendation having been made . . . demonstrating compelling Federal interests for such prosecution.” Joseph S. Allerhand, Note, *The Petite Policy: An Example of Enlightened Prosecutorial Discretion*, 66 GEO. L.J. 1137, 1137 n.3 (1978) (emphasis added) (citing U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-2.142 (1977) [hereinafter USAM 1977]).

143. Allerhand, *supra* note 142, at 1141 (citing Memorandum from Griffin Bell, U.S. Attorney Gen. to all U.S. Attorneys 1 (Feb. 11, 1977)).

144. *Id.* at 1141 n.19.

a substantial federal interest warranting federal prosecution.¹⁴⁵ However, the Principles themselves added no specific factors that would have either conclusively prohibited or required a particular federal civil rights prosecution. Griffin's civil rights exception lasted no later than 1984, when the *Petite* Policy was revised and for the first time specifically provided that a second prosecution could go forward if "the [prior] state proceeding left substantial federal interests demonstrably unvindicated."¹⁴⁶

The 1984 revision recognized that Attorney General Rogers' initial 1959 statement coupled with the skeletal pronouncements in the U.S. Attorneys' Manual were inadequate. At the outset, the revision amplified Attorney General Rogers' original double jeopardy-inspired fairness concerns, noting that the policy of precluding a

federal prosecution following a state prosecution based on substantially the same act or acts unless there is a compelling federal interest [is intended]. . . . to promote efficient utilization of the Department's resources and to protect persons charged with criminal conduct from the unfairness associated with multiple prosecutions and multiple punishments for substantially the same act or acts.¹⁴⁷

The fairness concerns meant that the Policy was broader than simple applications to prosecutions that might otherwise be barred by double jeopardy. Rather, the Policy would be applied in a "common sense, non-technical" manner, applying "even where a prospective federal prosecution requires proof of different elements than the state offense" and thus "would not—[be prohibited] under strict Double Jeopardy principles."¹⁴⁸

The 1984 revision also recognized for the first time, albeit opaquely, the importance of the order of the potential state and federal prosecutions. The policy noted that "in a matter involving overlapping federal jurisdiction, federal prosecutors should not only coordinate their activities with their state counterparts, but also carefully consider whether there is a federal interest

145. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-27.220 (1980) [hereinafter USAM 1980] (stating that a decision to prosecute requires more than mere probable cause; admissible evidence must probably be sufficient to obtain and sustain a conviction); *id.* § 9-27.230 (defining "substantial federal interest"). Attorney General Civiletti's original 1980 remarks noted that "no prosecution should be initiated . . . unless the government believes that the evidence is legally sufficient and that the person probably will be found guilty." Civiletti, *supra* note 135, at 3.

146. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-2.142(A)(3), at 24 (1984) [hereinafter USAM 1984]. Griffin devised his civil rights exception when he overrode then existing DOJ policy and personally authorized a federal civil rights prosecution based on police brutality against Hispanic victims, even though the DOJ had determined the prior state trial resulting in an acquittal was a fair trial. *Legends in the Law: Benjamin R. Civiletti*, *supra* note 135. The initial decision to decline prosecution outraged segments of the Hispanic community and led to some opposition to Civiletti's nomination for Attorney General. *Id.*

147. USAM 1984, *supra* note 146, § 9-2.142(A), at 21.

148. *Id.* § 9-2.142(A)(2), at 23 & n.4. Even with various modifications, this general principle still applies today. See JUSTICE MANUAL 9-2.000, *supra* note 24, § 9-2.031(B) (providing expressly that the Policy "applies even where a prior state prosecution would not legally bar a subsequent federal prosecution under the Double Jeopardy Clause because of the doctrine of dual sovereignty . . . or a prior prosecution would not legally bar a subsequent state or federal prosecution" under *Blockburger* principles defining the "same offense" (citations omitted)).

warranting a separate federal prosecution.”¹⁴⁹ The policy stopped just short of expressly endorsing a strong preference for resolving all issues in one prosecution.

In addition, the 1984 revision expressly brought Civil Rights back into the orbit of the *Petite* Policy, noting in a footnote:

The reference in the policy to a “compelling federal interest” or “substantial federal interest” is intended to indicate that a significant federal prosecutorial interest must be present to justify authorization of a dual prosecution. . . . cases coming within priority areas of the Department—*such as civil rights cases, organized crime cases, tax cases, and cases involving crimes against federal officials, witnesses or informants*—are, of course, more likely to meet the compelling federal interest requirement.¹⁵⁰

This provision addressed satisfaction of the substantial federal interest requirement. However, unlike the earlier Griffin Bell edict, it did not exempt all civil rights cases where the same act had been the subject of a prior state prosecution from the inquiry as to whether a substantial federal interest had been left substantially unvindicated.

Finally, the 1984 revision sought to address how to evaluate whether a substantial federal interest was left demonstrably unvindicated by the prior prosecution. This provided, for the first time, more than general aspirational guidance as to what constituted the necessary requisites where a successive federal prosecution should proceed.

The applicable factors were divided depending on whether the prior prosecution was a state or federal prosecution. For a prior state court prosecution resulting in a conviction, it noted that a subsequent federal prosecution “normally will not be authorized unless an enhanced sentence in the federal prosecution is anticipated.”¹⁵¹ A state court misdemeanor conviction or inadequate attention to victim restitution were the sole listed examples.¹⁵² The Policy then listed a handful of other circumstances that arguably could apply after both state court convictions and acquittals. The list included that the prior determination concerning guilt or severity of the sentence was influenced by incompetence, corruption, unavailability of evidence, and erroneous exclusion of evidence.¹⁵³ Notably, jury nullification was *not* expressly listed. Additionally, the Policy did not seem to permit a federal prosecution where the prior state trial was deemed fair. Lastly, it also listed “failure of the state to prove an element of the state offense which is not an element of the federal offense” as well as other

149. USAM 1984, *supra* note 146, § 9-2.142(A)(1), at 22.

150. *Id.* § 9-2.142(A)(3), at 24 n.7 (emphasis added).

151. *Id.* § 9-2.142(A)(3), at 24.

152. *Id.* § 9-2.142(A)(3), at 24 nn.7 & 8. The guideline did not expressly consider a prior state felony conviction resulting in a very lenient sentence. Such a scenario was not excluded from this version of the policy, but further clarification seemed necessary.

153. *Id.* § 9-2.142(A)(3)(a)–(b), at 25.

state court suppression results that might not apply in a subsequent federal criminal prosecution.¹⁵⁴

This formulation proved inadequate for the task and likely resulted in a considerable source of confusion that thwarted coherent and consistent, albeit publicly undisclosed, decision making. In 1992, the *Petite* Policy was overhauled again, superseding all prior guidelines on the subject.¹⁵⁵ The main structural change concerned reconfiguring the specific factors to determine whether a substantial federal interest was left demonstrably unvindicated and made their evaluation applicable to both prior state and federal prosecutions.

The 1992 revision added a prong that expressly addressed a prior state conviction and provided that “a subsequent prosecution may be warranted if the defendant in the state proceeding was charged with a state offense carrying a maximum penalty substantially below the maximum penalty of the [contemplated] federal offense(s).”¹⁵⁶ Thus, a state felony conviction, not just a misdemeanor conviction, which resulted in an inappropriately low sentence could justify a successive federal prosecution under the new policy.

The second prong, again, did not, by its express terms, exclusively apply only to prior acquittals. However, prior acquittals were clearly within the ambit of the coverage that, along with prior convictions, may have resulted in manifestly inappropriate sentences. It also merged the factors that applied to prior state prosecutions and prior federal prosecutions (or both) into the same section, but designated which scenario(s) applied to which type of prior prosecution.¹⁵⁷

The 1992 revision retained the 1984 factors noted above that could support a finding of a demonstrably unvindicated federal interest. However, most significantly, the 1992 revision added the critical factor that “[c]ourt or jury nullification involving an important federal interest, in blatant disregard of the evidence” could support a finding that a substantial federal interest was left demonstrably unvindicated.¹⁵⁸ The *Petite* Policy finally directly addressed the situation where racially biased juries acquitted white defendants, or where juries otherwise irrationally favored police officer defendants in blatant disregard of the evidence.

The second prong did not expressly or exclusively deal with a prior acquittal, but that eventuality was clearly contemplated. However, prior acquittal factors were also blended with other scenarios that could also apply to a first state trial that resulted in a conviction on at least some lesser charges.

In 1994, the DOJ’s Dual and Successive Prosecution Policy was again completely revised and “supersede[d] all prior Department guidelines and policy

154. *Id.* § 9-2.142(A)(3)(c)–(d), at 25.

155. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-2.142(B)(4) (1992) [hereinafter USAM 1992].

156. *Id.* § 9-2.142(A)(3), at 23. Note that this provision is narrowly focused on the charged offense. Thus, it technically did not address the relatively common situation where a state defendant is charged with a serious felony but convicted of a lesser included felony offense not expressly charged in the indictment or information.

157. *Id.*

158. *Id.* § 9-2.142(A)(3)(b), at 23.

statements on the same subject.”¹⁵⁹ Several key entirely new provisions were added that still remain in the current version in virtually identical form. The current version, last modified entirely in 2009, is essentially identical to the 1994 revision with only minor non-substantive technical and grammatical changes.¹⁶⁰

First, the 1994 revision expressly directed federal prosecutors, for resource efficiency reasons, to promptly “coordinate with their state counterparts to determine the most appropriate single forum in which to proceed to satisfy the substantial federal and state interests involved, and to resolve all criminal liability for the acts in question if possible.”¹⁶¹ This was stronger language than previously used, and further emphasized the DOJ’s preference to resolve all related criminal charges in one proceeding.

Next, the general definition of a “substantial federal interest” was further augmented with reference to the Principles of Federal Prosecution.¹⁶² Civil rights cases were not specifically mentioned or excluded.¹⁶³ Rather, the revised policy provided that “[m]atters that come within the national investigative or prosecutorial priorities established by the Department are more likely than others to satisfy [the substantial federal interest] requirement.”¹⁶⁴

The revised 1994 policy further added a procedural directive that “[i]n general, the Department will presume that a prior prosecution, regardless of result, has vindicated the relevant federal interest.”¹⁶⁵ This critical new provision, perhaps the single most important modification, set forth the operative procedural framework concerning DOJ’s assessment of whether a substantial federal interest had been left substantially unvindicated, and further reinforced the DOJ preference for resolution in a single forum. As the Author has explained previously:

The policy acknowledges, in effect, that a separate federal interest exists with respect to a federal prosecution based on the same acts (essentially reconfirming the dual sovereignty rationale), but that the separate interest is *presumed* to have been satisfied by the prior state prosecution, regardless of the result, so long as the prosecution resulted in either a conviction or an acquittal on the merits. In other words, the policy implies that the federal government’s primary interest in

159. Memorandum from Janet Reno, U.S. Attorney Gen. to Holders of Title 9, U.S. Attorneys’ Manual 1 (Dec. 14, 1994), <https://www.justice.gov/archive/usao/usam/1988/title9criminaldivisionchapters1-6.pdf>.

160. See JUSTICE MANUAL 9-2.000, *supra* note 24, § 9-2.142.

161. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL, § 9-2.142(I)(E), at 3 (1994) [hereinafter USAM 1994]. That provision is presently found in the current edition at JUSTICE MANUAL 9-2.000, *supra* note 24, § 9-2.031.

162. USAM 1994, *supra* note 161, § 9-2.142(I)(D), at 3 (stating that traditional elements of prosecutorial discretion as set forth in Principles of Federal Prosecution, *id.* § 9-27.110, still apply).

163. As further discussed above, the eventual deletion of the civil rights footnote 7 language from the 1984 version—footnote 8 in the 1992 revision—does not appear to have been intended as a substantive judgment that those areas are no longer federal prosecutorial priorities. See *supra* note 150 and accompanying text; see also *infra* note 174 (discussing elimination of footnotes in the 2009 revision). Those areas almost certainly remain DOJ priorities.

164. USAM 1994, *supra* note 161, § 9-2.142(IV)(A)(2), at 5.

165. *Id.* § 9-2.142(IV)(B), at 5. The key provision is found at the current version at JUSTICE MANUAL 9-2.000, *supra* note 24, § 9-2.031(D).

a federal prosecution is that the defendant is fairly tried on the facts and a fair, conclusive determination is reached. . . . The presumption, however, that the federal interests have been sufficiently vindicated is rebutted, and the successive prosecution *may* proceed, if [one of the three requisite prongs] of the *Petite* Policy [is] met.¹⁶⁶

Next, the revised policy substantially modified prior policy and set forth *three* distinct prongs informing how the presumption may be rebutted. This modified the previous policy that included an express “prior state conviction” prong where the prior sentence was deemed inadequate and a somewhat amorphous second prong, that did not specifically mention a prior state court acquittal, but as a practical matter, was intended to apply to that eventuality as well.

As a result of the 1994 revision, the first prong addressed where a “conviction was not achieved in the prior [state] prosecution” and remained focused on incompetence, jury nullification or similar concerns.¹⁶⁷ The second prong now expressly addressed situations where a conviction was achieved, but where the sentence was “manifestly inadequate” in light of the federal interest involved.¹⁶⁸ The new third prong added a catch-all provision:

Irrespective of the result in a prior state prosecution, in the *rare* case where (a) the alleged violation involves a compelling federal interest, particularly one implicating an enduring national priority; (b) the alleged violation involves egregious conduct, including that which threatens or causes loss of life . . . ; and (c) the result in the prior prosecution was manifestly inadequate in light of the federal interest involved.¹⁶⁹

The first two prongs directly refine provisions that had been part of the Policy since at least 1984. Although one might disagree with a particular factual conclusion of prosecutorial incompetence, jury nullification, or an inadequately light sentence, the framework is unambiguous and straightforward.¹⁷⁰

The new third prong was designed as an amorphous catch-all that could support a second prosecution for almost any tenable reason. It was clearly intended to provide greater ad hoc flexibility in high profile or sensitive cases to support a DOJ determination that a federal prosecution is necessary regardless of the basis of the outcome in the prior state trial. Police brutality cases—

166. KURLAND, DUAL SOVEREIGNTY, *supra* note 27, at 6–8 (footnotes omitted).

167. USAM 1994, *supra* note 161, § 9-2.142(IV)(B)(1), at 5.

168. *Id.* § 9-2.142(IV)(B)(2), at 6.

169. *Id.* § 9-2.142(IV)(B)(3), at 6–7 (emphasis omitted) (emphasis added). The third prong is now codified at JUSTICE MANUAL 9-2.000, *supra* note 24, § 9-2.031(D). The language is virtually identical to the 1994 version, with small non-substantive grammatical variations. Compare USAM 1994, *supra* note 161, § 9-2.142(IV)(B)(3), at 6 (using “in the rare case”), with JUSTICE MANUAL 9-2.000, *supra* note 24, § 9-2.031(D) (using “in those rare cases” (emphasis added)).

170. See AM. BAR ASS’N, FINAL REPORT OF AD HOC TASK FORCE ON DOUBLE JEOPARDY (1994), reprinted in KURLAND, DUAL SOVEREIGNTY, *supra* note 27, at 377–78 [hereinafter FINAL REPORT OF AD HOC TASK FORCE] (DOJ officials noting that Department’s *Petite* Policy review considers subjective and objective factors in determining whether defendant was wrongfully acquitted).

particularly those resulting in death—should still qualify as involving a compelling federal interest and impacting an enduring national priority.¹⁷¹

Moreover, significant cases of police misconduct likely to warrant federal interest almost always involve loss of life or serious physical harm. That does not guarantee a federal prosecution would go forward because the willfulness issue would still have to be addressed. However, the new prong provides a route to authorize the federal prosecution even where specific flaws that resulted in an acquittal or a lenient sentence cannot be readily identified, if the DOJ determines that the result of the prior prosecution was nonetheless “manifestly inadequate in light of the federal interest involved.”

It may not be a coincidence that the 1994 revision went into effect approximately two years after the Rodney King federal criminal civil rights trial. Perhaps the DOJ felt uneasy whether the then applicable guidelines lacking the third prong were adequate to support the decision to pursue a federal prosecution, because of uncertainty whether the state prosecutors were incompetent or that jury nullification occurred. The DOJ rationale was never publicly disclosed, thus shielding the actual *ratio decidendi* from public scrutiny, but triggering endless speculation nonetheless.¹⁷²

Going forward, reliance on this prong could be problematic in sensitive high profile cases, particularly if the reasons for prosecuting or declining to prosecute are publicly disclosed. In that scenario, it would apply in situations where federal prosecutors could not identify a specific significant flaw in the prior proceeding sufficient to justify its decision. In light of the new DOJ Title 8 guidelines, discussed below, which are likely to result in increased public disclosure and scrutiny of the rationale behind prosecutorial decision making in police shooting cases, how the DOJ addresses *Petite* Policy decisions, as opposed to sufficiency of the evidence determinations, could be problematic in the future.¹⁷³

171. The current version of the United States Attorneys’ Manual, now renamed the Justice Manual, defines “substantial federal interest” but offers no guidance on what constitutes a “compelling federal interest” or “enduring national priority.” See generally FINAL REPORT OF AD HOC TASK FORCE, *supra* note 170, at 380 (noting “use of [multiple] formulations to describe the *Petite* standard . . . only makes more vague what is an inherently vague concept”). Different administrations often have different prosecutorial priorities based on changing circumstances. As such, what may constitute a substantial federal interest will necessarily differ from time to time. See KURLAND, DUAL SOVEREIGNTY, *supra* note 27, at 8–11 (discussing relationship of substantial federal interest and changing federal prosecutorial priorities from time to time). However, an “enduring” national priority suggests recognition of core federal criminal justice principles that remain constant from administration to administration. See *Enduring*, WEBSTER’S NEW WORLD COLLEGE DICTIONARY 481 (5th ed. 2014) (defining “enduring” as “lasting, permanent, durable”). Attorney General Eric Holder often referred to the Civil Rights Division as the “crown jewel” of the Justice Department. See Jennifer Gonnerman, *Last Day at the Civil Rights Division*, NEW YORKER (Jan. 21, 2017), <https://www.newyorker.com/news/news-desk/last-day-at-the-civil-rights-division>. All told, the vindication of civil rights should continue to remain an “enduring” national priority.

172. The *King* case is discussed *infra* Subpart IV.E.1; see also *infra* text accompanying notes 219–222.

173. For a discussion of the new DOJ policies that support an increase in public disclosure of the prosecution rationale for federal charging decisions in police shooting cases, see *infra* text accompanying notes 211–214.

D. OTHER RELEVANT DOJ POLICIES AND CONSIDERATIONS

The *Petite* Policy was last revised in 2009, where it largely tracked the 1994 revision save for various stylistic modifications including the elimination of footnotes.¹⁷⁴ In addition, several relevant Department of Justice Guidelines have been adopted since the Civil Rights Section was upgraded to Division Status in 1957. Collectively, they complement the *Petite* Policy rationale and reinforce the DOJ's general preference of deference to vigorous state prosecution in police excessive force cases.

To the extent civil rights cases are of heightened importance, given the checkered history of state civil rights enforcement, as compared to other acts subject to concurrent jurisdiction, the availability of a second federal forum for prosecution provides a critical "backstop" if something goes manifestly wrong with a prior state prosecution that results in a miscarriage of justice of constitutional dimension. These concerns are rarely present in the same magnitude when evaluating potential bank robbery or narcotics prosecutions, and other less sensitive areas of concurrent jurisdiction.¹⁷⁵

As noted above, the order of prosecution, an issue addressed only indirectly by the *Petite* Policy, is important. No federal law of general applicability statutorily limits the federal government's ability to prosecute for the same conduct after a state prosecution has proceeded to verdict.¹⁷⁶ However, the inverse is not necessarily the case when the state prosecutes first.

As a matter of state constitutional or statutory law, several states impose legal limitations or prohibitions on a duplicative state prosecution when essentially the same conduct has already been prosecuted by the federal government. Thus, in order to ensure the legal availability of a second prosecution if a state prosecution resulted in a gross miscarriage of justice, the DOJ preference to defer prosecution until the state has completed its case

174. JUSTICE MANUAL 9-2.000, *supra* note 24, § 9-2.031. In 2008, the DOJ considered possible substantive modifications to the *Petite* Policy because the "'policy was adopted . . . during a time when there was little, if any, official coordination . . . between [federal and state] prosecuting counterparts' and that increased coordination 'ha[d] triggered *Petite* issues that may not have been contemplated when the policy was adopted.'" Thomas White, *Limitations Imposed on the Dual Sovereignty Doctrine by Federal and State Governments*, 38 N. KY. L. REV. 173, 205 (2011) (first alteration in original) (quoting Memorandum from Maureen H. Killion, Dir., Criminal Div., Office of Enf't Operations, U.S. Dep't of Justice to Kenneth Melson, Dir., Exec. Office of the U.S. Attorney, U.S. Dep't of Justice (May 22, 2008)). The DOJ ultimately determined "there was no pressing need to make substantive changes to the Policy." *Id.*

175. For example, "[i]t continues to be Department policy to reduce Federal involvement in the bank robbery area, and make deliberate progress toward maximum feasible deferral of bank robbery matters to those State and local law enforcement agencies which are prepared to handle them." U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-61.601 (2009).

176. The *Petite* Policy notes that "Congress expressly has provided that, as to certain offenses, a state judgment of conviction or acquittal on the merits shall be a bar to any subsequent federal prosecution for the same act or acts." JUSTICE MANUAL 9-2.000, *supra* note 24, § 9-2.031(A) (citing 18 U.S.C. §§ 659, 660, 1992, 2101, 2117 (2012)); *see also* KURLAND, DUAL SOVEREIGNTY, *supra* note 27, at 7 & n.11 (discussing statutory rationale for listed statutes).

ensures the availability of a second—federal—prosecution in every case irrespective of which state has previously undertaken the prosecution.

This is commonly referred to as the “backstop” rationale, which is grounded in promoting confidence in the justice system and resource allocation priorities, which includes reserving federal involvement for extreme cases of constitutional violations and encouraging local officials to police their own.¹⁷⁷ DOJ officials have elaborated on the “backstop” policy on numerous occasions. Even in a high profile police shooting case that qualifies as one of “national interest,”¹⁷⁸ federal prosecutors, as well as other FBI and DOJ officials, have long acknowledged that the DOJ performs a backstop function and generally defers in the first instance to local authorities for the investigation and prosecution of police brutality cases.¹⁷⁹ Attorney General Holder, commenting on George Zimmerman’s acquittal in the Trayvon Martin killing and the Michael Brown killing, criticized the difficult mens rea requirement in federal criminal civil rights prosecutions, but still recognized the federal government’s proper “backstop” role to state and local prosecution.¹⁸⁰ DOJ officials extensively commented on the rationale at several hearings after the Rodney King trials in Southern California.¹⁸¹ The utility of the backstop policy was also evident in some hate crime prosecutions, including the troubling prosecutions for the Vincent Chin killing in Michigan in 1982.¹⁸²

177. Johnson & Bridgmon, *supra* note 101, at 198.

178. See U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 8-3.130 (2018) [hereinafter JUSTICE MANUAL 8-3.00] (defining cases of “national interest” to include “[a] case involving a violation of the federal criminal civil rights laws resulting in death is presumed to be a case of national interest”). Notably, this designation is a factor, but not automatically determinative of whether a federal prosecution should proceed a state prosecution based on the same underlying conduct. See *infra* notes 179–185 and accompanying text (discussing factors in determining whether substantial federal interest sufficient to warrant federal prosecution).

179. See Levenson, *supra* note 1, at 539 & n.164. One federal prosecutor articulated the common governing rationale that “[t]hey’re local police officers and we want to give the local prosecution arms every opportunity to clean up their own shops.” *Id.* at 539 (internal quotation marks omitted) (citing David Freed, *Federal Prosecutors Usually Keep Hands Off*, L.A. TIMES, July 7, 1991, at A12 (quoting federal prosecutor Michael Emmick)). In 1991, in the aftermath of the Rodney King beating, Assistant Attorney General John Dunne testified before a congressional hearing on police brutality, and noted:

We . . . are not the front-line troops in combating instances of police abuse. That role properly lies with the internal affairs bureaus of law enforcement agencies and with State and local prosecutors. The federal enforcement program is more of a backstop, if you will, to these other resources.

Levenson, *supra* note 1, at 599 n.487 (citing congressional testimony).

180. Cristian Farias, *Eric Holder Wants to Lower the Bar for Civil Rights Prosecutions. That’s Trickier than It Sounds*, NEW REPUBLIC (Feb. 27, 2015), <https://newrepublic.com/article/121177/eric-holder-we-might-lower-bar-civil-rights-prosecutions> (discussing options to “make the federal government a better backstop” (internal quotation marks omitted) (quoting Attorney General Eric Holder in an interview with Politico’s Mike Allen)). Holder ultimately did not submit any proposal on the mens rea issue before he left office. See Russell Berman, *Obama’s Missing Police-Reform Proposal*, ATLANTIC (May 18, 2015), <https://www.theatlantic.com/politics/archive/2015/05/the-limits-of-police-reform/393530/>.

181. See Levenson, *supra* note 1, at 599 n.487 (citing congressional testimony).

182. Chin was killed by disgruntled “blue collar” workers who blamed “Japanese” (Chin was of Chinese descent) for the economic troubles facing the American auto industry. For a more detailed discussion of the case, which did not involve police misconduct, see FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND*

In addition, the DOJ Civil Rights Division Criminal Section website remains unchanged, and still recognizes:

Our cases often involve incidents that are invariably of intense public interest. While some violations may most appropriately be pursued by the federal Government, others can be addressed by either the federal Government or by state or local prosecutors. Our ultimate goal is to ensure that acts constituting federal criminal civil rights violations are sufficiently remedied, whether prosecuted federally or by local authorities.¹⁸³

The Principles of Federal Prosecution still provide that, in determining whether a “substantial federal interest” exists that would militate in favor of a determination to authorize a federal prosecution, federal prosecution could be declined, at least as a preliminary matter, if the person is subject to “effective” prosecution in another jurisdiction. The guideline considers the strength of the other jurisdiction’s interest in prosecution, the other jurisdiction’s ability and willingness to prosecute effectively, and the probable consequences if the person is convicted in the other jurisdiction.¹⁸⁴ The relevant commentary further provides that “the federal prosecutor should be alert to any local conditions, attitudes, relationships, or other circumstances that might cast doubt on the likelihood of the other authorities conducting a thorough and successful prosecution.”¹⁸⁵

As noted above, the inverse is not true. Several states have enacted laws that limit those states’ ability to prosecute a case where the underlying conduct has already been subject to a prior prosecution in another jurisdiction.¹⁸⁶ Thus, when the federal prosecution proceeds first, depending on which state has subject-matter jurisdiction over the acts in question, a second state prosecution is not available in all cases. This is not an inconsiderable factor in police misconduct cases where death or serious bodily injury has occurred.¹⁸⁷

WHITE 70–71 (2002); HELEN ZIA, *ASIAN AMERICAN DREAMS: THE EMERGENCE OF AN AMERICAN PEOPLE* 58–81 (2000). Chin’s killers received an inappropriately lenient state court sentence that did not include any period of incarceration. *Id.* at 60 (“[E]ach received three years’ probation and \$3,780 in fines and court costs to be paid over three years.”). The subsequent federal conviction on civil rights charges was reversed on appeal, and the defendants were subsequently acquitted on retrial after the case was moved to Cincinnati to address jury impartiality concerns. *Id.* at 79–80.

183. *Civil Rights Division: Criminal Section*, U.S. DEP’T JUST., <http://justice.gov/crt/criminal-section> (last visited Mar. 17, 2019).

184. JUSTICE MANUAL, *supra* note 22, § 9-27.240. The section also contains detailed commentary elaborating on the above considerations. Most of these considerations are usually present in police brutality cases. *See infra* Subpart IV.E.

185. JUSTICE MANUAL, *supra* note 22, § 9-27.240, cmt. 2.

186. *See* KURLAND, *DUAL SOVEREIGNTY*, *supra* note 27, at 87–289 (state by state analysis).

187. The Southern California Chapter of the ACLU deemed this so important it contended that even if dual sovereignty violates double jeopardy, there should be a civil rights exception for these types of cases. *See, e.g.*, Hoffman, *supra* note 137, at 651–52; *see also* Howard TMCRC Amicus Brief, *supra* note 136, at 20–24 (making a similar argument).

Next, if the State ultimately declines to prosecute—and thus there is no state court trial that proceeds to verdict—the *Petite* Policy does not apply.¹⁸⁸ Then, federal prosecutors would determine, consistent with the Principles of Federal Prosecution, whether a federal prosecution should be authorized. In evaluating whether a federal civil rights prosecution is warranted, the DOJ must consider that the case involves a substantial federal interest *and* that “the person’s conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction.”¹⁸⁹ Because, as noted above, § 242 requires that the law enforcement officer act “willfully,” a federal prosecution should be declined if the evidence suggests that, at most, only negligent or mere reckless conduct could be proved beyond a reasonable doubt. In this manner the statutory “willfulness” requirement also serves to filter out the multitude of cases where, at most, only negligence could be proved—cases that would otherwise overwhelm the limited resources of federal prosecutors and do not involve misconduct of constitutional dimension.¹⁹⁰ Conversely, the DOJ’s limited resources are sensibly utilized to prosecute extreme cases of police misconduct where the state, inexplicably or otherwise, has chosen not to prosecute.

Next, if the State does prosecute and the case proceeds to verdict, the DOJ is in the best position to evaluate whether a successive federal prosecution is necessary because a substantial federal interest has been left demonstrably unvindicated as a result of the state trial and verdict. By adhering to the threshold DOJ policy of deferring to state prosecutors in the first instance, the DOJ is in the best position to evaluate whether the defendant police officer acted to willfully violate an individual’s civil rights, or whether the resolution of the state charges, which could include conviction on lesser charges requiring proof of only reckless or negligent conduct, sufficiently vindicated the federal interest.¹⁹¹

Lastly, after a state trial, in addition to the FBI investigation, a full state investigative file and a full trial transcript exists and is subject to careful review.¹⁹² Voir dire proceedings that reveal the manner of jury selection are

188. This includes the following situations: The State decides to not pursue the case; the State presents the case to a grand jury which declines to indict; the State asks that the DOJ take the lead and turns the investigation over to federal authorities; and the State takes the case to trial and the trial results in a mistrial.

189. JUSTICE MANUAL, *supra* note 22, § 9-27.220; *see also id.* §§ 9-27.200, 9-27.230.

190. Procedurally, this explains the DOJ’s decision to decline to pursue federal prosecution against Officer Darren Wilson, *after* state authorities declined to bring any criminal charges in the aftermath of the Michael Brown killing in Ferguson, Missouri. For a further discussion, see *infra* Subpart IV.D.3, and notes 231–233 and accompanying text.

191. KURLAND, DUAL SOVEREIGNTY, *supra* note 27, at 6–7 (discussing sufficient vindication of federal interest based on operating presumption that paramount interest is usually sufficiently satisfied where the defendant has been fairly tried on the facts and a fair conclusive determination has been reached).

192. *See, e.g.,* Mark Berman, *After Mistrial, What’s Next in the Walter Scott Shooting Case? More Trials.*, WASH. POST (Dec. 6, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/12/06/after-mistrial-whats-next-in-the-walter-scott-shooting-case-more-trials/?utm_term=.227089bb2ef3 (noting that following state court hung jury and resulting mistrial in police shooting case, federal prosecutors proceeded to dissect state trial transcripts and record). State grand jury disclosure procedures are not a model of clarity and there is little instructive case law. For the most part, state procedures have been interpreted to permit disclosure to federal

similarly available for DOJ review. All of these factors further support the current DOJ policy of deferring to state prosecutors in the first instance and acting to vindicate the spirit to protect an individual from the unfairness associated with defending multiple prosecutions for the same underlying conduct.¹⁹³ As the Author aptly stated in 2001:

This . . . preference to defer in the first instance to state prosecution serves several ends. First, the policy is respectful of states in “Our Federalism,” and consistent with the general principle of American law that the prosecution of violent crimes is primarily a local responsibility. Thus, the policy wisely gives states the first opportunity to prosecute unlawful conduct by its own law enforcement officers.

Second, the policy guarantees that a second federal prosecution will be available to remedy a gross miscarriage of justice if the state trial results in an acquittal or unjustified lenient sentence, where the substantial federal interest has been demonstrably unvindicated.¹⁹⁴

In addition, DOJ guidelines require that, as part of the federal prosecutorial decision to commence a particular prosecution, prosecutors must determine that a federal offense has occurred and that the case can likely be proven beyond a reasonable doubt.¹⁹⁵ In addition, while police misconduct cases and civil rights violations remain an important federal priority, whether a particular case presents a “substantial federal interest” that should be federally prosecuted¹⁹⁶ requires an analysis of several variables.

Previous DOJ policy on the order of prosecution was more definite. Supplementing the history of federal deference dating back to 1866, the DOJ Civil Rights Resource Manual No. 47 formerly provided that:

[i]f during the course of the FBI [Civil Rights] investigation, state or local criminal charges arising out of the incident are filed against the subject(s), the FBI’s investigation should be suspended and the United States attorney and FBIHQ should be notified of the nature of the criminal charges and the likely timetable for the prosecution of such charges.¹⁹⁷

The provision also provided that possible “[e]xceptions to this procedure may be necessary on infrequent occasions,” but otherwise provided no

prosecutors in a manner similar to FED. R. CRIM. P. 6(e). SARA SUN BEALE ET AL., GRAND JURY PRACTICE §§ 5:11 n.32, 5:3 nn.33–35 (2d ed. 2017); *see also, e.g.*, MONT. CODE ANN. § 46-11-317 (2017) (same); 42 PA. CONS. STAT. § 4549(b) (1980) (setting forth disclosure requirements to “[f]ederal law enforcement . . . to assist them in investigating crimes under their . . . jurisdiction”).

193. JUSTICE MANUAL 9-2.000, *supra* note 24, § 9-2.031(A), sets forth the statement of policy providing:

The purpose of this policy is to vindicate substantial federal interests through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same acts(s) or transactions(s), to promote efficient utilization of Department resources, and to promote coordination between federal and state prosecutors.

194. KURLAND, DUAL SOVEREIGNTY, *supra* note 27, at 24–25 (footnote omitted).

195. JUSTICE MANUAL, *supra* note 22, § 9-27.220 (grounds for commencing or declining prosecution).

196. *Id.* § 9-27.230 (defining “substantial federal interest” supporting federal prosecution).

197. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS RESOURCE MANUAL NO. 47, at A (superseded provision) (copy on file with the *Hastings Law Journal*).

guidance.¹⁹⁸ However, this Manual has been withdrawn for revision since at least 2015, and the above provision is not presently applicable.¹⁹⁹ Nonetheless, as noted above, many other DOJ policies and practices, some recently modified or added for the first time in March 2018, inform on the policy that, in criminal civil rights investigations, deference to vigorous state prosecution remains the preferred course of action, and such deferral should be undertaken absent extraordinary circumstances.

It is also worth reemphasizing that, as impacting on the above principles, § 242 requires that the defendant act “willfully.” Given the limited reach of § 242, prudent prosecutorial decision making is best served by first deferring to a state prosecution where the range of prosecutable conduct is much broader. This often provides a more effective forum to determine whether the interests of both sovereigns have been adequately addressed. As noted above, the *Petite* Policy’s introductory “statement of policy” recognizes that, where particular conduct is within concurrent federal and state criminal jurisdiction, the matter should be resolved in one prosecution if possible. This, in turn, necessarily informs on the decision of what sovereign should first prosecute a police brutality case.

Although federal deference remains the general rule, the DOJ’s approach to these matters is in flux. Title 8 of the U.S. Attorneys’ Manual—devoted exclusively to Civil Rights—was substantially revised in March and April of 2018 to reflect the evolving realities concerning DOJ’s current approach to these cases that have now spanned both the present and former administrations.²⁰⁰

First, the *Petite* Policy’s application to civil rights cases is expressly reconfirmed, although it is cryptically buried in a new provision entitled “Coordination of Immunity Requests and Requests for Juvenile Certification.”²⁰¹ Second, the policies now provide more elaborate provisions that address the need for increased sensitivity when notifying victims’ families of DOJ’s reasons supporting a civil rights declination decision.²⁰² These provisions also permit the DOJ to discuss the underlying rationale of a declination decision with the families of victims of police shootings. As is further discussed below, this creates a problematic asymmetry where declination decisions, including *Petite* Policy decisions, are purportedly publicly explained, but *Petite* Policy decisions to go forward with a second prosecution generally

198. *Id.* at B.

199. *Civil Rights Resource Manual*, U.S. DEP’T JUST., <https://www.justice.gov/jm/civil-rights-resource-manual> (last visited Mar. 17, 2019) (indicating “Manual is currently being revised”).

200. See JUSTICE MANUAL, *supra* note 22, §§ 8-1.000–3.000.

201. JUSTICE MANUAL 8-3.00, *supra* note 178, § 8-3.142 (referencing immunity procedures to be followed in civil rights cases where *Petite* Policy is implicated).

202. *Id.* § 8-3.190. Even in areas other than civil rights, federal and state prosecutors now sometimes comment on declination decisions even in the absence of guidelines permitting such disclosure. This is a troubling trend. See, e.g., Benjamin Weiser, *Should Prosecutors Chastise Those They Don’t Charge?*, N.Y. TIMES (Mar. 24, 2017), nytimes.com/2017/03/24/nyregion/bill-de-blasio-campaign-finance.html (noting troubling trend that prosecutors seem more willing to speak publicly about the decision not to file charges in some high profile cases).

are not subject to public explanation because the DOJ is limited to commenting only on the “substance of the charge . . . [or] indictment, information, or other public documents.”²⁰³

Title 8 also addresses the order of prosecution determination. Resource Manual No. 47 has been effectively replaced by updated provisions that reflect the more contentious current reality between federal and state authorities even where the State seems poised to undertake a vigorous prosecution. Many of these fault lines were exposed by the surprisingly public interjurisdictional squabbles that occurred during various court proceedings in the Charleston, South Carolina prosecutions of Dylann Roof and Michael Slager.²⁰⁴ The DOJ’s apparent determination to “do something” after declinations in the Trayvon Martin and Michael Brown killings led quickly to Slager’s federal indictment and Roof’s federal prosecution in the Charleston church massacre. The latter was criticized as a “show trial” exhibiting the DOJ at its worst,²⁰⁵ and, the Slager federal indictment was criticized as premature, to say the least.²⁰⁶

Until 2018, the U.S. Attorneys’ Manual provided that “[f]requently, conduct which deprives persons of federally protected rights in violation of federal law also violates state law. . . . In such cases, where state and local authorities undertake vigorous prosecution in state courts, it is Department policy to cooperate fully with the local prosecutors.”²⁰⁷ That seemed consistent with federal deference to state prosecution in civil rights cases. In March, 2018, that provision was updated and now provides:

In such cases, where state and local authorities undertake prosecution in state courts, it is Department of Justice policy to cooperate with the local prosecutor *unless there is a good faith basis that is supported by the law, the facts, or other established Department of Justice Policy, to disagree with the state’s decision to prosecute or with its conduct of a prosecution.*²⁰⁸

203. U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 1-7.500(B) (2018) [hereinafter JUSTICE MANUAL 1-7.000]. This provision remains in the April 2018 revision and still provides that “[t]he public policy significance of a case may be discussed by the appropriate United States Attorney or Assistant Attorney General when doing so would further law enforcement goals.” *Id.* § 1-7.500(D). Whether this language will be relied upon to support disclosure of *Petite* Policy deliberations resulting in a federal prosecution remains to be seen. Under long-standing current practice, DOJ public comments are usually limited to a brief statement to the effect that the federal prosecution was necessary because substantial federal interests were left demonstrably unvindicated.

204. At a state court hearing, the state prosecutors, who had primary jurisdiction over Roof, blamed the federal government for trying to “send a message” at the expense of brushing aside the State’s wish to try Roof first, complaining that “[r]espect for the state court has been ignored by the Department of Justice.” Andrew Knapp, *Wilson: Feds Ignoring S.C. Roof Case Solicitor Frustrated over Scheduling Conflicts, Idea of Families Enduring Trial During Holidays*, POST & COURIER (June 19, 2016), https://www.postandcourier.com/archives/wilson-feds-ignoring-s-c-roof-case-solicitor-frustrated-over/article_9eb4911e-fe10-5d68-9771-228e4dcc2fe6.html.

205. See Stephen Cooper, *Dylann Roof ‘Show Trial’ Exhibits Justice Department at Its Worst*, HILL (Nov. 30, 2016, 10:38 AM), <https://thehill.com/blogs/pundits-blog/crime/308059-dylann-roofs-show-trial-exhibits-justice-department-at-its-worst>.

206. For a discussion of the *Slager* trial, see *infra* Subpart IV.E.4.

207. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 8-3.170 (1992), at 6.

208. JUSTICE MANUAL 8-3.00, *supra* note 178, § 8-3.170 (emphasis added).

These provisions demonstrate that the DOJ's current policy in police excessive force cases, even where death or serious bodily injury result, generally still favors deference to an initial state prosecution where the state has demonstrated a genuine willingness to prosecute. However, its interest in assessing the level of vigor of the state prosecution has now evolved into a more aggressive posture in evaluating whether the DOJ disagrees with the direction and conduct of state prosecutorial efforts. Consequently, the DOJ may be more assertive in the future in attempting to prosecute civil rights cases in the first instance, thus increasing potential conflict with state prosecutorial efforts.²⁰⁹ This does not substantially impact the *Petite* Policy, which only comes into play when the state has prosecuted first and has taken its case to verdict.

Ideally, the DOJ will continue to be circumspect in determining when to proceed first. The logical practicalities remain, that state and local governments are primarily responsible to manage their own police departments. The DOJ has limited resources and can only prosecute a small fraction of police misconduct claims.²¹⁰ By deferring to a "vigorous" state prosecution, the federal "backstop" is always available, if necessary, where the prior state trial resulted in a grave miscarriage of justice. These remain the types of cases where the DOJ's limited resources are best directed. In the pursuit of justice, the DOJ public relations motivation to be seen as "doing something" is not a particularly effective or principled exercise of prosecutorial discretion.

The purpose of a successive federal prosecution has never been to provide a second opportunity to relitigate a case merely because of dissatisfaction, no matter how intense, with a particular verdict. The determination of what constitutes a miscarriage of justice in a particular case is always a subjective determination, but in order to be accepted as credible, it must be anchored in a

209. This may impact federal hate crimes prosecutions more than police misconduct cases. Hate crimes prosecutions statutorily require a non-litigable certification that, inter alia, the federal prosecution is "necessary to secure substantial justice" without regard to the status of any state prosecution. 18 U.S.C. § 249(b)(1)(D) (2012). As was the case with Dylann Roof, the DOJ brought federal hate crimes charges related to the death arising out of the 2017 "Unite the Right Rally" in Charlottesville while a state prosecution was pending. However, unlike the Roof prosecution, the DOJ appears willing to permit the previously instituted state murder prosecution to proceed first. Doug Stanglin, *Driver Accused of Plowing into Crowd at Charlottesville Rally Charged with Federal Hate Crimes*, USA TODAY (June 27, 2018, 1:17 PM), <https://www.usatoday.com/story/news/2018/06/27/Charlottesville-rally-james-alex-fields-charged-federal-hate-crimes/738514002> (noting state first degree murder prosecution scheduled to proceed first in November, 2018). In December 2018, the defendant, James A. Fields, Jr., was convicted of first-degree murder and several other state felonies, and sentenced to life imprisonment. As this Article entered the final editing stages, Field's federal trial remains pending, but no trial date has been set, and the DOJ has not yet determined whether it will seek the death penalty. Presumably, the DOJ is undertaking its requisite *Petite* Policy review. JUSTICE MANUAL 9-2.000, *supra* note 24, § 9-2.031 (D) (where prior state prosecution reaches verdict, *Petite* Policy applies "even if an indictment or information already has been filed in the federal prosecution").

210. JUSTICE MANUAL, *supra* note 22, § 9-27.001 (principles of federal prosecution preface recognizing need to effectively manage government's limited prosecutorial resources); *see also id.* § 9-27.230 cmt. 1 (recognizing limited federal resources as impacting determination of a "substantial federal interest"). For a further discussion of the relationship between federal resources and prosecutorial decision making, see Steven Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3203 (2014).

clear-eyed evaluation of the evidence and the law. Until recently, the underlying rationale supporting a decision whether to pursue federal prosecution has not been subject to public disclosure under almost any circumstances. This is very sensitive terrain, and represents the essence of jealously guarded prosecutorial discretion. However, as discussed in the next section, in the last few years, some high profile civil rights cases have engendered significant public interest, creating pressure on the DOJ to publicly release detailed explanations of its prosecutorial decision making, even though this type of disclosure was at odds with then existing DOJ policies.²¹¹

This carried forward to the current administration. As further discussed below, the Obama Administration publicly issued case closing memoranda explaining its declination decisions in several high-profile police shooting cases. The Trump DOJ continued that significant departure from procedure until it ultimately modified several relevant civil rights guidelines in March 2018 as part of its comprehensive revision of the U.S. Attorneys' Manual.

One guideline was amended to permit “[i]n some rare, high profile, or complex [civil rights] matters [particularly involving allegations of police misconduct], . . . [the DOJ] may elect to meet with families of a victim to explain the basis for a closing decision.”²¹² Because of the unpalatability and practical difficulties of requiring aggrieved family members to comply with any purported confidentiality requirement, a disclosure under this provision inevitably results in a similar carefully worded DOJ public statement so as to at least assure accuracy, even though the guidelines do not appear to formally provide for the public release of such a statement.

As further discussed below, this effort at increased sensitivity and transparency is designed to yield at least a modicum of public relations benefit. However, any benefit will likely be of limited value. A declination explanation based on purported insufficient evidence rarely quells public outcry and often increases disdain for federal law enforcement because the declination is usually tied to a perception that the requisite “high bar” unjustly prevented the authorization of a federal civil rights prosecution.

Moreover, it becomes even more problematic in the aftermath of controversial *Petite* Policy declinations. Here, an honest and thorough evaluation often goes beyond an assessment of the sufficiency of the evidence, and requires a sober and sensitive analysis of the quality of the state prosecution,

211. See text accompanying *supra* note 212.

212. JUSTICE MANUAL 8-3.00, *supra* note 178, § 8-3.190. That provision provides in relevant part:

Because criminal civil rights cases often spark intense public interest, it is often the practice to send case-closing notification letters in cases closed without indictment or prosecution. The practice of sending [such] letters. . . is particularly encouraged in cases of police misconduct and other cases involving law enforcement officer subjects.

. . . .

In some rare, high profile, or complex matters, attorneys from the Civil Rights Division . . . may elect to meet with families of a victim to explain the basis for a closing decision.

the good faith and competence of the prosecutors, and whether the verdict was a product of jury nullification. In the recent past, the DOJ disingenuously evaded an appropriate *Petite* Policy analysis in publicly disclosing the supposed declination rationales in the Trayvon Martin and Freddie Gray fatalities by only focusing on purported sufficiency of the evidence deficiencies.²¹³

Whether these types of issues will be credibly confronted in the future remains to be seen. Furthermore, DOJ guidelines arguably now provide a degree of asymmetry concerning public disclosure. When a *Petite* Policy determination concludes that a successive prosecution should go forward, no policy clearly provides for a public explanation of that result because of the express limitations concerning public announcements regarding the substance of the charges in the indictment.²¹⁴ These consequences are further discussed in the following section.

E. DOJ POLICIES APPLIED IN SELECTED CIVIL RIGHTS CASES

As discussed above, for more than five decades, *Petite* Policy determinations, as with virtually all other DOJ discretionary decisions concerning whether to prosecute a particular case,²¹⁵ were internal decisions not subject to public disclosure and were not otherwise subject to any other legal disclosure requirements.²¹⁶ Indeed, throughout most of the *Petite* Policy's existence, the DOJ has been consistently tight-lipped about disclosing information concerning its application, and had been often criticized for failing to provide sufficient information concerning how the *Petite* Policy has been applied.²¹⁷

213. See *infra* notes 223–233 and accompanying text.

214. JUSTICE MANUAL 1-7.000, *supra* note 203, § 1-7.500; see also text accompanying *supra* note 203 (discussing potential limited window to discuss *Petite* Policy decisions that result in federal indictment where necessary to “further law enforcement goals”).

215. A straightforward decision to decline prosecution where there was no prior prosecution is governed by the Principles of Federal Prosecution. Federal prosecutors are required to provide the reasons supporting the recommendation to decline prosecution, but that is an internal requirement not subject to public disclosure. JUSTICE MANUAL, *supra* note 22, § 9-27.270. As for public disclosure, in most cases, a straightforward conclusory statement that there is insufficient evidence to establish guilt beyond a reasonable doubt would suffice, without any detailed evaluation of the facts. More problematic would be a decision to decline prosecution for lack of a substantial federal interest, but the rationales for those decisions traditionally were not publicly disclosed. The DOJ publicly discloses limited annual statistical information, and tabulates “Criminal Matters Declined—Immediate and Later Declinations by Reason.” The relevant table provides statistical information only, with broad explanation categories which provide no individual explanatory analysis. For fiscal year 2016, out of 547 civil rights matters declined, 436 were for “insufficient evidence,” 24 were based on “prioritization of federal resources and interests,” and 44 concerned matters “referred to other jurisdiction.” U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT FOR FISCAL YEAR 2016 tbl. 14 (2016).

216. See Allerhand, *supra* note 142, at 1143 & n.28 (discussing efforts to analyze administration of *Petite* Policy “obscured by lack of data”). The Freedom of Information Act (FOIA) was enacted in 1967, see 5 U.S.C. § 552 (2012), eight years after the original promulgation of the *Petite* Policy, and similarly does not provide public access to these decisions.

217. For a general discussion concerning the application of the *Petite* Policy and the recognition that it confers no enforceable rights upon a defendant, see ABRAMS, *supra* note 137, at 118–23; and Michael A. Simons,

Where a prior state prosecution reached a verdict—and hence the *Petite* Policy was applicable—the Department would, at most, make a terse, conclusory statement indicating whether a federal prosecution would go forward. Typically, the DOJ would recognize the applicability of the *Petite* Policy, even if not identified by name or cited with complete accuracy, with cryptic references concerning whether certain “federal interests” had been left insufficiently vindicated, but would not include discussion of any relevant facts or legal analysis supporting any decision.²¹⁸

The DOJ recently changed some of the relevant guidelines, in large part, so they would now align with what has evolved into a current asymmetrical practice. Current practice in high profile police shooting cases had evolved into a series of exceptions where DOJ issues detailed press releases explaining the basis for the decision *not* to pursue a particular federal civil rights prosecution. Consider the following high profile police excessive force cases which concern the *Petite* Policy or other DOJ policies concerning whether a federal prosecution should go forward. It is too soon to determine whether the DOJ’s new changes publicizing some of its internal decision making process are necessary or desirable, or whether they should be revisited.

1. *Rodney King*

After the state court acquittals in the 1992 Rodney King case, which led to massive rioting in Los Angeles, Attorney General William Barr stated that “[i]t’s important for people to remember, . . . that the verdicts (Wednesday) on state charges are not the end of the process” and that the standard whether to bring a second federal prosecution is “whether or not we believe the federal interest has been vindicated by the state proceeding.”²¹⁹ Three months later, a federal grand jury in Los Angeles returned an indictment against the officers charging criminal civil rights violations. At that time, the United States Attorney in Los Angeles commented only that civil rights was a significant federal interest and that “[t]he [prior state court] verdict did not vindicate the Federal interest.”²²⁰ Although the legal punditry engaged in rampant speculation concerning whether a second federal prosecution was justified under DOJ guidelines, the DOJ never released its *Petite* Policy analysis supporting its decision to proceed with a successive

Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization, 75 N.Y.U. L. REV. 893, 962 (2000).

218. For a decision to proceed with a prosecution, DOJ policy limits comments to “[t]he substance of the charge” as reflected in the charging documents, but also provides that “[t]he public policy significance of a case may be discussed by the appropriate [DOJ personnel] when doing so would further law enforcement goals.” JUSTICE MANUAL 1-7.000, *supra* note 203, § 1-7.500(B), (D).

219. Henry Weinstein & Ronald J. Ostrow, *Justice Dept. Resumes Its Review of King Beating: Investigation: Federal Probe, Which Was on Hold During Trial of Four Officers, Will Focus on Possible Civil Rights Violations*, L.A. TIMES (May 1, 1992), http://articles.latimes.com/1992-05-01/local/me-1513_1_civil-rights-violation (internal quotation marks omitted) (quoting U.S. Attorney General William Barr).

220. Robert Reinhold, *U.S. Jury Indicts 4 Police Officers in King Beating*, N.Y. TIMES (Aug. 6, 1992), <http://www.nytimes.com/1992/08/06/us/us-jury-indicts-4-police-officers-in-king-beating.html> (internal quotation marks omitted) (quoting U.S. Attorney Lourdes Baird).

federal prosecution.²²¹ As noted above, a 1994 comprehensive *Petite* Policy revision added a completely new, third prong that arguably served as a post hoc justification for the *King* federal prosecution.²²² However, that provision had not been promulgated at the time the DOJ deliberated whether to bring a federal prosecution in this case.

2. *Trayvon Martin*

The *King* case was illustrative of how *Petite* Policy decisions were made during that era, which were not subject to any public disclosure requirements. During the Obama Administration, the DOJ began to subtly shift its approach in high-profile cases where it declined federal prosecution. The Trayvon Martin killing in Florida, where law enforcement was not involved in the shooting, generated a tremendous amount of publicity and protests. The shooter, George Zimmerman, was eventually charged and acquitted of murder in state court. Thereafter, the DOJ faced tremendous public pressure to bring federal charges in order to address what many considered a toxic pattern of lethal racial injustice.

After Zimmerman's state court acquittal, the few DOJ pronouncements concerning its prosecutorial options consisted of typical cryptic statements alluding to the *Petite* Policy not unlike those of the Rodney King era. For example, shortly after the acquittal, an unnamed DOJ official was quoted as saying that federal authorities are trying to determine if "federal prosecution is appropriate in accordance with the Department's policy governing successive federal prosecution following a state trial."²²³

The Zimmerman case presented a public relations quandary for the Obama Administration and the Holder Justice Department who, understandably, sought to appear proactive on civil rights and racial justice matters. However, even apart from the problematic quest to identify an applicable federal statute since Zimmerman was not law enforcement acting "under color of law," this was a difficult case to justify federal prosecution under the *Petite* Policy. The State of

221. See KURLAND, DUAL SOVEREIGNTY, *supra* note 27, at 26 & n.49 (speculating *Petite* Policy decision to pursue federal prosecution was based on state prosecutorial incompetence for not calling King as witness and jury nullification); see also Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 49–57 (1995) (discussing difficulty of establishing incompetence in state prosecution). A slightly modified *Petite* Policy went into effect on July 1, 1992, but the new policy did not appear to add anything significant to the prior 1984 revision. The "successful" federal prosecution in the *King* incident is often cited as an example of the procedures working properly to achieve justice. However, only two of the four officers were convicted in the federal trial, and the Supreme Court ultimately upheld the district court judge's downward departure and relatively lenient sentence based on its finding that most of the blows were lawful and that *King* exacerbated the situation by resisting arrest. *Koon v. United States*, 518 U.S. 81, 102–05 (1996); see also Kurland, *supra* note 21, at 218 & n.41 (citing the *Koon* decision).

222. See discussion *supra* notes 168–173 and accompanying text; see also *supra* note 221 (stating that *King* prosecution could be justified based on then existing *Petite* Policy regarding prosecutorial incompetence and jury nullification).

223. Jacob Gershman, *DOJ's Own Rules Set High Bar for Zimmerman Charges*, WALL ST. J.: L. BLOG (July 15, 2013, 6:29 PM), <http://blogs.wsj.com/law/2013/07/15/dojs-own-rules-set-high-bar-for-zimmerman-charges/>; DOJ's Own Rules-set-high-bar. The comment clearly refers to the *Petite* Policy.

Florida had undertaken a controversial, but nonetheless, vigorous and competent state homicide prosecution that had proceeded to verdict. As such, any objective *Petite* Policy analysis was certain to yield a result that a federal prosecution should be declined. Operating under the assumption that the DOJ would still adhere to its long standing and sensible policy of not commenting substantively on charging decisions,²²⁴ which would also include a *Petite* Policy determination, this Author set forth what a likely DOJ comprehensive *Petite* Policy analysis would entail.²²⁵ The analysis concluded that the requisites for a subsequent federal prosecution could not be met.²²⁶ The assessment proved correct when DOJ subsequently concluded that no federal prosecution would go forward.

However, the DOJ departed from its formal “no comment” position and actually discussed, to some degree, the factors that purportedly led to its decision not to prosecute. In its official press release, the DOJ made no mention of the *Petite* Policy or its analytical framework, or even the fact that there was a prior state prosecution based on substantially the same acts that had resulted in a verdict on the merits.²²⁷ Instead, the press release noted that the decision focused exclusively on “the facts surrounding the shooting” and that “federal investigators determined that there [was] insufficient evidence to prove beyond a reasonable doubt a violation of these [various potentially applicable federal civil rights] statutes.”²²⁸

By addressing the issue in this manner, the DOJ seemed to have reverted back to Attorney General Griffin Bell’s since discarded 1977 policy that exempted civil rights charges from the *Petite* Policy because the federal “civil rights laws protect federal interest [sic] so vital in nature that they must be enforced independently of any related state actions.”²²⁹ In other words, the prior state court acquittal appeared irrelevant; the DOJ analysis in civil rights matters and whether a federal prosecution should be authorized appeared based solely on the Principles of Federal Prosecution, consisting of a straightforward analysis of the strength of the evidence after a determination of the existence of a

224. See, e.g., Peter Hermann, *Prosecutors Drop Criminal Case Against Activist Arrested After Laughing at Sessions*, WASH. POST (Nov. 7, 2017), https://www.washingtonpost.com/local/public-safety/prosecutors-drop-criminal-case-against-activist-arrested-after-laughing-at-sessions/2017/11/07/35468c0e-c3ec-11e7-aae0-cb18a8c29c65_story.html?noredirect=on&utm_term=.e2e8fbf72f32 (quoting DOJ spokesman as saying that “[t]he U.S. attorney’s office typically does not discuss charging decisions, and has no comment on the decision to dismiss this particular case” (internal quotation marks omitted)).

225. Kurland, *supra* note 21, at 209–17.

226. *Id.*

227. Press Release, U.S. Dep’t of Justice, *Federal Officials Close Investigation into Death of Trayvon Martin* (Feb. 24, 2015), <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-trayvon-martin>.

228. *Id.*

229. Allerhand, *supra* note 142, at 1141 n.19 (referencing Attorney General Bell’s DOJ Press Release of February 11, 1977).

substantial federal interest.²³⁰ But that was not then existing DOJ policy. This seemed like a half-hearted and ill-conceived public relations maneuver destined to fail to assuage the civil rights community who would see the explanation as only further exposing the fatal flaws of the “high bar” that prevented federal prosecution.

3. *Michael Brown*

One month later, in March 2015, the Obama Administration under Holder again deviated from its policy when it publicly announced it would not pursue a criminal civil rights prosecution arising out of the Michael Brown killing in Ferguson, Missouri. After Brown was shot and killed by a police officer during what began as an officer-citizen law enforcement encounter, the DOJ followed its usual practice and deferred its investigation while the state pursued its criminal investigation. The state prosecutor presented the case before a state grand jury. Because of the unusual Missouri public records laws, the state grand jury proceedings were publicly released after the grand jury declined to return an indictment against the officer on any charges.²³¹

The *Petite* Policy was not implicated in DOJ’s subsequent inquiry whether to bring federal charges because there was no prior state prosecution that had proceeded to verdict. The DOJ deviated from its long standing practice of not revealing its prosecutorial decision-making process when it applied the Principles of Federal Prosecution and determined that it would not pursue federal prosecution.²³² This evaluation focused exclusively on whether there was probable cause to believe a federal crime had been committed and could be proven beyond a reasonable doubt, and, if so, whether a substantial federal interest existed sufficient to warrant federal prosecution.

The DOJ’s official press release noted:

Due to the high interest in this case, the department took the rare step of publicly releasing the closing memo in the case. The report details, in over 80 pages, the evidence, including evidence from witnesses, the autopsies and physical evidence

230. That would not mean that a federal civil rights prosecution would be authorized in every case. It would mean that the decision making would be substantially different; there would still be an inquiry to identify a substantial federal interest, but no inquiry *as to whether such interest was left demonstrably unvindicated by the result of a prior state prosecution*. Similarly, there would be no operative presumption that the prior state court adjudication on the merits sufficiently vindicated the identified federal interest.

231. In the federal system, grand jury proceedings are secret and not subject to public disclosure after the grand jury proceedings are completed. FED. R. CRIM. P. 6(e).

232. The DOJ investigation had access to the state investigative files, and the DOJ investigation ultimately determined it could not disprove a lawful use of force. The local prosecutors empaneled a grand jury, and ultimately determined that Officer Wilson shot and killed Brown in a lawful exercise of self-defense, or, at minimum, determined there was no probable cause that the officer committed any form of homicide. See *infra* text accompanying note 233 (discussing aspects of Ferguson grand jury procedures and comparison with ABA model rules). Evidence presented to the grand jury tended to refute the highly publicized but ultimately false narrative that Brown raised his hands in an act of peaceful surrender and implored the officer “don’t shoot.” Jessica Chasmar, *WaPo Columnist Jonathan Capehart: People Call Me ‘House Negro’ for Debunking ‘Hands up, Don’t Shoot.’* WASH. TIMES (Mar. 20, 2015), <http://washington-times.com/2015/mar/20/jonathan-capehart-people-call-me-house-negro> (discussing Brown’s refutation).

from the analysis of the DNA, blood, shooting scene and ballistics. The report also explains the law as developed by the federal courts and applies that law to the evidence.²³³

233. Press Release, U.S. Dep't of Justice, Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri (Mar. 4, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri> (emphasis added). As fully set forth in the report, state authorities empaneled a state grand jury which ultimately declined to bring any charges against Officer Wilson after hearing evidence concerning his self-defense claims, including his own testimony. Some criticized the state prosecutor's decision to present significant self-defense evidence, instead of following the more common grand jury practice of presenting a one sided prima facie case that virtually assures a vote to indict. See, e.g., Anna Brand, *Giuliani: Black Violence Is Reason for White Cops in Ferguson*, MSNBC (Nov. 30, 2014, 10:47 AM), <http://www.msnbc.com/msnbc/rudy-giuliani-former-mayor-black-violence-reason-white-cops-ferguson> (quoting Professor Michael Eric Dyson's criticism of the Ferguson grand jury for its failure to quickly return a "ham sandwich" indictment); Joel Cohen & Bennett L. Gershman, *Reflecting on the Ferguson Grand Jury*, HUFFINGTON POST (Dec. 2, 2014, 3:19 PM), http://huffingtonpost.com/joel-cohen/reflecting-on-thefergo_b_6249714.html (noting criticism against district attorney for allowing grand jury to hear every piece of evidence to determine whether police officer was legally justified in shooting Michael Brown to death); James C. McKinley, Jr. & Al Baker, *Grand Jury System, with Exceptions, Favors the Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014), <https://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html> (noting most felony grand jury presentations are bare bones proceedings where only witnesses favorable to the government testify and the defendant rarely testifies). This topic is more properly the subject of a separate article. See, e.g., Roger A. Fairfax, Jr., *The Grand Jury's Role in the Prosecution of Unjustified Police Killings—Challenges and Solutions*, 52 HARV. C.R.-C.L. L. REV. 397 (2017).

However, police shooting cases are somewhat *sui generis* in that the putative defendant often testifies before the grand jury and at trial (if a trial is necessary), while in most other criminal cases the putative defendant not only declines to testify, but, at trial, often relies solely on the burden of proof and presents no formal affirmative defense case whatsoever. The American Bar Association has long endorsed the position that "[n]o prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense." A.B.A., STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-3.6(b), at 64 (3d ed. 1993). The accompanying commentary states:

Section (b) [the disclosure of evidence section] goes beyond the minimum requirements of constitutional law . . . by requiring prosecutors to make timely disclosure to the grand jurors of . . . all evidence known to the prosecutor tending to negate the guilt of the accused or to mitigate the offense. For example, when a police officer has seriously injured or killed a person in the line of duty, prosecutors often present all available information and witnesses to the grand jury so that an evaluation of probable cause can be made by an entity independent of the prosecutor. Such a procedure enhances public confidence in the ultimate decision on whether to prosecute.

Id. at 66–67 (emphasis added) (footnotes omitted); see also JUSTICE MANUAL, *supra* note 22, § 9-11.233 (setting forth DOJ general obligation to present substantial evidence negating guilt to grand jury).

In 2015, the A.B.A. House of Delegates approved a new Fourth Edition of the Prosecution Function Standards. New commentary has not yet been approved. Standard 3-3.6(b) of the Third Edition was deleted but its substance was largely retained in new Standard 3-4.6(e), which provides that "[a] prosecutor with personal knowledge of evidence that directly negates the guilt of a subject of the investigation should present or otherwise disclose that evidence to the grand jury." A.B.A., CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-4.6(e) (4th ed. 2015), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition-TableofContents/. In addition, new Standards 3-4.5(a) and 3-4.6(b) of the Fourth Edition further amplify principles consistent with the relevant Third Edition commentary set forth above. For example, Standard 3-4.5(a) provides that a prosecutor "should not . . . mislead the grand jury, or abuse the processes of the grand jury." *Id.* at Standard 3-4.5(a). New Standard 3-4.6, promulgated in response to the spate of recent controversial state grand jury presentations in police shooting cases, states that "a grand jury may properly be used . . . to determine the sense of the community regarding potential charges." *Id.* at Standard 3-4.6(b).

While the A.B.A. has not yet released the updated accompanying commentary for the Fourth Edition, in light of the inclusion of the above provisions, it is unlikely that the above quoted Third Edition commentary

Thus, the Obama DOJ appeared to create an unwritten “high public interest” exception for those “rare” cases which was contrary to its long held position that the heretofore jealously guarded intricacies of DOJ charging decisions and case closing memoranda not be publicly disclosed. This “exception,” however, did not appear in the U.S. Attorneys’ Manual or in any other DOJ published guideline in effect at the time. It also appeared that the public explanations were limited to high profile DOJ declinations, creating asymmetrical disclosure practices because decisions to prosecute were subject to narrow public disclosure rules. The asymmetry only served to highlight the “high bar” for federal civil rights prosecution authorization, which in turn yielded increased criticism of the DOJ concerning the supposed impotence of the relevant federal criminal civil rights statutes.

4. *The Prosecution of Michael Slager*

Near the end of the Obama Administration, new Attorney General Loretta Lynch ratified questionable decisions to immediately pursue federal prosecutions in the Dylann Roof Church shooting murders and the Michael Slager police shooting case.²³⁴ Both violent incidents occurred in Charleston, South Carolina, where the relevant factors in both cases suggested that vigorous local prosecutions should proceed first.

On April 4, 2015, North Charleston Police Officer Michael Slager shot and killed Walter Scott after Slager stopped Scott’s vehicle because of a broken tail light.²³⁵ A brief scuffle ensued, and Scott, attempting to avoid being tased, fled the scene of the initial stop. Slager chased him onto an empty lot,²³⁶ where he shot the fleeing Scott, firing eight shots and hitting Scott five times.²³⁷

After the shooting, Slager claimed to state law enforcement authorities that Scott was attempting to take his taser and that Slager feared for his life when he

will be affirmatively repudiated regardless of how the new commentary addresses the heightened scrutiny of state grand jury practice in police shooting cases. For a general review of the Criminal Justice Standards revision process, see Rory K. Little, *The ABA’s Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111 (2011). As noted above, after the state grand jury declined to indict Officer Wilson on any charges, the DOJ pursued its own investigation and evaluated whether the Principles of Federal Prosecution supported bringing federal civil rights charges. The DOJ ultimately issued an unusual detailed report explaining that federal criminal charges were not appropriate because of insufficient evidence that Officer Wilson acted unreasonably and with the requisite willful intent to violate Brown’s civil rights. Press Release, *supra*. The DOJ noted that it had taken “the rare step of publicly releasing the closing memo in the case.” *Id.* For the complete report, see U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (2015).

234. See text accompanying *infra* note 249.

235. Catherine E. Shoichet & Mayra Cuevas, *Walter Scott Shooting Case: Court Documents Reveal New Details*, CNN (Sept. 10, 2015, 12:10 AM), <http://www.cnn.com/2015/09/08/us/south-carolina-walter-scott-shooting-michael-slager/>.

236. Jon Swaine, *South Carolina Shooting Witness: Victim ‘Just Wanted to Get Away from the Taser,’* GUARDIAN (Apr. 9, 2015), <https://www.theguardian.com/us-news/2015/apr/08/feidin-santana-bystander-walter-scott-shooting-interview>.

237. Shoichet & Cuevas, *supra* note 235.

fired his weapon.²³⁸ However, video evidence from a bystander's cell phone camera, which Slager was unaware of at the time he made his initial statement, established that Scott was running away at the time Slager fired his weapon.²³⁹

Slager was subsequently arrested by local authorities on April 7, and indicted by a South Carolina state grand jury on one count of murder on June 8, 2015.²⁴⁰ South Carolina prosecutors were ready, willing, and able to pursue an aggressive criminal prosecution.²⁴¹

South Carolina had already won the grand jury indictment jurisdictional race to the courthouse and the state case inexorably moved toward trial. In May 2016, a federal grand jury returned a § 242 indictment against Slager for unlawful use of force under color of law.²⁴² DOJ also added two additional counts for unlawful use of a weapon during the commission of a crime of violence and obstruction of justice.²⁴³ These additional counts were inherently connected to the civil rights charge which alleged the shooting was without legal justification. Thus, all of the three counts arose out of “substantially the same act(s) or transaction(s).”²⁴⁴ As such, the inclusion of the two derivative charges would not have exempted the federal prosecution from adherence to the Principles of Federal Prosecution and related *Petite* Policy requisites.²⁴⁵

The Slager federal indictment did not adhere to relevant DOJ practice at least as it pertained to the timing of the federal indictment. The DOJ press release announcing the Slager indictment did not even mention the pending state murder charges. The only mention of local law enforcement involvement concerned the federal obstruction charge which “allege[d] that Slager intentionally misled [South Carolina Law Enforcement Division] investigators by claiming that Scott [the victim] was coming toward him with a taser at the time that Slager fired his

238. Andrew Knapp, *Dash Video Strikes at Heart of Problem, Critics of Police Say*, POST & COURIER (Apr. 8, 2015), http://www.postandcourier.com/archives/dash-video-strikes-at-heart-of-problem-critics-of-police/article_e431fcb3-96c8-5cb1-9d9a-19949ad1207a.html.

239. Swaine, *supra* note 236.

240. Alan Blinder & Timothy Williams, *Ex-South Carolina Officer Is Indicted in Shooting Death of Black Man*, N.Y. TIMES (June 8, 2015), <https://www.nytimes.com/2015/06/09/us/former-south-carolina-officer-is-indicted-in-death-of-walter-scott.html?smid=pl-share>; Indictment, *State v. Slager*, No. 2015-GS-10-03466 (S.C. June 8, 2015) (charging one count of murder pursuant to S.C. CODE § 16-03-0010 (1976)).

241. Swaine, *supra* note 236.

242. Indictment at 1, *United States v. Slager*, No. 2:16-cr-00378-CRI (D.S.C. May 10, 2016) (count one charging violation of deprivation of rights under color of law pursuant to 18 U.S.C. § 242).

243. *Id.* at 2–3. Count two (use of a weapon during a crime of violence, referencing the § 242 violation alleged in count one); and count three (obstruction of justice 18 U.S.C. § 1512(b)(3) (alleging obstruction preventing eventual communication to federal judge or federal law enforcement officer concerning the uttering of false information to South Carolina law enforcement authorities concerning circumstances surrounding shooting that led to the shooting alleged in count one)).

244. JUSTICE MANUAL 9-2.000, *supra* note 24, § 9-2.031(B). The significance of the “substantially same act(s) or transaction(s)” is further discussed *infra* note 245 and accompanying text.

245. In other words, the two additional counts did not make the civil rights violation resulting in death only a minor part of the indictment. Such a characterization, if accepted, arguably would have exempted the analysis from the relevant DOJ policies preferring resolution in one trial.

weapon.”²⁴⁶ Such an allegation hardly buttressed the claim that the federal prosecution should supersede the state murder prosecution or required an indictment at this time.

The federal prosecutors’ unnecessary rush to the courthouse exposed what some viewed as the raw political motivations of the Obama Administration and new Attorney General Lynch. The DOJ’s peculiar actions suggested that they were undertaken to atone for prior DOJ inaction in some of the other high profile police shooting cases, which had created an unflattering perception of federal impotence or indifference.²⁴⁷

After the return of the federal indictment, South Carolina prosecutors, now on the defensive, swiftly adopted a conciliatory tone and pronounced that the state charges were not superfluous, stating:

While certainly the state charges address the killing of Mr. Scott, they do not directly address the alleged violation of Mr. Scott’s civil rights by a government employee acting under color of law. . . . It is essential that law enforcement and our community see the federal government address such an important aspect of the case.²⁴⁸

The state prosecutors’ initially constrained comments were necessary from a public relations standpoint to further demarcate the State’s purported discrete rationale for its murder prosecution to continue in the face of dueling overlapping indictments. The comments did not address why a federal indictment was warranted at that time, particularly since the State was already pursuing a vigorous state prosecution.

The macabre fortuity that the Dylan Roof Charleston Church massacre was also subject to dueling federal and state indictments between the same State and federal prosecutors’ offices handling the Slager case created logistical difficulties that eventually resulted in the *Roof* federal trial commencing first. However, the interjurisdictional détente was fleeting. In arguing to maintain the State’s preference to try Roof first, the state prosecutor asserted in state court that DOJ and the federal court were disrespecting the state court prosecution and selfishly subjecting the victim’s families to two painful trials simply “because the Department of Justice wanted to have their trial.”²⁴⁹

246. Press Release, U.S. Dep’t of Justice, Former North Charleston, South Carolina, Police Officer Michael Slager Charged with Federal Civil Rights Offense (May 11, 2016), <https://www.justice.gov/opa/pr/former-north-charleston-south-carolina-police-officer-michael-slager-charged-federal-civil>.

247. See Taylor, *supra* note 38 (questioning federal action in this case in contrast to Trayvon Martin, Michael Brown, Eric Garner, and Freddie Gray cases).

248. Chris Dixon & Tamar Lewin, *South Carolina Officer Faces Federal Charges in Fatal Shooting*, N.Y. TIMES (May 11, 2016), <https://www.nytimes.com/2016/05/12/us/south-carolina-officer-faces-federal-charges-in-fatal-shooting.html> (internal quotation marks omitted) (quoting Scarlett Wilson, Charleston prosecutor).

249. Knapp, *supra* note 204. The Roof case presented many similar successive prosecution DOJ guidelines issues in the hate crimes context. Hate crimes are different in one fundamental respect that the relevant federal statute has a certification requirement expressly authorizing federal prosecution independent of the State’s effectiveness in prosecuting the same conduct. See 18 U.S.C. § 249(b)(1)(D) (2012) (stating that federal prosecution may proceed without regard to state prosecution if federal prosecution “is in the public interest and necessary to secure substantial justice”). Attorney General Lynch addressed the overlapping state murder

Consequently, the *Slager* state trial commenced prior to the federal trial essentially by default,²⁵⁰ thereby maintaining the preferred order of initial state prosecution consistent with DOJ policy despite its non-compliance with its own procedures. Much of the punditry predicted a relatively easy state court conviction, given the video evidence establishing Slager's initial version of events concerning the ultimate fatal confrontation was demonstrably false as well as the state court jury's option to convict on lesser included homicide offenses.²⁵¹

However, video evidence of police shootings have become more common, and possess enormous potential evidentiary value.²⁵² Capable defense lawyers have developed sophisticated strategies to counter such evidence. Moreover, one underestimates the unpredictability of a criminal jury at their peril.²⁵³ At trial,

prosecution in her press release and sought to explain why a separate federal indictment was immediately necessary:

As you know, the state of South Carolina is also prosecuting Roof for the murders, . . . [and other] offenses he is alleged to have committed. We commend the state authorities for their tremendous work and quick response. It is important to note, however, that South Carolina does not have a hate crimes statute and as a result, the state charges do not reflect the alleged hate crime offenses presented in the federal indictment returned today.

. . . .

[W]e look forward to our continued collaboration as these parallel state and federal prosecutions work their way through their respective court systems.

Press Release, U.S. Dep't of Justice, Attorney General Lynch Statement Following the Federal Grand Jury Indictment Against Dylann Storm Roof (July 22, 2015), <https://www.justice.gov/opa/pr/attorney-general-lynch-statement-following-federal-grand-jury-indictment-against-dylann-storm>. This tautological reasoning was unconvincing. The lack of a state hate crimes statute hardly meant that racial animus evidence could not be admitted to establish motive and premeditation in the state murder prosecution, where the State was also energetically seeking the death penalty.

Moreover, had the State and federal government not reached an agreement, South Carolina, the sovereign which first arrested Roof and thus maintained "primary jurisdiction" over Roof, would have retained sentencing priority even where the federal trial proceeded first. Memorandum from Henry Sadowski, Regional Counsel, Ne. Region, Fed. Bureau of Prisons on Interaction of Federal and State Sentences When the Federal Defendant Is Under State Primary Jurisdiction, at 2 (July 7, 2011) (on file with the *Hastings Law Journal*). In addition, the comments were tone deaf to the concerns that the victims' families would have to endure the emotional trauma of multiple trials. For criticisms of hate crimes statutes as largely symbolic, see, for example, Stuart Taylor, Jr., *'Hate Crimes' and Double Standards*, ATLANTIC (May 2007), <https://www.theatlantic.com/magazine/archive/2007/05/hate-crimes-and-double-standards/305992/> (describing hate crimes bill as ineffective "feel-good legislation"); John S. Baker, Jr., *United States v. Morrison and Other Arguments Against Federal "Hate Crime" Legislation*, 80 B.U. L. REV. 1191, 1194–1204 (2000) (contending that federal hate crime legislation is "symbolism over substance"). For a criticism of the federal government's death penalty prosecution of Roof as a misguided "show trial" with "the intention of . . . satisfying public opinion, rather than ensuring justice," see Cooper, *supra* note 205.

250. Andrew Knapp, *Roof, Slager Trials Set to Overlap*, POST & COURIER (June 20, 2016), https://www.postandcourier.com/archives/roof-slager-trials-set-to-overlap/article_aae3f0ff-b7a9-5fe1-8fc8-e3362490782e.html.

251. See Taylor, *supra* note 38 (noting strong video evidence and "no question" of Slager's guilt).

252. See, e.g., MAJOR CITIES CHIEFS ASS'N & F.B.I. NAT'L EXEC. INST. ASS'N, OFFICER INVOLVED SHOOTINGS AND THE IMPLICATIONS OF VIDEO EVIDENCE 1 (2016) (noting that "[m]any of the [recent officer involved] shootings have been captured on video").

253. See, e.g., Pat Gauen, *Unpredictable Juries Are Hardly New*, ST. LOUIS POST-DISPATCH (Aug. 26, 2010), https://www.stltoday.com/news/local/columns/pat-gauen/unpredictable-juries-are-hardly-new/article_

Slager acknowledged his initial recounting of events was inaccurate—he did not shoot Scott during a struggle for control of his taser gun.²⁵⁴ He explained the inaccuracies were a result of the adrenaline stress of the situation and the resulting perception distortion.²⁵⁵

This scenario was illustrated in a *Bluebloods* television episode entitled *The Truth About Lying*.²⁵⁶ There, a uniformed police officer confronts a use of force situation. Her immediate post-arrest statement concerning the incident is soon revealed as inconsistent with video footage obtained from a bystander. The Inspector General initially seeks to fire the officer for lying. However, she agrees to participate in a police confrontation training simulation before formally announcing the firing. In the debriefing session immediately afterward, the Inspector General incorrectly answers several questions concerning basic facts (for example, type of weapon, color of clothing), and thus, is convinced that an officer under stress in a life or death situation does not necessarily lie when the officer incorrectly describes what he or she had allegedly observed.²⁵⁷

Slager, offering a version of the above scenario as one aspect of his defense, avoided conviction. The jury deadlocked on the murder charge as well as on the lesser included offense of voluntary manslaughter, which resulted in a mistrial.²⁵⁸ Federal prosecutors then interceded and effectuated a plea bargain that also resolved the state charges. Slager pleaded guilty to the § 242 count, admitting he willfully deprived Scott of his civil rights. As part of a global settlement agreement, the other federal charges were dropped, as was the state murder charge.²⁵⁹

The federal intervention that short-circuited the state retrial was appropriate. The *Petite* Policy was not violated because the state prosecution

69df06ea-3c8c-5809-97e5-631c03722aaa.html (discussing illogical verdicts in criminal cases and quoting trial lawyer Abraham Lincoln that “[a] jury too often has at least one member more ready to hang the panel than to hang the traitor” (internal quotation marks omitted)).

254. Keith O’Shea, *Walter Scott Shooting: Officer Said His Mind Was Like ‘Spaghetti,’* CNN (Nov. 30, 2016, 2:38 AM), <https://www.cnn.com/2016/11/29/us/michael-slager-murder-trial-walter-scott/index.html>.

255. See Dustin Waters, *Attorneys for Michael Slager Cite Trump’s Declarations of ‘Fake News’ in Allegations of Media Witch-Hunt*, CHARLESTON CITY PAPER (Feb. 27, 2017, 2:34 PM), <https://www.charlestoncitypaper.com/TheBattery/archives/2017/02/27/attorneys-for-michael-slager-cite-trumps-declarations-of-fake-news-in-allegations-of-media-witch-hunt> (discussing defense contention that Slager’s “perception and memories of that day’s events were affected by stress”). Law enforcement training simulations have documented stress related factors that distort perception, judgment, and memory. See Brooke A. Masters, *Under the Gun; I Died, I Killed, and I Saw the Nature of Deadly Force*, WASH. POST, Feb. 13, 2000, at B1 (recounting her poor performance during Firearms Training System simulation).

256. *Blue Bloods: The Truth About Lying* (CBS television broadcast Oct. 18, 2013).

257. Jay Bobbin, *‘Blue Bloods’ Season 4, Episode 4: ‘The Truth About Lying’ Catches Cops, Relatives and Lovers*, SCREENER TV (Oct. 18, 2013), <http://screenertv.com/news-features/blue-bloods-season-4-episode-4-the-truth-about-lying-catches-cops-relatives-and-lovers/>.

258. Alan Blinder, *Mistrial for South Carolina Officer Who Shot Walter Scott*, N.Y. TIMES (Dec. 5, 2016), <https://nytimes.com/2016/12/05/us/walter-scott-michael-slager-north-charleston.html>.

259. Press Release, U.S. Dep’t of Justice, Former North Charleston, South Carolina, Police Officer Michael Slager Pleads Guilty to Federal Civil Rights Offense (May 2, 2017), <https://www.justice.gov/opa/pr/former-north-charleston-south-carolina-police-officer-michael-slager-pleads-guilty-federal> (noting that guilty plea to federal civil rights charge resolves all other state and federal charges).

never reached a verdict. Federal prosecutors properly evaluated the evidence and determined that sufficient cause existed to successfully prosecute a § 242 excessive force case.²⁶⁰ Federal prosecutors were aware that the state court jury was apparently within one vote of returning a guilty verdict on some homicide charge, further buttressing their discretion to proceed with the prosecution reasonably confident that the high bar of a successful federal civil rights prosecution could be met.²⁶¹ Resolution on these terms also comported with DOJ guidelines that endorse satisfactory resolution of all criminal litigation in one proceeding if possible.²⁶² All told, the spirit of the DOJ guidelines prevailed although DOJ should have waited until the state trial ended in a mistrial before obtaining the federal indictment.

5. *Freddie Gray*

When President Trump took office, his Justice Department, given its strong deference to state and local law enforcement, should have unhesitatingly reaffirmed the *Petite* Policy in its entirety.²⁶³ Unsurprisingly, the Trump DOJ reversed numerous Obama administration DOJ policies and priorities concerning civil rights and other matters.²⁶⁴ However, while the Trump DOJ left the *Petite* Policy unchanged, it continued some of the curious unwritten Obama era public disclosure practices in high profile civil rights police excessive use of force cases, and ultimately formally adopted some of the practices as part of its recent comprehensive review of the U.S. Attorneys' Manual.²⁶⁵

In April 2015, Freddie Gray was severely injured under suspicious circumstances while in the custody of the Baltimore Police Department. His ultimate death touched off several days of rioting and civil unrest in Baltimore.

260. The Principles of Federal Prosecution authorize a federal prosecution, inter alia, where “other circumstances that might cast doubt on the likelihood of the other authorities conducting a thorough and successful prosecution.” JUSTICE MANUAL, *supra* note 22, § 9-27.240(2). The mistrial in the first state trial, given the strength of the prosecution’s case, was an important factor supporting DOJ’s decision to prosecute without waiting for the results of a state retrial.

261. Darran Simon et al., *Judge Declares Mistrial in Michael Slager Trial*, CNN (Dec. 6, 2016, 9:31 AM), <https://cnn.com/2016/12/05/us/michael-slager-murder-trial-walter-scott-mistrial/index.html>.

262. JUSTICE MANUAL 9-2.000, *supra* note 24, § 9-2.031(A) (“In order to insure the most efficient use of law enforcement resources, . . . federal prosecutors should, as soon as possible, consult with their state counterparts to determine the most appropriate single forum in which to proceed to satisfy the substantial federal and state interests involved, and, if possible, to resolve all criminal liability for the acts in question.”). Some commentators criticized the State’s decision to abandon the murder prosecution and considered the outcome inequitable. See Mason, *supra* note 81 (condemning South Carolina’s decision to abandon retrial, imploring the State to “give the public a full and truthful explanation of the decision-making process . . .”).

263. See, e.g., Laura Jarrett, *Jeff Sessions Ushers in ‘Trump Era’ at the Justice Department*, CNN (Apr. 13, 2017, 10:04 AM), <https://cnn.com/2017/04/13/politics/jeff-sessions-new-era-for-doj/index.html> (noting Attorney General Sessions’ comment that “[i]t is not the responsibility of the federal government to manage non-federal law enforcement agencies”).

264. See *id.*

265. See Tillman, *supra* note 140 (discussing Trump DOJ undertaking first comprehensive revision of USAM since 1997). For a discussion of the recent March 2018 revisions to Title 8, concerning civil rights, see *supra* note 140; *supra* notes 201–214 and accompanying text.

Gray posed no imminent threat to any of the officers involved and should not have died in police custody. Ultimately, he suffered fatal injuries after being placed, with some difficulty, in the back of a police wagon without being fully restrained by a seat belt. Gray's family received a \$6.4 million settlement prior to the commencement of any state prosecution.²⁶⁶ The ensuing state prosecutions against several Baltimore police officers evoked justifiable criticism as overly aggressive prosecutorial excess. Nevertheless, the DOJ properly deferred to state prosecutors in the first instance.

The state prosecutions, which occurred during the Obama administration, did not result in any convictions.²⁶⁷ When President Trump took office, DOJ review to determine whether to authorize any federal civil rights prosecutions had not been completed. In September 2017, the Trump DOJ issued an eight-page press release concluding that a federal prosecution would not be pursued against any of the Baltimore police officers.²⁶⁸ The press release was far less detailed than the eighty-page DOJ tome declining to pursue federal prosecution in the Michael Brown fatal shooting in Ferguson, Missouri. Nonetheless, the Gray press release was essentially a declination report which contained detailed factual and legal analysis pertinent to prosecutorial decision making.²⁶⁹

For example, the press release noted that, of the six officers charged by state authorities, one trial resulted in a hung jury while three other officers were all acquitted in bench trials. Consequently, state prosecutors dismissed all remaining charges, thereby "ending all state prosecutions related to Gray's

266. Keith L. Alexander, *Baltimore Reaches \$6.4 Million Settlement with Freddie Gray's Family*, WASH. POST (Sept. 8, 2015), https://www.washingtonpost.com/local/crime/baltimore-reaches-64-million-settlement-with-freddie-grays-family/2015/09/08/80b2c092-5196-11e5-8c19-0b6825aa4a4a3a_story.html?utm_term=.3992f12959be.

267. Six officers were charged with various offenses, ranging from murder to less serious felony offenses. After an initial hung jury at the first trial, other defendants subsequently exercised their unilateral right to a bench trial as permitted under Maryland law and were all acquitted. Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions Against Officers*, BALT. SUN (July 27, 2016), <https://www.baltimoresun.com/g00/news/maryland/freddie-gray/bs-md-ci-miller-pretrial-motions-20160727-story.html?i10c.encReferrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8%3d&i10c.ua=1&i10c.dv=18>; Kevin Rector & Michael Dresser, *Officers' Selection of Judge Trials Shaped Outcome in Freddie Gray Case—Spurring Debate*, BALT. SUN (July 31, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-pivotal-nero-bench-decision-20160731-story.html>. The state prosecutor was castigated for rushing to prosecute based on improper and allegedly unethical considerations. For example, at a press conference in the shadow of violence and civil unrest, she quickly announced that she was filing criminal charges against several officers, proclaiming "[t]o the people of Baltimore and the demonstrators across America, I heard your call for 'no justice, no peace,'" thereby suggesting improper and arguably unethical motivation to bring criminal charges to quell civil unrest. Danny Cevallos, Opinion, *Was the Freddie Gray Case a Political Prosecution?*, CNN (July 27, 2016, 9:08 PM), <https://www.cnn.com/2016/07/27/opinions/baltimore-police-freddie-gray-cevallos/index.html>. The prosecutor may have unwittingly stumbled into a paradigmatic academic "utilitarianism run amok" debate concerning the propriety of punishing a person known to be innocent in order to placate an enraged mob. See DRESSLER, *supra* note 77, at 21–22 & nn.38–40 (discussing criticism of utilitarian punishment theory relying on similar hypothetical, and citing sources).

268. Press Release, U.S. Dep't of Justice, *Federal Officials Decline Prosecution in the Death of Freddie Gray* (Sept. 12, 2017), <https://www.justice.gov/opa/pr/federal-officials-decline-prosecution-death-freddie-gray>.

269. *Id.*

death.”²⁷⁰ The press release reviewed, in uncommon detail, the applicable law and evidence, concluding that “the evidence is insufficient to prove beyond a reasonable doubt that [the officers] willfully violated Gray’s civil rights. Accordingly, the investigation into this incident has been closed without prosecution.”²⁷¹

Unquestionably, the *Petite* Policy applied with respect to the fate of the three defendants acquitted in bench trials. The DOJ’s ultimate decision to decline prosecution, reflected in the press release, was correct even had a comprehensive *Petite* Policy analysis been undertaken and articulated. However, any *Petite* Policy analysis was conspicuous only by its utter absence. Other than cursory introductory reference to the prior state bench trials, there was no discussion or analysis of the state trials that had proceeded to verdict, and thus no discussion of the significance, if any, of the prior acquittals. Likewise, there was no mention of the *Petite* Policy *raison d’être*: whether a “substantial federal interest had been left demonstrably unvindicated” by the prior prosecutions.

A thorough public *Petite* Policy analysis of the Freddie Gray case would have been eye opening and highly instructive. It would have provided critical insight into how the DOJ interprets the cryptic general subjective guiding principles that undergird the policy and how particular case specific factors are evaluated. For example, it likely would have discussed the significance, if any, of the bench trial acquittals, including the unilateral right of an accused to elect a bench trial under Maryland law, a right nonexistent under federal law so that any federal prosecution would have almost certainly been tried to a jury.²⁷² Moreover, a *Petite* Policy analysis necessarily would have further addressed whether the state verdicts were rational, whether another rational factfinder might have reached a different conclusion, and whether the alleged actions impacted a “compelling federal interest, particularly one implicating an enduring national priority.”²⁷³ In addition, analysis of the third *Petite* prong could have provided invaluable insight as to how DOJ evaluates whether to pursue a second prosecution even where it finds no specific infirmity in the manner in which the prior state cases were tried to verdict. Yet the DOJ press release analyzed the case in a vacuum, as if the *Petite* Policy did not exist, that the prior state prosecutions never occurred, or, were irrelevant to the inquiry of

270. *Id.*

271. *Id.*

272. See FED. R. CRIM. P. 23(a)(2) (providing government consent requirement); see also Adam H. Kurland, *Providing a Federal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. DAVIS L. REV. 309, 309 (1993) (noting that the Federal Rules presently provide that prosecutor must consent to defendant’s request to waive a jury trial and proposing that federal law should be amended to provide a federal defendant with a unilateral right to a bench trial); Daniel Epps, *Police Should Face Juries, Not Just Judges*, WASH. POST, Sept. 21, 2017, at A21 (arguing that fatal police shooting cases should be jury trials so that jury can provide the community with a voice in vital criminal justice matters).

273. JUSTICE MANUAL 9-2.000, *supra* note 24, § 9-2.031(D).

whether the federal government should undertake a successive federal prosecution that was already subject to a prior state prosecution for essentially the same underlying conduct.

The decision to ignore the *Petite* Policy is not without consequence. Perhaps most disturbing, since the *Petite* Policy is still in effect, ignoring it in an official press release is disingenuous at best. Avoiding discussion of the applicable policy in an effort to provide a more palatable public rationale is self-defeating and undermines the purported public interest transparency motivation that led to disclosing at least some prosecutorial decision-making rationale in the first place. This further invites cynicism and undermines trust in government where significant tension and distrust are already present in many of these situations.

Ignoring the *Petite* Policy also means ignoring the reality of the prior state court acquittals. Apparently, for public relations reasons, both the Obama DOJ in the Trayvon Martin death and the Trump DOJ in the Freddie Gray death did not want to be associated in formally acknowledging, even indirectly, the rationality and legitimacy of the state court verdicts. Apparently, it was deemed more palatable to decline prosecution relying solely on the rubric of burden of proof hurdles. If this is the true motivation, then the DOJ should consider dispensing with the faux candor and simply revert to its prior procedures and not disclose the reasons for its declination decisions under any circumstances. This would also reinstate symmetry by effectively barring DOJ comment for both declinations and authorizations.

The new DOJ disclosure provisions have created an uncomfortable asymmetry on two levels. First, as noted above, disclosure of the prosecutorial rationale applies only for declination decisions where the victim's family can personally receive the rationale for the decision. However, decisions to authorize a prosecution are not subject to any public disclosure save for rote details concerning the charges set forth in the indictment.

Second, the asymmetry is further exacerbated where a prior state prosecution has reached a verdict. Again, in most cases, a decision to go forward with a federal prosecution will provide no public statement other than referencing the indictment. When a declination decision is made in circumstances where the *Petite* Policy applies, disclosure of the factual analysis seems to focus exclusively on whether sufficient evidence exists to bring a federal criminal prosecution and ignores the crux of the *Petite* Policy. As noted above, this inevitably focuses almost exclusively on whether willfulness can be proven beyond a reasonable doubt. Nothing was learned concerning how the *Petite* Policy factors, which were left totally unaddressed, actually influenced the decision making process. Again, this only serves to ill-advisedly highlight more dissatisfaction with the "high bar" for federal prosecution and engenders more public outcry to change federal law to permit prosecution for negligent or

“mere” reckless police misconduct.²⁷⁴ So we are left with an unsatisfactory situation where the few DOJ prosecutorial explanations concerning public disclosure of civil rights prosecutions concern only declinations and those pronouncements never forthrightly address *Petite* Policy considerations even when clearly applicable.

6. *Alton Sterling*

On July 5, 2016, Alton Sterling was shot and killed by Baton Rouge police while they were apparently attempting to control him and take him to the ground after he allegedly reached for a gun in his pocket. The officers were responding to a call that a suspect had reportedly brandished a weapon and, upon their arrival on the scene, Sterling did not comply with the officers’ lawful commands. The shooting was recorded by several bystanders and some of the camera angles appeared to support the claim that he was not reaching for his weapon when he was shot multiple times. Subsequent investigation confirmed Sterling had possessed a loaded firearm.²⁷⁵

Over concerns of the appearance of partiality, coupled with the tense public environment as a result of other recent high profile police shootings of African-American males, state and local officials asked the DOJ to take the lead in the investigation and the DOJ opened up a civil rights investigation. The local district attorney commented that the decision to involve the federal agencies was to “give the community confidence” and that any consideration of state charges would come after the federal investigation concluded.²⁷⁶

The state invitation to reverse the preferred order of investigation violated no DOJ policy. This may have seemed prudent at the time in order to calm an outraged public. However, if the DOJ ultimately declined to pursue federal charges, it likely would further exacerbate a problematic situation for state and local authorities facing a skeptical public in the midst of eroding public confidence. The DOJ investigation was not completed at the time President Trump took office in January 2017, and the matter carried over to the Trump DOJ.

As noted, in May 2017, DOJ issued a press release, announcing that it would not bring any civil rights charges arising out of the Sterling incident. The *Petite* Policy was not implicated because there was no prior state prosecution. Rather, like Michael Brown, this was a straight forward application of the

274. For discussion of various legislative proposals to “lower the bar,” see *infra* Subpart V.C.

275. After both the DOJ and the State declined to prosecute on any charges, the State Attorney General eventually issued a detailed report reflecting these findings. See generally LA. DEP’T OF JUSTICE, THE FINAL REPORT OF THE INVESTIGATION AND THE DETERMINATION OF CRIMINAL RESPONSIBILITY AND USE OF FORCE BY OFFICERS BLANE SALAMONI AND HOWARD LAKE OF THE BATON ROUGE POLICE DEPARTMENT IN THE OFFICER INVOLVED DEATH OF ALTON STERLING OCCURRING JULY 5, 2016 (2018).

276. Maya Lau, *Baton Rouge’s District Attorney Says FBI, U.S. Attorney’s Office Take Lead in Investigation of Alton Sterling Death*, ADVOCATE (July 6, 2016, 11:00 AM), http://theadvocate.com/baton_rouge/news/alton_sterling/article_a98cbf9c-1de4-5467-a61b-a43cd4f884e9.html (quoting statement made by district attorney).

Principles of Federal Prosecution, where public release of the ultimate prosecutorial decision making analysis did not normally occur. Nevertheless, the Trump DOJ—not content to simply issue a terse comment that a careful review of the evidence did not support a prosecution for willful conduct—instead issued a five-page press release devoted to a factual summary and legal analysis supporting its declination decision.²⁷⁷ The press release emphasized that two independent nationally recognized use-of-force experts both concluded that the officers’ actions were reasonable and that the evidence did not sufficiently disprove the officers’ claim that Sterling was reaching for his gun.²⁷⁸

Unsurprisingly, DOJ’s transparency efforts did little to mute the intense criticism. Civil rights groups castigated then Attorney General Jefferson Sessions personally, with one critic stating “[t]here is no way to misinterpret the message that Jeff Sessions sent . . . [which is] [b]lack lives do not matter.”²⁷⁹ However, given the state of the evidence, the DOJ’s decision would likely have been the same under the Obama Administration.²⁸⁰ As discussed earlier, the only option that could conceivably support a different outcome would be for federal prosecutors to push the *Screws* envelope and contend that the subject conduct reached a level of recklessness that constitutes “willfulness” under the statute.²⁸¹ However, a federal prosecutor involved in the investigation specifically rejected that approach, commenting “[b]eing *reckless*, escalating a situation that may have been de-escalated—those things are not a basis, under the law, for a federal criminal civil rights prosecution.”²⁸²

DOJ provided its investigative files to the Louisiana Attorney General to determine whether the subject conduct violated state law.²⁸³ But the lily had already been gilded, thus illustrating the problems when a federal civil rights investigation does not to operate as a “backstop.” Although double jeopardy was not legally applicable, under the circumstances, it was unlikely that the State would contradict DOJ’s assessment on willfulness. At the outset, this essentially fatally undermined the State’s ability to bring the most serious murder charges. Lesser state charges were still theoretically possible, but the unavailability of more serious charges to serve as a sword of Damocles and critical plea bargaining tool, as was evident in the resolution of the Slager case, likely ensured that the State would decline to pursue any charges. The State only had itself to blame for voluntarily ceding the initial investigatory priority in the first

277. Press Release, U.S. Dep’t of Justice, Federal Officials Close Investigation into Death of Alton Sterling (May 3, 2017), <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-alton-sterling>.

278. *Id.*

279. Rebecca R. Ruiz & Matt Apuzzo, *Sessions Closed the Sterling Case. Odds Are, His Predecessor Would Have, Too.*, N.Y. TIMES, May 5, 2017, at A16 (internal quotation marks omitted) (quoting Rashad Robinson, executive director of Color of Change).

280. *Id.*

281. See discussion *supra* notes 76–79 and accompanying text.

282. Richard Fausset & Alan Blinder, *2 Fatal Police Shootings Yield 2 Different Results*, N.Y. TIMES, May 3, 2017, at A17 (emphasis added) (quoting prosecutor).

283. Press Release, U.S. Dep’t of Justice, *supra* note 277.

place, regardless of its supposed high-minded motives in doing so. Defense counsel stopped just short of claiming victory, but confidently expected state officials to reach the same defense favorable conclusion.²⁸⁴

In March 2017, the Louisiana Attorney General announced that the officers would not be charged in the fatal shooting of Sterling. He also released a thirty-four page report that concluded the officers were engaged in a lawful arrest, Sterling was armed with a loaded weapon and was under the influence of various substances, and that the shooting was “justified.”²⁸⁵ Predictably, the result was criticized as a wholesale injustice unless a conviction was achieved.²⁸⁶

7. *Eric Garner*

In July 2014, Eric Garner died during the course of an arrest in the Staten Island Borough of New York City. Police attempted to arrest him for selling single untaxed black-market cigarettes in response to local merchants’ complaints about the persistent illegal sales, which were hurting business.²⁸⁷ Garner was uncooperative during the arrest and was tackled to the ground. Bystanders recorded the events as they unfolded, where Garner was heard complaining that “I can’t breathe.”²⁸⁸ The coroner ultimately determined that the arresting officer administered a chokehold on Garner, a procedure banned by the NYPD several years earlier, which caused his death.²⁸⁹ Daniel Pantaleo, the officer in question, claimed he performed a sanctioned take down technique as he attempted to effectuate the arrest. Defense lawyers and other allies also claimed that Garner’s obesity and asthma likely contributed to his unfortunate accidental death.²⁹⁰

The local Staten Island District Attorney’s office presented the Garner case to a state grand jury where Officer Pantaleo testified. The grand jury ultimately refused to return an indictment on any charges. Nationwide protest and civil unrest ensued. Because of New York grand jury secrecy rules, the state grand

284. Fausset & Blinder, *supra* note 282.

285. Mark Berman & Wesley Lowery, *Baton Rouge Police Officers Won’t Be Charged in Fatal Shooting of Alton Sterling*, WASH. POST (Mar. 27, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/03/27/baton-rouge-police-officers-wont-be-charged-in-fatal-shooting-of-alton-sterling/?utm_term=.91cfbfb90c8. Defense counsel noted that he would challenge the expected officers’ firing for purported violations of department policies, even if the conduct was not criminal. *Id.*

286. *See id.*

287. Shawn Cohen & Bob Fredericks, *Chokehold Cop Hopes Trump Administration Drops Eric Garner Case*, N.Y. POST (Nov. 11, 2016, 5:28 PM), <https://nypost.com/2016/11/11/chokehold-cop-hopes-trump-administration-drops-eric-garner-case>.

288. Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

289. *See* Phillip Swarts, *N.Y. Officer Won’t Face Charges in Eric Garner Chokehold Death*, WASH. TIMES (Dec. 3, 2014), <https://washingtontimes.com/news/2014/dec/3/eric-garner-chokehold-death-ny-officer-wont-face-c/> (noting that coroner determined that chokehold was cause of death and ruled death a homicide).

290. Nia-Malika Henderson, *Peter King Blames Asthma and Obesity for Eric Garner’s Death. That’s a Problem for the GOP.*, WASH. POST (Dec. 4, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/12/04/peter-king-blames-asthma-and-obesity-for-eric-garners-death-this-is-a-problem-for-the-gop/?utm_term=.a574a329fb8f.

jury transcripts have never been publicly released and the public has never been informed of what particular charges were actually presented to the grand jury. Subsequent litigation by various public interest organizations failed to obtain public disclosure of the grand jury proceedings.²⁹¹ The Staten Island District Attorney, Daniel Donovan, parlayed his notoriety and the lack of an indictment in the Garner case to win a congressional seat in 2014.²⁹² Garner's family received a \$5.9 million settlement, even though no state criminal charges were ever filed.²⁹³

Consistent with DOJ policy, the federal government then commenced its own civil rights investigation. The *Petite* Policy was not implicated because there had been no prior state prosecution that reached a verdict. The DOJ obtained access to the state grand jury materials, which presumably included Officer Pantaleo's state grand jury testimony, as well as the instructions and range of charges presented to the state grand jury.²⁹⁴

Thereafter, the press reported that Brooklyn federal prosecutors and local FBI agents determined that no federal charges were warranted. That conclusion, never officially made public, was likely based on a combination of factors suggesting that the evidence lacked sufficient strength to prove willful unconstitutional conduct beyond a reasonable doubt.²⁹⁵

After a long delay, the case took a bizarre turn after Attorney General Lynch assumed office. She took the unusual step of assigning new FBI agents

291. James v. Donovan, 14 N.Y.S.3d 435 (App. Div. 2015); see also Jonathan Blitzer, *The Case to Release the Garner Grand-Jury Records*, NEW YORKER (Mar. 10, 2015), <https://www.newyorker.com/news/news-desk/the-case-to-release-the-garner-grand-jury-records>.

292. John B. Judis, *Is the Police Brutality Debate Helping Republicans?*, NAT'L J., Apr. 25, 2015, at 2-2; see also Alexander Burns, *Daniel Donovan Gets Wary Welcome to Congress After Eric Garner Case*, N.Y. TIMES, May 23, 2015, at A17 (noting skepticism whether Donovan's office "presented a strong case or not" (quoting Representative Gregory W. Meeks)). Donovan was upset in his 2018 reelection bid and lost his seat in Congress. Timothy Cama, *Dem Max Rose Beats GOP's Dan Donovan in New York House Race*, HILL (Nov. 6, 2018, 10:11 PM), <https://thehill.com/homenews/campaign/414564-rose-beats-gops-donovan-in-new-yorks-staten-island-race>.

293. Al Baker & Eli Rosenberg, *Federal Grand Jury Begins Hearing Evidence in Eric Garner Case*, N.Y. TIMES (Feb. 11, 2016), <https://www.nytimes.com/2016/02/11/nyregion/federal-grand-jury-begins-hearing-evidence-in-eric-garner-case.html>.

294. See Andrew Buncombe, *Eric Garner: Prosecutors Present Evidence in Civil Rights Case of Unarmed Black Man Killed by Police*, INDEPENDENT (Feb. 12, 2016, 5:16 PM), <https://www.independent.co.uk/news/world/americas/eric-garner-prosecutors-present-evidence-in-civil-rights-case-of-unarmed-black-man-killed-by-police-a6870266.html> (noting DOJ access to state grand jury materials, including Pantaleo's prior grand jury testimony); see also Baker & Rosenberg, *supra* note 293. The range of charges presented to the state grand jury is largely irrelevant to the federal investigation. Federal prosecutors are only examining whether, applying the Principles of Federal Prosecution, sufficient evidence exists to likely prove willful conduct beyond a reasonable doubt, an inquiry wholly separate from whether a state grand jury considered manslaughter, negligent homicide or various reckless endangerment charges.

295. See JUSTICE MANUAL, *supra* note 22, § 9-27.300. That evidentiary assessment would logically include the fact that Officer Pantaleo was involved in a lawful arrest where the suspect resisted. Whether Pantaleo used an unlawful chokehold likely became a critical disputed issue as well. If DOJ is unsure it can prove a constitutional violation of Garner's civil rights beyond a reasonable doubt, that should end the federal inquiry because whether the police acted negligently or may be liable for reckless endangerment are solely state law enforcement matters of which the federal government lacks a prosecutorial interest.

and new prosecutors from the Civil Rights Division in Washington to reassess the case, as Civil Rights Division lawyers and Attorney General Lynch reportedly believed federal prosecution was appropriate.²⁹⁶ The DOJ had not made a final prosecutorial decision at the time President Trump took office in January 2017.²⁹⁷ The case lingered in legal limbo for more than a year when the press eventually reported in April 2018 that, according to an anonymous source “not authorized to publicly discuss an ongoing investigation,” career prosecutors again recommended that federal charges should be pursued, but it remained uncertain whether a case will ultimately be approved at the highest levels of the Justice Department.²⁹⁸

At the date of this writing, the pending decision continues to rest with the Trump DOJ. Whatever the DOJ ultimately decides, the process and the decision should be accepted. As best as can be determined, the DOJ has carefully waded through difficult, ambiguous, and sometimes contradictory evidence. A decision either way should represent a rational prosecutorial decision and lend further support that existing federal statutes and procedures are adequate. Although unlikely in this intense politically sensitive climate, the DOJ should resist the temptation to offer a more detailed public explanation beyond the announcement of the prosecutorial decision.²⁹⁹ With or without a public explanation, a declination will almost certainly prompt another round of protests and more ill-advised calls to “lower the bar” for federal prosecution.³⁰⁰

296. Lynch’s decision was also unusual in that the internal DOJ disagreements became public through media leaks, and met with much criticism. The New York City Patrolmen’s Benevolent Association accused her of trying to take a “third bite at the apple” and decried her relentless pursuit of her favored “predetermined outcome.” Opinion, *Movement in the Eric Garner Case*, N.Y. TIMES (Oct. 26, 2016), <https://www.nytimes.com/2016/10/26/opinion/movement-in-the-eric-garner-case.html>.

297. See Cohen & Fredericks, *supra* note 287.

298. Matt Zaptosky, *Civil Rights Prosecutors Again Recommend Charges in Death of Eric Garner*, WASH. POST (Apr. 20, 2018), https://www.washingtonpost.com/world/national-security/civil-rights-prosecutors-recommend-charges-in-death-of-eric-garner/2018/04/20/01d77236-44b4-11e8-bba2-0976a82b05a2_story.html?noredirect=on&utm_term=.5c72420e661b (referencing anonymous sources); see also Matt Apuzzo, *Charges Sought in Eric Garner’s Death, but Justice Officials Have Doubts*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/politics/eric-garner-charges-recommended.html> (noting conflict between career prosecutors and top Trump DOJ officials, the latter apparently concerned that the case is unwinnable).

299. This is unlikely given the new DOJ provisions authorizing disclosure to victim’s family concerning the DOJ rationale to decline prosecution. JUSTICE MANUAL 8-3.00, *supra* note 178, § 8-3.190. On the other hand, a DOJ decision to pursue prosecution could test the bounds of what prosecutors may comment on beyond the four corners of the charging document.

300. In July 2016, NYPD informed the DOJ that it would no longer hold off on disciplinary proceedings arising out of the Garner fatality if the DOJ had not announced by August 31, 2018, whether it will file criminal charges. NYPD has held off moving forward so as not to prejudice any subsequent criminal case. It remains unclear as to how the federal case could be adversely affected, and there is also some dispute as to DOJ’s position whether it has sought a delay of the NYPD proceedings. Benjamin Weiser & J. David Goodman, *Police Dept. Gives Federal Investigators Ultimatum in Eric Garner Case*, N.Y. TIMES (July 16, 2018), <https://www.nytimes.com/2018/07/16/nyregion/eric-garner-police-federal-deadline.html>.

V. THE UNNECESSARY PROPOSED FEDERAL LEGISLATIVE CHANGES

A. ADEQUACY OF EXISTING FEDERAL LAWS AND GUIDELINES

Despite the intense controversies surrounding recent fatal police shootings, the federal government's "backstop" role in these cases remains sound policy and the relevant statutes are adequate. Properly and objectively understood, this state of affairs does not represent a federal abdication of responsibility.³⁰¹ The relevant DOJ guidelines have also operated well, although the new public disclosure guidelines raise problematic issues in an effort to achieve some increased level of transparency.

B. EVOLVING STATE OF STATE PROSECUTIONS

The soundness of the "backstop" policy is largely dependent on state and local law enforcement's willingness to fairly and effectively investigate these incidents. History shows that state law enforcement was abhorrent in many circumstances, particularly where "Sherriff *Screws*-like" southern law enforcement officers committed murder with impunity.³⁰² However, the situation has markedly improved over the last half-century. Today, many police misconduct cases concern allegations of excessive force arising out of what began as a lawful police encounter, with many incidents involving officers

301. White House Press Secretary Sarah Sanders faced a torrent of criticism when she appeared to robotically dismiss press inquiries concerning the fatal police encounters involving Sterling, Garner, and Stephon Clark in Sacramento as "local matters" and the responsibility of "local authorities." Press Release, Press Briefing by Press Secretary Sarah Sanders (Mar. 28, 2018), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-032818/>. The press coverage suggested that the White House position concerning the fatal police shootings of African-Americans constituted an abdication of federal responsibility. See, e.g., Jenna Amatulli, *White House on Police Shootings of African-Americans: It's a 'Local Matter,'* HUFFINGTON POST (Apr. 11, 2018), https://www.huffingtonpost.com/entry/white-house-on-police-shootings-of-african-americans_us_5abce840e4b03e2a5c7a0169 (noting nationwide protests and turmoil juxtaposed with White House "local matter" characterization); Katie Reilly, *Trump White House Calls Fatal Police Shooting of Stephon Clark a 'Local Matter,'* TIME (Mar. 28, 2018, 8:00 PM), <http://time.com/5219574/donald-trump-stephon-clark-local-matter/>. Charitably construed, Sanders made correct statements on two of the three incidents. Sterling was indisputably a local matter because the DOJ had already determined it would not bring criminal civil rights charges. Garner is a federal responsibility, as the DOJ is currently evaluating whether to bring charges after the state grand jury failed to return an indictment on any charges. See discussion *supra* Subpart IV.E.7. The Clark fatal shooting investigation is presently a matter for local authorities because of DOJ policies that defer to vigorous state prosecution in the first instance are in play. Moreover, Sanders demonstrated a modicum of understanding of the relevant interjurisdictional procedures. In apparent response to the Clark incident, she stated "[t]his is something that is a local matter, and that's something that we feel should be left up to the local authorities at this point in time." Press Release, *supra* (emphasis added). In response to a later question, Sanders apparently alluded to both the recent Clark fatal shooting and the recent Louisiana decision to decline to pursue any criminal charges in the Sterling case, and reverted back to a fifty percent accuracy rate by stating "when it comes to . . . the rulings that have taken place in the last few days, those are things that have to be done at a local level and they're not federal decisions at this point in time." *Id.* (emphasis added). Again, this was a correct statement as applied to Clark, but was inaccurate as applied to Sterling because federal involvement had concluded.

302. See *supra* text accompanying notes 67–72.

engaging in a good faith arrest and permitted to use some degree of force because the suspect resisted.³⁰³

Admittedly, successful prosecutions of police officers are difficult. Juries, understandably, often give police officers the benefit of the doubt, and the substantive law of self-defense and lawful use of excessive force tend to favor police officers.³⁰⁴

Police shootings often have a significant racial component. However, this complex problem extends far beyond race. Inordinate focus on federal prosecutions as the most important, if not exclusive, means of addressing this problem and achieving justice is unwarranted. The relevant statistics require subtle and intricate analysis. From a raw numerical standpoint, most victims of police shootings are white.³⁰⁵ However, African-Americans interface with the criminal justice system at a rate far in excess of their percentage share of the population.³⁰⁶ African-Americans make up twenty-five percent of police shooting victims, but are only twelve per cent of the population.³⁰⁷ Additionally, African-Americans constitute thirty-three percent of the prison population³⁰⁸ and make up almost twenty-seven percent of all arrests.³⁰⁹ Increasing the number of federal criminal civil rights prosecutions clearly will not solve this multi-dimensional criminal justice problem. As former University of California, Berkeley Law School Dean Christopher Edley, Jr. noted in the immediate aftermath of Ferguson, “the solution must go beyond police practices to looking

303. See *supra* Subpart IV.D (discussion of high profile police shooting cases, most of which began as lawful police encounters).

304. Emanuella Grinberg, *Why Police-Involved Shooting Trials Rarely End in Convictions for Officers*, CNN (Aug. 29, 2018, 8:56 PM), <https://www.cnn.com/2017/06/23/us/police-deadly-force-trials/index.html>; see also McCarthy, *supra* note 10 (“It is virtually impossible to prove a civil-rights violation when there is no denying that police were engaged in a good-faith arrest and were put in the position of using force because a suspect resisted.”); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 9 (2009) (noting juries frequently believe and sympathize with defendant officers).

305. Wesley Lowery, *Aren't More White People than Black People Killed by Police? Yes, but No.*, WASH. POST (July 11, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-yes-but-no/?utm_term=.e097d18d44e1; Chris Nichols, *What Are the Facts on Police Shootings Following Death of Stephon Clark?*, POLITIFACT (Mar. 29, 2018, 3:24 PM), <https://www.politifact.com/california/article/2018/mar/29/what-are-facts-police-shootings-following-death-st/>; Edwin Rios, *Alton Sterling Is the 38th Person Killed by Louisiana Cops Since 2015*, MOTHER JONES (July 6, 2016, 6:31 PM), <https://www.motherjones.com/politics/2016/07/38-police-shootings-louisiana-since-2015/> (citing statistical compilations from Washington Post, in 2015, and noting 258 black police fatalities out of a total of 990)

306. See sources cited *supra* note 305.

307. See sources cited *supra* note 305.

308. John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison is Shrinking*, PEW RES. CTR. (Jan. 12, 2018), <http://www.pewresearch.org/fact-tank/2018/01/12/shrinking-gap-between-number-of-blacks-and-whites-in-prison/>.

309. *2016 Crime in the United States: Table 21A*, F.B.I., <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-21> (last visited Mar. 17, 2019).

at the school systems, health-care policies and other programs that ‘devalue’ minority lives.”³¹⁰

Nevertheless, improved circumstances at the local level, albeit small, reinforce Burke Marshall’s and Attorney General Kennedy’s aspirations that that state and local law enforcement would eventually take their civil rights enforcement responsibilities seriously. State and local officials, including prosecutors, are indisputably the proper authorities to assume primary responsibility to provide oversight of their local police departments. Although far from perfect, state and local jurisdictions generally investigate these cases competently and many are instituting progressive reforms that increase police accountability. Preliminary data reveals that deadly police shootings of unarmed persons, including unarmed African-Americans, have generally declined since 2015.³¹¹ Undoubtedly, the wide spread presence of video of police encounters has served both as a check on improper conduct and as persuasive evidence at trial.³¹²

As noted above, the range of criminal charges available to state prosecutors far exceeds the range of charges available to federal prosecutors, who are largely constrained to prosecute only willful constitutional violations. This prevents federal prosecutors from being miscast as micromanagers of police departments compelled to resolve negligence and other nonconstitutional claims. Several reforms at the state level are starting to take hold, injecting more dispassionate objectivity into local investigations and prosecutions of police officers who break the law. This reinforces the operating principle that federal civil rights prosecutions properly serve as a “backstop” to state prosecutions.

Independent state investigators and prosecutors who do not have a close symbiotic relationship with a particular police department are becoming more common. These reforms increase independence and reduce the concern that a close prosecutor-police relationship could inhibit fair investigation of police misconduct cases. In the immediate aftermath of the 2018 shooting of Stephon Clark in Sacramento, California, the California Attorney General announced that

310. Karen Tumulty, *Ferguson, Staten Island: Similar Events Bring Very Different Reaction*, WASH. POST (Dec. 4, 2014), https://www.washingtonpost.com/politics/ferguson-staten-island-similar-events-bring-very-different-reaction/2014/12/04/bf4a482c-7bd9-11e4-b821-503cc7efed9e_story.html?utm_term=.c4857ede32ef.

311. John Sullivan et al., *Police Shootings of Unarmed Are Down*, WASH. POST, May 8, 2018, at A11 (reporting on preliminary data from 2015 to present).

312. The evidence presents in the form of police body and dash cams, and bystander video recordings. *See id.* (discussing several encounters which were recorded); Kristine Hamann, *Police Body-Worn Cameras: The Prosecutors’ Perspective*, 33 CRIM. JUST. 17, 17 (2018) (noting increased use of police body-worn cameras “inevitably will capture a great deal of evidentiary material that will be useful in every type of criminal prosecution”); *see also* Nicole Chavez, *Nashville Officer Charged with Criminal Homicide in Fatal Shooting of Black Man*, CNN (Sept. 28, 2018, 10:09 AM), <https://www.cnn.com/2018/09/28/us/daniel-hambrick-nashville-police-shooting/index.html> (noting state homicide charges brought after surveillance video shows officer shooting black man in back). As this Article entered the final editing stages, a Chicago police officer responsible for the Laquan McDonald killing was convicted of second degree murder in Illinois state court. Police dash cam video introduced at trial constituted critical evidence against the defendant. Jazz Shaw, *Jason Van Dyke Needed to be Convicted for Killing LaQuan McDonald*, HOTAIR (Oct. 7, 2018, 9:31 AM), <https://hotair.com/archives/2018/10/07/jason-van-dyke-needed-convicted-killing-laquan-mcdonald/>.

he would conduct an independent investigation into the matter.³¹³ In the wake of the Eric Garner fatality, the Governor of New York issued an executive order adopting similar special prosecutor appointment procedures when an unarmed civilian is killed in a police encounter.³¹⁴ Other factors, such as increased use of body cameras, dash cam recorders, and civilian cell phone videos have also increased transparency and made it less likely to simply accept unchallenged an officer's version of events. Remarkably, the tide may finally even be turning against the trend to expand lethal force doctrines embodied in "stand your ground" laws. Also in the immediate wake of the Clark fatality, California lawmakers proposed tightening the standard under which police officers could use deadly force.³¹⁵

Furthermore, local prosecutorial accountability continues to increase through the ballot box. As a result of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, urban jurisdictions are now often led by elected African-American mayors and prosecutors, and many African-American police chiefs now command police forces that better reflect demographically the communities which they serve.³¹⁶ These factors further contribute to an atmosphere where police shooting cases should be taken more seriously by local law enforcement and local prosecutors, particularly where dissatisfied constituents have voted local prosecutors out of office.³¹⁷ This is as it should be.

313. Madison Park, *Sacramento Residents Voice Outrage over Stephon Clark's Shooting Death*, CNN (Mar. 28, 2018, 4:43 PM), <https://cnn.com/2018/03/28/us/sacramento-city-council-stephon-clark/index.html>.

314. *Governor Cuomo Signs Executive Order Appointing NYS Attorney General as Special Prosecutor in Cases Where Law Enforcement Officers Are Involved in Deaths of Civilians*, N.Y. ST.: GOVERNOR (July 8, 2015), <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-appointing-nys-attorney-general-special-prosecutor-cases>. The order has produced mixed results. See Rachel Silberstein, *How Cuomo's Special Prosecutor Order Is Playing Out, 19 Months Later*, GOTHAM GAZETTE (Feb. 27, 2017), <http://www.gothamgazette.com/state/6778-while-cuomo-s-special-prosecutor-order-continues-calls-for-permanency-remain> (surveying incidents where policy was invoked).

315. Ray Sanchez, *California Lawmakers Seek Change in Police Lethal Force Standard*, CNN (Apr. 3, 2018, 5:34 PM) <https://www.cnn.com/2018/04/03/us/sacramento-stephon-clark-shooting-legislation/index.html>. This proposal will have to be fleshed out and subject to responsible deliberation. Some legal force experts opined that the proposed legislation is merely a linguistic reformulation that would not affect any actual change in what constitutes lawful use of lethal force. *Id.*

316. See MICHAEL K. BROWN, *WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM* 351–56 (rev. ed. 1988) (discussing trend of the increase of black local officials starting in the 1980s).

317. Philadelphia recently elected "radical" district attorney Larry Krasner, who supported adopting an aggressive approach to police misconduct prosecutions, and replaced dozens of high-ranking old guard prosecutors upon taking office. Daniel Denvir, *Philadelphia Just Elected the Most Radical DA in the Country—Now What?*, NATION (Nov. 10, 2017), <https://www.thenation.com/article/philadelphia-just-elected-the-most-radical-da-in-the-country-now-what/> (noting Krasner ran on a pledge of cracking down on prosecutor complicity with police misconduct); Abraham Gutman, Opinion, *The Two Big Reasons the Police Union Wants Larry Krasner to Lose*, PHIL. MAG. (Nov. 3, 2017, 9:00 AM), <https://www.phillymag.com/news/2017/11/03/Krasner-mcnesby-police-union/> (discussing his tougher stance on police abuse). Krasner promptly prosecuted a police brutality case, taking advantage of far more flexible state charges to address conduct unlikely to be reached by federal criminal statutes. Bobby Allyn, *Krasner Files Charges Against Former Philly Cop for Alleged Brutality*, WHYY (Mar. 1, 2018), <https://whyy.org/articles/krasner-files-charges-former-cop-alleged-brutality/> (describing incident and resulting simple assault, reckless endangerment, and official oppression charges); Chavez, *supra* note 312 (noting Nashville police officer charged with state law homicide, Mayor commenting that "officers accused of misconduct 'will be required to account for their actions'"); see also Ed Krayewski, *Prosecutors in Chicago, Cleveland Lose Re-Election Bids After Police Abuse Controversies*, REASON (Mar. 16,

Next, even where a state prosecution does not occur, or does not result in a conviction, other non-prosecution alternatives provide a measure of justice that may serve as an impetus for reform. Federal consent decrees, used often by the Obama Administration, can serve as a proactive vehicle for systemic reform.

Unfortunately, former Attorney General Sessions deemphasized federal consent decrees with local police departments, complaining that they are onerous, expensive, and undermine department morale. Instead, he supports a strategy of prosecuting the isolated “bad apples” within a police department.³¹⁸ Fortunately, Sessions also recognized the “need to rebuild public confidence in law enforcement through common-sense reforms, such as de-escalation training.”³¹⁹

The excessive force problem is not simply one of ferreting out the rogue “bad apples.” Civil “pattern and practice” litigation, designed to unveil systematic institutional shortcomings, when utilized, often results in a consent decree monitored under federal court supervision. This is proactive and creates an opportunity for constructive institutional reform and more effective policing which could yield a decrease in police shootings.³²⁰

Consent decrees, while often expensive, are nevertheless cost effective; certainly as compared to the most common alternative of huge civil judgments. It is a sober reality that, in police shooting cases, a large dichotomy exists between conduct deemed civilly culpable as opposed to conduct that can be established as criminal beyond a reasonable doubt—even where the alleged criminal conduct requires only a finding of criminal negligence or recklessness under relevant state laws. Municipalities and local police departments routinely

2016, 8:30 AM), <http://reason.com/blog/2016/03/16/prosecutors-in-chicago-cleveland-lose-re> (noting defeats of incumbent prosecutors after police abuse controversies and commenting that “local policies and politicians have far more influence on the conditions under which police violence thrives, and so local fights, while less glamorous and less followed, are far more important than the national ones [concerning addressing conditions that would reduce police violence]”). Additionally, the local prosecutor who conducted the state grand jury investigation regarding the Michael Brown killing in Ferguson, Missouri, who had held office for almost three decades, was ousted in the Democratic primary by a reform candidate. The incumbent had last run unopposed in 2014, prior to the Brown killing. Cleve R. Wootson, Jr., *Voters Oust Prosecutor Accused of Favoring Ferguson Officer Who Killed Michael Brown*, WASH. POST (Aug. 8, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/08/08/voters-oust-prosecutor-accused-of-favoring-ferguson-officer-who-killed-michael-brown/?utm_term=.ac46dce204d3. Lastly, some have forcefully argued that electoral accountability through the ballot box is far more effective than relying on unelected special prosecutors. Colin Taylor Ross, Opinion, *Despite What Many Reformers Believe, Special Prosecutors Will Only Weaken Police Accountability*, WASH. POST (Apr. 17, 2016), https://www.washingtonpost.com/opinions/despite-what-many-reformers-believe-special-prosecutors-will-only-weaken-police-accountability/2016/04/17/bbe6dc74-0303-11e6-9203-7b8670959b88_story.html?utm_term=.29ddff8d2b6f.

318. Andrew Kaczynski, *Attorney General Jeff Sessions: Consent Decrees ‘Can Reduce Morale of the Police Officers’*, CNN (Apr. 14, 2017, 12:45 PM), <https://www.cnn.com/2017/04/14/politics/kfile-sessions-consent-decrees/index.html>; see also Ryan J. Reilly, *Jeff Sessions’ Confirmation as Attorney General Seems Pretty Much Inevitable*, HUFFINGTON POST (Jan. 11, 2017), https://www.huffingtonpost.com/entry/jeff-sessions-attorney-general_us_58759ef9e4b03c8a02d400c4; Jeff Sessions, Editorial, *Avoid Harmful Federal Intrusion*, USA TODAY (Apr. 18, 2017, 4:34 PM), <https://www.usatoday.com/story/opinion/2017/04/17/jeff-sessions-intrusion/100579848> (criticizing disproportionate focus on small number of police who are “bad actors” but emphasizing the DOJ commitment to “punish any police conduct that violates civil rights”).

319. Sessions, *supra* note 318.

320. See Harmon, *supra* note 304, at 16–17.

face multi-million dollar wrongful death lawsuits that often result in huge payouts to victims' families, even when a criminal trial has not resulted in a guilty verdict³²¹ or where there has been no trial at all.³²² Without questioning the propriety of the payouts (either by verdict or settlement), the police and the communities would be far better served by expenditures directed at proactive police reform focusing on training, developing de-escalation techniques, and other best practices that would avoid future shootings resulting in large civil damage awards. Nevertheless, large civil payouts by municipalities clumsily provide, at the very least, a modest motivation for police training and reform, if for no other reason than the enormous adverse financial consequences to the locality.³²³

321. In 2016, Philando Castile was fatally shot by a police officer during what began as a routine traffic stop in the small Minneapolis suburb of St. Anthony, Minnesota. Video recordings showed him complying with all police commands and also calmly informing the officers he was lawfully in possession of a firearm. The shooter, Officer Jeronimo Yanez, was removed from the force almost immediately, and then later acquitted of all state criminal charges, which included second-degree murder and endangering safety by discharging a firearm charges. Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html>. The City quickly reached a nearly \$3 million federal settlement with the family. Mark Berman, *Settlement Reached in Minn. Police Shooting*, WASH. POST, June 27, 2017, at A3. The settlement amount was almost equal to the entire 2016 budget for the St. Anthony Police Department. CITY OF ST. ANTHONY VILL., POLICE DEPARTMENT ANNUAL REPORT 2016, at 2 (2016) (noting that the total department budget for 2016 was \$3,382,475). In addition, Yanez received \$48,500 from the municipality as part a negotiated employee separation agreement. Shenequa Golding, *Officer Acquitted in Philando Castile Case Paid \$48,500 to Leave the Department*, YAHOO! (July 11, 2017), <https://finance.yahoo.com/news/officer-acquitted-philando-castile-case-161734713.html>. In Cleveland, the family of Tamir Rice, a twelve-year-old who was killed in 2014 by a police officer while Rice was displaying what was later determined to be a toy gun in a city park, received a \$6 million payment to resolve a federal lawsuit. A local grand jury had refused to indict the officer on any charges, with the local prosecutor noting that the "shooting was a perfect storm of human error, mistakes and communications," but not a criminal act. Michael Pearson, *Tamir Rice Shooting: Cleveland to Pay \$6 Million to Settle Lawsuit*, CNN (Apr. 25, 2016, 10:56 PM), <https://www.cnn.com/2016/04/25/us/tamir-rice-settlement/index.html>. As of February 2018, the federal criminal civil rights investigation remains open, DOJ having earlier acknowledged their continuation of its independent review of the matter "given the strict burdens and requirements imposed by applicable federal civil rights laws." Ashley Fantz et al., *No Indictment in Tamir Rice Case, Prosecutor Says*, WCIA (Dec. 28, 2015, 4:18 PM), <https://www.wcia.com/news/no-indictment-in-tamar-rice-case-prosecutor-20says/312811324>. For a compilation of large civil settlement awards in recent high profile police shooting cases involving deaths of black victims, see, Jasmine C. Lee & Haeyoun Park, *15 Black Lives Ended in Confrontations with Police. 3 Officers Convicted.*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/interactive/2017/05/17/us/black-deaths-police.html>.

322. Mark Berman, *Eric Garner's Family Settles with New York City for \$5.9 Million*, WASH. POST (July 13, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/07/13/eric-garner-family-settles-with-new-york-city-for-5-9-million/?utm_term=.264c1b9d7940.

323. Arguments that various indemnification procedures for police officers which limit the direct financial consequences of large civil awards for police misconduct somehow do not advance reform efforts appear contrary to basic and largely universally accepted economic principles. Recently, law enforcement agencies acknowledged they are getting "slammed with settlements and judgments [for dogs killed by police, and that money] could be better spent within their agencies" on increased training and reform. Arin Greenwood, *Pet Threat: Courts Are Awarding Significant Damages to Families Whose Dogs Are Killed by Police*, 104 A.B.A. J. 16, 17 (2018). Thus, focused solely on dollar amounts, the financial cost for the death of a human being is exponentially higher, as it should be, thus providing significant economic incentives for reform that cannot be ignored by rational municipal decision makers regardless of the existence of various indemnification procedures.

C. PROPOSALS TO MAKE IT “EASIER” TO BRING FEDERAL CRIMINAL CHARGES

After reviewing the reforms at the state and local level, the proposals for more extensive federal involvement can now be evaluated. As discussed above, the calls to “lower the bar” to make federal civil rights prosecution “easier,” actually have two interrelated policy and legislative components.

The *Petite* Policy currently provides federal prosecutors with the option of evaluating a prior state prosecution that reached verdict to determine whether willful conduct can and should be prosecuted. If there was a full and vigorous competent state court prosecution that resulted in a conviction, or an acquittal that also included a failure to convict for negligent or reckless conduct, fairness considerations should not countenance a second bite of the apple simply because of mere dissatisfaction with a verdict. The *Petite* Policy sets forth sensible, albeit strict, factors in evaluating whether a second federal prosecution should go forward and further presumes, subject to rebuttal, that a prior state prosecution that resulted in a verdict sufficiently vindicated the relevant federal interests.³²⁴ A successive federal prosecution is designed to be an extraordinarily rare event, even in civil rights cases. There is no basis to lower the policy “bar” to, in effect, resurrect Attorney General Bell’s exemption for civil rights cases.

Legislative proposals to “lower the bar” to make federal prosecutions “easier” concern expanding statutory coverage to include lesser mens rea requirements than the current “willful” standard in § 242. That would open the door for federal prosecution for manslaughter, and other types of negligent or reckless homicides committed by law enforcement that do not rise to the level of a “willful” constitutional violation.

However, that is not nearly as easy as it sounds. This result cannot be achieved by simply amending § 242 by repealing the willfulness requirement or by adding additional lesser culpability requirements. This would raise significant constitutional issues by purporting to reach conduct arguably beyond the constitutional reach of the Fourteenth Amendment.³²⁵

In recognition of that problem, the proposed Police Accountability Act of 2015³²⁶ would make local law enforcement officers subject to federal prosecution for murder or manslaughter as defined by the United States Code,³²⁷ if the officer is employed by a public agency which receives certain federal criminal justice grant funding.³²⁸ This proposed statute relies on the spending clause to support federal jurisdiction. The contorted drafting technique is

324. See *supra* notes 165–166 and accompanying text.

325. See *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (holding that § 242 is enforcement legislation enacted under section 5 of the Fourteenth Amendment).

326. H.R. 1102, 114th Cong. (2015).

327. *Id.* 18 U.S.C. § 1111(a) (2012) defines murder and § 1112(a) defines manslaughter. Currently, these statutes apply when such crimes are committed “[w]ithin the special maritime and territorial jurisdiction of the United States.” *Id.* §§ 1111(b), 1112(b). This jurisdictional limitation would not apply in prosecutions brought under the Police Accountability Act. See text and sources accompanying *infra* notes 328–329.

328. H.R. 1102 § 2(a) (proposal to add new § 28 to Title 18 of the U.S. Code).

necessary to, at best, barely withstand constitutional scrutiny.³²⁹ It is one thing to federally prosecute willful deprivations of civil rights under § 242—clearly a substantial federal interest and one of constitutional dimension, given its Fourteenth Amendment constitutional foundation. However, as noted above, it is quite another thing for the federal government to use federal prosecution as part of the general management and routine oversight of local police departments, which is not a federal responsibility. As such, the federal prosecution of law enforcement misconduct not amounting to a constitutional violation is not, and should not become, a federal prosecutorial responsibility.

The prosecution of negligent and perhaps some types of reckless police conduct via a manslaughter charge would likely exceed the reach of conduct actionable under the Fourteenth Amendment. Rather, such a jurisdictional expansion of a statute would have to be justified under the Commerce Clause or Spending Clause,³³⁰ constitutional provisions that have been subject to intense criticism concerning the problematic trend to expand federal criminal law to cover conduct already criminal under state law.³³¹

Moreover, as noted above, some federal appellate courts have held that current § 242's statutory willfulness requirement can be satisfied by some form of recklessness, thereby obviating any need to amend the existing statute.³³² The DOJ is adeptly situated such that it can undertake strategic litigation in an effort to expand this statutory interpretation nationwide.³³³ This modest expansion via plausible judicial interpretation of the present statute is consistent with language in *Screws*, and covers conduct of constitutional dimension that would pass Fourteenth Amendment jurisdictional constitutional muster. Federal prosecutors should not be tasked with prosecuting alleged local law enforcement misconduct not of constitutional dimension, regardless of whether state prosecutors

329. The Congressional Research Service notes that the proposed statute “might stretch the boundaries of legislation justified under the Spending Clause.” JARED P. COLE, CONG. RESEARCH SERV., R.44104, FEDERAL POWER OVER LOCAL LAW ENFORCEMENT REFORM: LEGAL ISSUES 14 (2016). The United States Civil Rights Commission has long endorsed amending § 242 to remove the purported “judicially imposed specific intent requirement.” U.S. CIVIL RIGHTS COMM’N, REVISITING *WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES IN AMERICA* 72–75 (2000). These recommendations do not acknowledge the difficult constitutional jurisdictional issues which would arise if the statutory willfulness requirement was altered.

330. See *supra* notes 325–329 and accompanying text.

331. See generally A.B.A. FEDERALIZATION REPORT, *supra* note 6; see also HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2009) (criticizing current trend to absurdly over criminalize federal law so that innocent persons likely are unwittingly committing three felonies a day). For the most recent expansion of the federal hate crimes statute which is forced to rely on the Commerce Clause to reach conduct directed at victims who are not part of a suspect class under the Fourteenth Amendment, see 18 U.S.C. § 249(b).

332. See discussion *supra* notes 79–81 and accompanying text. For a detailed discussion of the various appellate courts’ approaches concerning when recklessness constitutes willful conduct under § 242, see Michael J. Pastor, *A Tragedy and a Crime?: Amadou Diallo, Specific Intent, and the Federal Prosecution of Civil Rights Violations*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 171, 185–92 (2002).

333. See Pastor, *supra* note 332; see also *supra* notes 77–81 and accompanying text (noting that the Ninth and Third Circuits, and perhaps even Seventh Circuit already permit § 242 prosecutions based on allegations of reckless disregard for constitutional rights).

unsuccessfully prosecuted a manslaughter or negligent homicide charge or declined prosecution altogether.

In any event, altering DOJ policies or amending applicable federal criminal statutes to make it purportedly easier to bring federal criminal civil rights prosecutions is not a constructive alternative.³³⁴ Similarly, the answer is not to lower the burden of proof in federal criminal civil rights cases in order to broaden the range of charges to more closely replicate the charges available to state prosecutors in police misconduct cases. This would not only be ineffective but would also exacerbate the significant unfairness concerns first enunciated in Attorney General Rogers' 1959 press release that spawned the creation of the *Petite* Policy.

The *Petite* Policy and the dual sovereignty doctrine should not be abused simply to afford the proverbial "second bite of the apple" because of dissatisfaction in some quarters with the result of a particular prosecution. Federal civil rights prosecutions should be sensibly limited to cases of willful, or at least extremely reckless, police misconduct. The above proposed legislation, if enacted, would only needlessly undermine the spirit of double jeopardy-like fairness protections that underlie the *Petite* Policy.

CONCLUSION

Several recent highly publicized police excessive force cases raise a number of consequential criminal justice issues. Intensified calls to "lower the bar" in order to make federal civil rights prosecutions easier should be resisted. Altering existing statutes and changing the relevant DOJ guidelines to substantially increase the number of federal civil rights prosecutions and to make it easier to obtain convictions is ill-advised and unnecessary.

The history of the federal criminal civil rights statutes and the evolution of the relevant DOJ guidelines reinforce the principle that the federal government and the states possess joint responsibility to protect civil rights, and that the states properly possess the primary responsibility to oversee the conduct of local law enforcement. The long-standing DOJ policy of deference to vigorous state prosecutions, where state prosecutors have far more flexibility to charge many other offenses that do not require proof of "willfulness," with an option of a subsequent federal prosecution as a "backstop" where necessary to vindicate a substantial federal interest and to address a miscarriage of justice of constitutional dimension, remains sound. This policy is respectful of Federalism and represents a sensible allocation of the federal and state governments' collective responsibility to protect civil rights. These principles will still largely apply to police excessive force cases prosecuted under § 242 even if the Supreme Court abolishes dual sovereignty, because most federal criminal civil rights statutes would not constitute the "same offense" as the relevant statutes at

334. See Grinberg, *supra* note 304; McCarthy, *supra* note 10.

issue in state police excessive force prosecutions. The DOJ should vigorously and unambiguously recommit to this policy.

Recently, the DOJ has modified its position to provide, in limited circumstances, a public explanation of its reasons to decline a particular prosecution in cases of intense public interest. Where the DOJ decides to occasionally, even if ill-advised, publicly release details or the underlying rationale of a particular declination decisions, it should still adhere to all other applicable DOJ policies, even if that requires a sensitive but intellectually honest evaluation of a prior state prosecution. If the DOJ is unwilling to meet that responsibility, it should rethink its new policy, particularly when the case concerns the *Petite* Policy. The DOJ's credibility is impaired when it issues disingenuous public statements that do not accurately reflect DOJ Policy.

A handful of federal appellate courts have already held that some types of reckless conduct is prosecutable under the present § 242 "willfulness" requirement. The DOJ should undertake strategic prosecutions to construct the best test case for Supreme Court review that would result in the Court's definitive approval of this broader statutory interpretation of willfulness that would apply nationwide. Thus, calls to "reform" federal law to make federal prosecution of some criminal civil rights cases "easier" by lowering the requisite mens rea through legislative amendment are unnecessary at this time.

One must recognize the complexities of constructively addressing police shootings and the fair administration of criminal justice. This raises profound issues that go far beyond merely proposing the expansion of § 242's mens rea requirement. Federal criminal prosecution, while central to vindicating civil rights and achieving justice, is not the exclusive or necessarily the best avenue in all cases to achieve those goals. State prosecutors are taking increased responsibility for prosecuting police misconduct. Those actions should, in the long run, be more productive in addressing police misconduct and reducing fatalities at the hands of law enforcement than would a modest increase in federal prosecutions.

Federal prosecution of police misconduct should be pursued when the State has abdicated its responsibility to vigorously prosecute willful misconduct or when it is necessary to address a manifest miscarriage of justice resulting from a prior state prosecution. In this manner, federal civil rights prosecutions will continue to occupy a proper, constructive, and constitutionally appropriate role in the fair administration of American criminal justice.

POSTSCRIPT

On the last day of the Supreme Court's 2017-18 Term, the Court granted certiorari in *Gamble v. United States*, a case challenging the dual sovereignty doctrine.³³⁵ Many Supreme Court prognosticators opined that dual sovereignty was virtually certain to be abolished, given the decision to grant certiorari coupled with the apparent support of an unusual ideological alliance of Justices Ginsburg and Thomas who arguably had tipped their hand in a recent case suggesting that they supported the abolishment of dual sovereignty.³³⁶

The elimination of dual sovereignty would cause uncertainty concerning the future of some federal civil rights prosecutions and would inevitably trigger related litigation concerning the contours of several inherently related double jeopardy issues. However, regardless of the result in *Gamble*, federal civil rights police misconduct prosecutions under 18 U.S.C. § 242 and the relevant DOJ Guidelines generally deferring to state prosecutions in the first instance would be largely unaffected by the decision.

Gamble was argued in December, 2018. Based on the tenor of the questioning, several professional Court observers suggested that it appeared unlikely the Court was prepared to overturn the dual sovereignty doctrine, which is supported by at least 150 years of precedent.³³⁷

During oral argument, Justice Breyer recognized the existential importance of robust federal criminal civil rights enforcement, and other members of the Court further amplified on that theme.³³⁸ Even if dual sovereignty is abolished, virtually all § 242 prosecutions would not be considered the same offense as a state law homicide or assault charge based on the same conduct by virtue of application of the Court's venerable *Blockburger* doctrine, which holds that two offenses are not the same if each offense requires proof of an element the other does not.³³⁹ All parties and several members of the Court agreed on this point.³⁴⁰

335. *Gamble v. United States*, 694 F. App'x 750 (11th Cir. 2017), cert. granted, 138 S. Ct. 2707 (2018).

336. Justices Thomas and Ginsburg recently joined in a concurring opinion calling for a "fresh examination" of the dual sovereignty doctrine in an appropriate case. *Puerto Rico v. Sanchez-Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg and Thomas, J.J., concurring). Under long standing Supreme Court operating procedures, a certiorari grant requires at least four of the nine Justices to vote to accept the case. *Supreme Court Procedures*, U.S. COURTS, uscourts.gov/about-federal-courts/educationalresources/about-educational-outreach/activity-resources/supreme-1 (last visited Mar. 17, 2019).

337. See, e.g., Amy Howe, *Argument Analysis: Majority Appears Ready to Uphold "Separate Sovereigns" Doctrine*, SCOTUSBLOG (Dec. 6, 2018, 2:20 PM), <http://www.scotusblog.com/2018/12/argument-analysis-majority-appears-ready-to-uphold-separate-sovereigns-doctrine>.

338. See Transcript of Oral Argument at 23–24, *Gamble v. United States*, 138 S. Ct. 2707 (2018) (17-646), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-646_21o2.pdf (comments of Justice Breyer); see also *id.* at 32–33 (comments of Justice Gorsuch); *id.* at 46–47 (comments of Justice Ginsburg).

339. *Blockburger v. United States*, 284 U.S. 299 (1932). These issues were emphasized in the Howard TMCRC Amicus Brief, *supra* note 136. These issues were also addressed at several junctures during oral argument. Transcript of Oral Argument, *supra* note 338, at 26–28, 33–34, 47–48.

340. See Transcript of Oral Argument, *supra* note 338, at 27, 34, 47 (comments of Justices Alito, Breyer and Ginsburg suggesting that *Blockburger* test would apply and that federal police misconduct prosecutions are not the same offense as state law homicide or assault prosecutions). Petitioner *Gamble* concurred. See *id.* at 33;

Moreover, even the relevant DOJ guidelines discussed in this Article, which generally support a backstop role for the DOJ and general deference to state prosecutions in the first instance in police excessive force cases, would likely remain unaffected by the elimination of dual sovereignty. The amicus brief filed by the Howard University Thurgood Marshall Civil Rights Center, where this Author served as Counsel of Record, noted:

First, the [DOJ's] discretionary Petite Policy would still apply for section 242 prosecutions. The Policy presently recognizes that a federal prosecution following a state prosecution based on substantially the same acts is constitutionally appropriate under the dual sovereignty doctrine. . . . However, the Policy also applies where "a prior prosecution would not legally bar a state or federal prosecution under the double jeopardy clause because each offense requires proof of an element not contained in the other." . . . Thus, should dual sovereignty be abolished, the constitutional justification would shift to the above noted second prong of the Policy. As such, the Petite Policy, which was unchanged after a 2017 comprehensive revision of the [United States Attorney's Manual], would still remain in full force and effect. A successive federal prosecution may be appropriate if the prior state prosecution left a "substantial federal interest . . . demonstrably unvindicated."³⁴¹

Therefore, although the elimination of dual sovereignty could create significant uncertainty regarding several important aspects of federal prosecution for conduct also criminal under state law, the federal government's ability to prosecute police brutality cases under Title 18, § 242 will likely survive. Thus the analysis set forth in this Article should remain operative regardless of the result in *Gamble*.

However, the elimination of dual sovereignty could create significant collateral problems that would likely obligate the Court, in relatively short order, to grant certiorari in a series of future cases raising a variety of inherently related double jeopardy issues. For example, the *Blockburger* test to define the "same offense" could face reevaluation.³⁴² Additionally, *Ashe v. Swenson*³⁴³ would have to be reconsidered to determine whether the mutuality of parties limitation in criminal cases should be abandoned. This could further hamstring federal prosecutors in § 242 prosecutions by extending issue preclusion principles to inter-jurisdictional successive prosecutions even when the federal charge does not constitute the "same offense" as compared to any state charge litigated to verdict in a prior state prosecution.³⁴⁴

see also Brief of Petitioner at 9, 51–52, *Gamble v. United States*, No. 17-646 (U.S. Sept. 4, 2018), https://www.supremecourt.gov/DocketPDF/17/17-646/62536/20180904142141905_17-646%20ts.pdf.

341. Howard TMCRC Amicus Brief, *supra* note 136, at 8 (third alteration in original) (citations omitted).

342. Justice Alito briefly alluded to this concern during oral argument. See Transcript of Oral Argument, *supra* note 338, at 27.

343. 397 U.S. 436 (1970). Issue preclusion as applied to criminal cases is discussed in the Howard TMCRC Amicus Brief, *supra* note 136, at 15–19, and the issue was briefly noted at oral argument. Transcript of Oral Argument, *supra* note 338, at 69–70.

344. In light of Justice Gorsuch's recent plurality opinion in *Currier v. Virginia*, 138 S. Ct. 2144 (2016), this doctrinal extension seems unlikely even if dual sovereignty is abolished. See *id.* at 2152 (noting "that issue

Perhaps the specter of this inevitable doctrinal chaos will factor into the Court's decision-making whether to retain dual sovereignty. A decision in *Gamble* is expected sometime prior to the end of the Court's current Term in late June 2019. Only then will dual sovereignty's fate be revealed and the contours of any collateral double jeopardy consequences be more clearly recognized.

preclusion principles should have only 'guarded application . . . in criminal cases'" (quoting *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016) (alteration in original))).
