Civil Rights, Criminal Punishments: 18 U.S.C. § 242 and the Failure of Federal Rights Enforcement

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While 42 U.S.C. § 1983 is one of the most commonly utilized statutes in federal civil litigation, federal prosecutors hardly afford the statute's criminal counterpart, 18 U.S.C. § 242, the same attention. Since the volume of federal rights–vindicating cases under Section 1983 far outstrips that under Section 242, the people are largely left to enforce their own rights. But this regime of federal rights enforcement has several costs, both practical and expressive. Practically, a host of socioeconomically dependent factors—from fear of retaliation to distrust of the legal system—renders private plaintiffs especially poorly suited to stand as the primary enforcers of civil rights. And expressively, the fact that nearly all litigated federal rights violations are at most met with merely civil fines, rather than the opprobrium accompanying criminal punishment, communicates to the public that federal rights violations are not prohibited but priced. This Note argues that federal prosecutors could alleviate the costs of a primarily civil, rather than criminal, federal rights–enforcement apparatus by reviving an old but underutilized tool: the Section 242 misdemeanor prosecution.

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INTRODUCTION

When Attorney General and later Supreme Court Justice Frank Murphy founded what would become the Department of Justice's Civil Rights Division, he saw its establishment as an expressive act. It was, in his view, "a warning that the might of

the United States government was on the side of oppressed peoples in protecting their civil liberties."[1] But today, these lofty words ring hollow. Contrary to its architect's wishes, the Civil Rights Division rarely brings its might to bear on those who violate the civil rights of the vulnerable,[2] routinely declining to prosecute even egregious rights violations for fear of overstretching the statutes it administers and thereby inviting adverse appellate rulings.[3]

Because the Department of Justice employs criminal civil rights statutes only sparingly and conservatively, the people are largely left to enforce their own rights through civil litigation.[4] Yet, a unique host of factors—from mistrust of the legal system to the qualified immunity doctrine—renders private civil rights plaintiffs especially unlikely to vindicate their rights and thus ineffective stewards of the federal rights–enforcement apparatus.[5] And by failing to charge the vast majority of civil rights violations,[6] the Department of Justice expresses to the public that the victims of such violations are unworthy of having their rights vindicated through criminal prosecution, a message that is often at odds with public opinion and thereby undermines faith in the law.[7]

This Note analyzes the dire costs of the prevailing federal rights–enforcement regime and concludes that a rights-vindicating apparatus that is in substantial part criminal, rather than almost solely civil, would both be more effective and more appropriately express social condemnation of rights violations. Specifically, it proposes increasing prosecutions under 18 U.S.C. § 242—which proscribes federal rights violations by public officials—for infringements of rights that are clearly established across the courts of appeals.[8] Section 242 reaches much of the same conduct as its widely used civil counterpart, 42 U.S.C. § 1983.[9] Yet, Section 242 is hardly utilized because of the Department of Justice's fear of exposing the statute to unfavorable appellate rulings.[10] A

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1. ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 25 n.37 (1947).
2. *See infra* notes 146–148 and accompanying text.
3. *See infra* Part II.A.
4. *See infra* Part II.A.
5. *See infra* text accompanying notes 188–196.
6. *See, e.g.*, *infra* text accompanying notes 151–154.
7. *See infra* Part II.B.2.
8. *See infra* Part III.B.3.
9. *See infra* note 142.
10. *See infra* Part II.A.2.

targeted revitalization of federal rights enforcement, however, would remedy the ills of the current rights-vindicating regime.

Part I examines the legislative and historical circumstances surrounding the creation of the modern federal rights–enforcement apparatus and traces the case law that has shaped it since. Part II discusses the federal government's abdication of federal rights enforcement to the people, the reasons for it, and its costs. Part III summarizes previously suggested reforms to federal rights enforcement, which have largely required legislative action, and proposes a solution that would not require such intervention: resurrecting the Section 242 misdemeanor prosecution.

I. CRIMINAL SANCTIONS AND CIVIL REMEDIES FOR FEDERAL CIVIL RIGHTS VIOLATIONS

Since its origin in the aftermath of the Civil War, modern federal civil rights law's purpose has been to empower the federal government to defend the rights of the oppressed.[11] But for just as long, courts have met federal civil rights laws with skepticism, restricting and overturning them in light of the fundamental constitutional issues they often raise.[12] These two features of early federal civil rights law—its purpose and the judicial scrutiny it drew—illuminate modern doctrine and practice regarding 18 U.S.C. § 242, a key federal criminal civil rights statute, and its relationship to its civil counterpart, 42 U.S.C. § 1983. While Section 1983 is well known for authorizing private plaintiffs to sue state actors for violations of federal rights, Section 242 criminalizes much of the same conduct. Yet, Section 242 is hardly utilized because of the Department of Justice's fear of exposing the statute to unfavorable appellate rulings.

Part I.A details the historical and legislative origins of the modern federal rights–enforcement statutory apparatus, its brief success, and its swift downfall. Part I.B discusses the revival of federal civil rights enforcement in the 1940s, the federal criminal civil rights statutes' subsequent appearances at the Supreme Court, and the judgments resulting therefrom.

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11. *See infra* Part I.A.1.
12. *See infra* Part I.A.2, I.B.2–3.

A. RECONSTRUCTION-ERA ORIGINS AND EARLY EVOLUTION

1. *Congressional Purpose and Statutory Predecessors*

Sections 1983 and 242 were forged in the fires of Reconstruction.[13] Indeed, along with 18 U.S.C. § 241,[14] these twin statutes were key parts of Congress' larger, unprecedented legislative effort to protect newly freed Black Americans' civil rights in the aftermath of the Civil War.[15]

The first piece of this statutory dyad, Section 242, originated in the Civil Rights Act of 1866 (the 1866 Act).[16] The 1866 Act was Congress's first substantial legislative attempt at securing equal citizenship and fundamental rights for Black Americans,[17] an objective rendered all the more critical by the absence, at that time, of a binding constitutional amendment to the same end.[18] Its first section declared "all persons born in the United States . . . to be citizens of the United States" and thereafter enumerated the rights of "such citizens[ ] of every race and color, without regard to any previous condition of slavery," such as the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit,

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13. *See* Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27, 27 (codified as amended at 18 U.S.C. § 242); Enforcement Act of 1870, ch. 114, §§ 16–18, 16 Stat. 140, 144 (codified as amended at 18 U.S.C. § 242); Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983).

14. Sections 241 and 242 have been codified at various locations since their enactment. *See* CARR, *supra* note 1, at 57 (detailing Section 241's codification history); *id.* at 70–71 (same for Section 242). In this Note, these statutes and their respective predecessors are referred to as "Section 241" and "Section 242" for ease of reference.

15. *See* Civil Rights Act of 1866; Enforcement Act of 1870; Ku Klux Klan Act of 1871; Paul J. Watford, Screws v. United States *and the Birth of Federal Civil Rights Enforcement*, 98 MARQ. L. REV. 465, 471–72 (2014) ("Together, these Acts represented the most significant effort on the part of the federal government to secure the civil rights of citizens at any point in the country's history before the 1960s.").

16. *See* Civil Rights Act of 1866 § 2.

17. *See* Watford, *supra* note 15, at 471. The Act's immediate aim was to address "the pressing problem[ ] of Black codes, which were discriminatory forms of legislation directed against African Americans in the post–Civil War South." 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, 197 (2009). Its secondary purpose, however, was to "increase[ ] the level of power and the presence that the federal government had over those states (and persons within those states) who were resistant to ensuring that the basic rights of African Americans were met." *Id.*

18. Although Congress passed the Fourteenth Amendment just over two months after the Civil Rights Act, more than two years elapsed thereafter until the Amendment's ratification. *Compare* 14 Stat. at 27, *with Landmark Legislation: The Fourteenth Amendment*, U.S. SENATE, https://www.senate.gov/about/origins-foundations/senate-and-constitution/14th-amendment.htm [https://perma.cc/6PZ2-GH83] (last visited Oct. 1, 2023).

purchase, lease sell, hold, and convey real and personal property . . . , as is enjoyed by white citizens."[19] The 1866 Act's second section then defined as a misdemeanor offense "the deprivation of any right secured or protected by this act"—that is, any right enumerated in the 1866 Act's first section—"under color of law."[20] Until the Fourteenth Amendment's ratification two years later, the 1866 Act stood as the primary means of enforcing the rights of newly freed Black Americans.

Although the Fourteenth Amendment rendered much of the Civil Rights Act of 1866 superfluous,[21] Congress reenacted the 1866 Act's first and second sections as Sections 16 and 17 of the Enforcement Act of 1870 (the 1870 Act).[22] The 1870 Act was squarely aimed at securing voting rights.[23] To that end, Congress made it a felony to conspire "to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States."[24] Despite the challenges that awaited this provision at the Supreme Court in the following decades,[25] it survives largely intact as 18 U.S.C. § 241.[26]

The 1866 and 1870 Acts, however, were insufficient to combat the racial violence that pervaded the South during Reconstruction.[27] After the Ku Klux Klan's founding in 1866, it was increasingly difficult to prosecute those who violated Black Americans' rights because of the pernicious effects of racism and

19. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981–1982); *see also* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 398 (1982).

20. Civil Rights Act of 1866 § 2.

21. Watford, *supra* note 15, at 471.

22. *See* Enforcement Act of 1870, ch. 114, §§ 16–17, 16 Stat. 140, 144 (codified as amended at 18 U.S.C. § 242); *see also* Sunstein, *supra* note 19, at 399.

23. *See* Watford, *supra* note 15, at 471. Indeed, the Act's title upon passage was "An Act to enforce the Right of Citizens of the United States to vote in the several States of the Union, and for other Purposes." 16 Stat. at 140.

24. Enforcement Act of 1870 § 6. This conspiracy offense's felony status contrasts with the color of law offense's misdemeanor status, which persisted in the Enforcement Act of 1870. *Compare id.* § 6, *with id.* § 17.

25. See *infra* Part I.A.2.

26. *See* 18 U.S.C. § 241 (making it a felony for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States").

27. *See* Watford, *supra* note 15, at 471.

the Klan's influence.[28] So dire were the circumstances that, in early 1871, the U.S. House of Representatives created a committee[29] to investigate the Klan and other criminal groups' violent terrorization—including through torture, murder, and rape—of much of the South's Black population.[30] The House committee soon received a letter from President Grant requesting further legislation to restrain this violence in the South.[31] Just five days after receiving the President's message,[32] the committee reported to the House a bill that would become the Ku Klux Klan Act of 1871 (the 1871 Act).[33] While the 1871 Act created several criminal and civil sanctions tailored to addressing the grim situation in the South, arguably its most significant measure was

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28. *See* Daniel Rafferty, *Qualified Immunity: Sculpting a Statute-esque Solution to a Judicially Created Policy*, 47 U. DAYTON L. REV. 105, 108–09 (2022).

29. *See id.* at 109; *see also* Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light in State Action and the Fourteenth Amendment*, 11 ST. LOUIS U. L.J. 331, 332 (1967) (citing CONG. GLOBE, 42nd Cong., 1st Sess. 116–17 (1871)).

30. *See* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS 1866–1876, at 43 (2005). Particularly telling is the congressional testimony of Thomas Settle, a Justice of the North Carolina Supreme Court, from this time:

> I suppose any candid man in North Carolina would tell you it is impossible for the civil authorities, however vigilant they may be, to punish those who perpetrate these outrages [of racial violence]. The defect lies not so much with the courts as with the juries. You cannot get a conviction; you cannot get a bill found by the grand jury, or, if you do, the petit jury acquits the parties. . . . [M]embers of this secret organization[,] [the Ku Klux Klan][,] . . . put themselves in the way to be summoned as jurors, to acquit the accused, or to have themselves summoned as witnesses to prove an alibi. . . . [T]here has not been a single instance of conviction in the State.

CONG. GLOBE, 42nd Cong., 1st Sess. 320 (1871).

31. *See* Avins, *supra* note 29, at 332 (citing CONG. GLOBE, 42nd Cong., 1st Sess. 236 (1871)). The letter read:

> A condition of affairs now exists in some of the States of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.

CONG. GLOBE, 42nd Cong., 1st Sess. 236 (1871).

32. *Compare* CONG. GLOBE, 42nd Cong., 1st Sess. 236–37 (1871) (indicating that the President's message was received on March 23, 1871), *with id.* at 317–18 (showing that the bill was proposed on March 28, 1871).

33. *See* Rafferty, *supra* note 28, at 109.

the unprecedented "private enforcement regime" that its first section created.[34] The 1871 Act specifically established:

> That any person who, under color of any law . . . of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .[35]

Critically, the 1871 Act provided that such actions were to be brought in federal court,[36] thus circumventing the Klan's undue influence over Southern state court juries.[37]

Collectively, the 1866, 1870, and 1871 Acts constitute one of the most significant and ambitious congressional civil rights projects in the United States' history.[38] And, with congressional and presidential support, the project significantly promoted equality.[39] But data indicates that such success was limited and localized. For instance, from 1870 to 1877, the federal government brought 3,384 criminal prosecutions under the Enforcement Acts in the South and secured 1,143 convictions, a conviction rate of merely 34%.[40] Almost all these prosecutions, moreover, were concentrated in

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34. *See* Paul J. Gardner, *Private Enforcement of Constitutional Guarantees in the Ku Klux Act of 1871*, 2 CONST. STUD. 81, 82 (2016).

35. Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983).

36. *See* Ku Klux Klan Act of 1871 § 1.

37. *See* CONG. GLOBE, 42nd Cong., 1st Sess. 320 (1871) (relating how Klan members made it "impossible" for Southern authorities to punish racial violence by "put[ting] themselves in the way to be summoned as jurors, to acquit the accused"); Rafferty, *supra* note 28, at 108–09 ("Klan members and sympathizers would either infect jury pools or conspire with government officials to block any cases from coming before the court at all.").

38. *See* Watford, *supra* note 15, at 472.

39. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863–1877, at 281–91, 457–59 (Henry Steele Commager & Richard B. Morris eds., Perennial Classics 2002); HOWARD N. MEYER, THE AMENDMENT THAT REFUSED TO DIE: EQUALITY AND JUSTICE DEFERRED: A HISTORY OF THE FOURTEENTH AMENDMENT 72–73 (Madison Books 2000) (1973).

40. WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION 1869–1879, at 42–43 (1979). This rate is extraordinarily low compared to recent federal conviction rates. In 2018, for example, 90% of federal criminal defendants pleaded guilty, and, of the 2% who went to trial, 83% were convicted. John Gramlich, *Only 2% of Federal Criminal Defendants Went to Trial in 2018, and Most Who Did Were Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/short-reads/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/3Q6F-HRZM].

Mississippi and the Carolinas.[41] In fact, in the rest of the South, there was little to no enforcement at all: In Alabama, there were only ten convictions under the Enforcement Acts during Reconstruction, with even fewer in Arkansas, Georgia, Louisiana, and Texas combined.[42] And most enforcement took place from 1871 to 1873: The government obtained only 121 convictions under the Enforcement Acts in the South from 1874 to 1877, compared to 466 in 1873 alone.[43] Thus, after 1873, enforcement plummeted.[44]

This collapse resulted in large part from Congress cutting appropriations and initiating a policy of clemency in 1873.[45] But these decisions themselves stemmed from a deeper pathology: the absence of political will to enforce Reconstruction policies in the postwar South.[46] This lack of support was, in turn, largely a consequence of white Southerners' violent resistance to efforts to deconstruct white supremacy, which effectively amounted to a guerrilla war against the federal government.[47] This violence posed a grave threat to Reconstruction's success, for it required any federal measures to uphold Black Americans' civil rights to be backed by a massive, protracted federal military presence in the South.[48] But widespread support for such a costly effort simply did not exist among Northerners, having largely faded among Republicans by the 1870s.[49] The absence of such support thus

41. *See* GILLETTE, *supra* note 40, at 42–43.
42. *See id.* at 43–44.
43. *Id.* at 43.
44. *See id.* at 42, 45.
45. *See id.*
46. *See* Brooks D. Simpson, *Mission Impossible: Reconstruction Policy Reconsidered*, 6 J. CIV. WAR ERA 85, 89 (2016).
47. *See* James L. Huston, *Reconstruction as It Should Have Been: An Exercise in Counterfactual History*, 51 CIV. WAR HIST. 358, 360 (2005).
48. *See* William Blair, *The Use of Military Force to Protect the Gains of Reconstruction*, 51 CIV. WAR HIST. 388, 389–90 (2005) ("Military intervention—and the willingness by the chief executive and the Congress to deploy this power consistently—offered the best chance to preserve the spirit of the Fourteenth and Fifteenth Amendments, which protected individual freedoms and granted [B]lack suffrage."); *see also* Simpson, *supra* note 46, at 89 (suggesting that "white supremacist terrorist violence posed the biggest threat to the success of Reconstruction").
49. *See* Simpson, *supra* note 46, at 89; *see also* Huston, *supra* note 47, at 360 ("[W]hite Southerners were willing to fight a ferocious guerrilla war for white supremacy, while Northerners and Southern Republicans cowered at the nature of the violence and the cost necessary to subdue it."). *But see* ROBERT M. GOLDMAN, "A FREE BALLOT AND A FAIR COUNT": THE DEPARTMENT OF JUSTICE AND THE ENFORCEMENT OF VOTING RIGHTS IN THE SOUTH, 1877–1893, at xxiii–iv (1990) ("The enforcement of voting rights in the South after 1877 reflected the continued interest and concern by the Republican Party for the political rights of the freedman.").

sharply limited the prospects of any federal civil rights project during Reconstruction.

2. *Early Jurisprudence: The* Slaughter-House Cases, Cruikshank, *and* Harris

While enforcement failures therefore rendered the 1866, 1870, and 1871 Acts largely ineffectual by the mid-1870s, a series of Supreme Court decisions hollowed out those statutes even further. All three Acts were premised on the theory that the Reconstruction Amendments had considerably broadened the set of federal constitutional rights[50] and thus had expanded the federal government's rights-enforcement authority.[51] In the *Slaughter-House Cases*, however, the Supreme Court rejected these fundamental notions.[52] The Court took an exceedingly restrictive view of federal civil rights, holding them to consist of only rights such as those "to demand the care and protection of the Federal government over . . . life, liberty, and property when on the high seas" and "to use the navigable waters of the United States."[53] On the other hand, the Court found that *state* civil rights encompass "nearly every civil right for the establishment and protection of which organized government is instituted"—that is, "those rights which are fundamental."[54] On this understanding, the rights protected by the Fourteenth Amendment are extremely limited, and the fundamental rights incident to state citizenship are left solely to the states to protect.[55]

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50. Watford, *supra* note 15, at 472.

51. *Id.*

52. 83 U.S. (16 Wall.) 36 (1873).

53. *Id.* at 79. Constitutional scholars and historians have been almost unanimous in denouncing "the *Slaughter-House* Court for lacking the courage and intellectual integrity to give full meaning to each of the provisions of the fourteenth amendment." Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 410–11, 410 n.7 (1990) (surveying criticisms).

54. *The Slaughter-House Cases*, 83 U.S. at 76.

55. *See* Watford, *supra* note 15, at 472–73. For their part, many of the Fourteenth Amendment's framers "roundly criticized the opinion on the floor of Congress in 1873." KACZOROWSKI, *supra* note 30, at 132. Several members of Congress "insisted that the framers in 1866, as well as their Democratic opponents, recognized that they were assuming authority to protect the natural rights of freemen, and that they thereby produced the revolution in American federalism that [the *Slaughter-House* majority] claimed they could not have intended." *Id.*

Although the Court's later, more favorable treatment of the Enforcement Acts' voting rights–enforcement provisions[56] assisted the Department of Justice's battle against the Klan,[57] its interpretation of the Fourteenth Amendment in the *Slaughter-House Cases* nevertheless undermined the Department's efforts.[58] The Court undoubtedly knew that its decision would stymie the Department of Justice's rights-enforcement efforts in the South, with some even viewing the Court's decision as a direct challenge to the Grant Administration's Southern policy.[59] Thus, through the *Slaughter-House Cases*, the Supreme Court dealt a blow to the 1866, 1870, and 1871 Acts, subverting the enforcement of Congress's civil rights legislation.[60]

Several other decisions adverse to federal rights enforcement followed in the subsequent decades. Particularly unfavorable were *United States v. Cruikshank*[61] and *United States v. Harris*.[62] In the former, the Court effectively gutted the Enforcement Act of 1870,[63] holding that enforcement of both the Bill of Rights' guarantees and natural rights resides exclusively within the jurisdiction of the states.[64] Accordingly, the *Cruikshank* majority found that the Fourteenth Amendment did not reallocate rights-enforcement powers from the states to the federal government and, therefore, that that Amendment did not grant the federal government authority to directly enforce natural rights.[65]

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56. *See Ex parte* Yarbrough, 110 U.S. 651 (1884) (upholding the Enforcement Act of 1870's provision criminalizing conspiracies to prevent, by force or intimidation, citizens from voting).

57. *See* GOLDMAN, *supra* note 49, at xxiii–iv ("[B]etween 1877 and 1898 virtually all federal court decisions in fact upheld the enforcement of voting rights through Congressional legislation, the high point being the Supreme Court's decision in [*Ex parte Yarbrough*].").

58. See KACZOROWSKI, *supra* note 30, at 141.

59. *See id.* at 132–33 ("The Court must have known the debilitating consequence its decision would have on the efforts of Department of Justice officers to enforce civil rights in the federal courts of the South. . . . Justice Miller, for one, was conscious of the eviscerating impact his opinion had upon the president's Southern policy.").

60. Rafferty, *supra* note 28, at 110.

61. 92 U.S. 542 (1876).

62. 106 U.S. 629 (1883).

63. *See* KACZOROWSKI, *supra* note 30, at 177.

64. *See id.* at 176; *see also Cruikshank*, 92 U.S. at 553 ("The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of [the] 'unalienable rights with which they were endowed by their Creator.' Sovereignty, for this purpose, rests alone with the States." (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776))).

65. KACZOROWSKI, *supra* note 30, at 177.

Contrary to the drafters' intentions,[66] the Court declared that the Fourteenth Amendment "simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."[67] Under *Cruikshank*, then, the federal government could not employ the Fourteenth Amendment to criminalize civil rights violations by private citizens, rendering Section 241 effectively void.[68] Less than seven years later, the Court also voided the second section of the Ku Klux Klan Act of 1871 in *United States v. Harris,* holding that the Fourteenth Amendment empowered Congress to regulate only state action, not private conduct.[69]

Together, the *Slaughter-House Cases*, *Cruikshank*, and *Harris* undermined Congress' ability to punish civil rights violations by private actors, a major setback given that most violations of and threats against Black Americans' rights were carried out by private individuals.[70] The damage these decisions caused was only magnified by the newly Democratic Congress' repeal of many of the remaining civil rights statutes in the 1890s.[71] To follow was a decades-long dormancy in federal civil rights enforcement.

B. THE EVOLUTION OF CRIMINAL CIVIL RIGHTS OFFENSES

1. *Latency and Revival*

The period known as the nadir of American race relations[72] was also the nadir of federal rights enforcement: White supremacists

66. *See* Wilson R. Huhn, *The Legacy of* Slaughterhouse*,* Bradwell*, and* Cruikshank *in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1075–76 (2009); *see also supra* note 55.

67. United States v. Cruikshank, 92 U.S. 542, 554 (1875).

68. *See* KACZOROWSKI, *supra* note 30, at 177.

69. United States v. Harris, 106 U.S. 629, 638–40, 643–44 (1883) ("[W]hen [a state] has not made or enforced any law abridging the privileges or immunities of citizens of the United States . . . the [Fourteenth] [A]mendment imposes no duty and confers no power upon Congress.").

70. Watford, *supra* note 15, at 473.

71. *See* CARR, *supra* note 1, at 45–46 ("By the Act of February 8, 1894, [Congress repealed 39] sections of the Revised Statutes of 1873[ ] dealing with federal protection of the right to vote . . . . This action . . . reflected the Democratic Party's desire to end federal supervision of elections in the South.").

72. The "nadir of American race relations," a term coined by the historian Rayford W. Logan, describes the period extending from the end of Reconstruction in 1877 to, roughly, the early 20th century. *Racial Violence and the Red Summer*, NAT'L ARCHIVES, https://www.archives.gov/research/african-americans/wwi/red-summer [https://perma.cc/

violently persecuted Black Americans throughout the South practically unchecked for generations.[73] Although Black Americans lived under the constant threat of violence from private and public actors alike,[74] the federal government employed Section 242 in but two reported cases during this period.[75] Federal rights enforcement remained in this static, bleak state well into the 20th century.[76]

But a watershed in federal rights enforcement came with the founding of the Department of Justice's Civil Liberties Unit (the Unit) in 1939.[77] Then-Attorney General Murphy, solely upon his own initiative, established the Unit explicitly to reinvigorate federal civil rights enforcement.[78] And indeed, complaints promptly poured in from across the country, most related to violations of Black Americans' civil rights.[79] An internal study revealed that the Unit had only three statutory tools available to address these complaints, each from the Reconstruction era: the Anti-Peonage Act of 1867 and Sections 241 and 242.[80] Given the former's limited application to debt bondage, the new Unit based its litigation strategy on the latter two statutes.[81] But a few critical uncertainties about Sections 241 and 242 still required judicial

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WSS5-PEA3] (June 28, 2021). This period is so called because it saw the dismantling of "the political and legal gains won by African Americans during Reconstruction." *Id.*

73. *See id.* (explaining that, during this period, "thousands of African Americans were hanged, burned to death, shot to death, tortured, mutilated, and castrated by white mobs who almost never were prosecuted for their crimes"); *see also* MICHAEL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-*BROWN* SOUTH 1–9 (1987) (discussing the widespread racial violence of this era and explaining that "[t]he failure of the southern criminal justice system to punish lynching was nearly total").

74. Watford, *supra* note 15, at 474.

75. Brief for the United States at 49, Screws v. United States, 325 U.S. 91 (1945) (No. 42). The first, United States v. Buntin, 10 F. 730 (C.C.S.D. Ohio 1882), concerned the prosecution of a school official who excluded students on the basis of race; the second, United States v. Stone, 88 F. 836 (D. Md. 1911), involved the prosecution of election officials for intentionally making it more difficult for Black voters to vote for Republican candidates.

76. *See* Watford, *supra* note 15, at 474.

77. *See* CARR, *supra* note 1, at 24. The Unit's name was changed to the Civil Rights Section in 1941 to avoid public confusion with the American Civil Liberties Union. *Id.* at 24 n.35. In 1957, the Section became the Civil Rights Division, and it remains so to this day. *See* Watford, *supra* note 15, at 474.

78. *See* Watford, *supra* note 15, at 474; *see also* CARR, *supra* note 1, at 25.

79. *See* Tom C. Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 47 COLUM. L. REV. 175, 180 (1947).

80. CARR, *supra* note 1, at 56–57.

81. *Id.* at 57–83.

resolution. This resolution came, however imperfectly, in *United States v. Classic*[82] and *Screws v. United States*.[83]

2. Classic *and* Screws

Classic was the Civil Liberties Unit's first important case.[84] It arose out of the September 1940 Democratic congressional primary in Louisiana.[85] The reform-minded defendants, Louisiana Commissioners of Election, allegedly altered around 100 ballots to shift votes away from what remained of the Huey Long machine.[86] On that basis, federal prosecutors indicted the defendants under Sections 241 and 242.[87] The government specifically charged, among other things, that the defendants conspired "to injure and oppress citizens in the free exercise and enjoyment of" their right "to have their ballots counted as cast for the candidate of their choice" and "willfully and under color of law" deprived "registered voters at the primary" of "their right to cast their votes for the candidates of their choice and to have their votes counted as cast."[88] The district court sustained demurrers on these charges, finding the criminal civil rights statutes inapplicable and unconstitutional, and the government appealed directly to the Supreme Court.[89]

In a 4-3 decision, the Court reversed.[90] Writing for the majority, Justice Harlan Fiske Stone found that the Constitution's prescription that "[t]he House of Representatives shall be composed of Members chosen . . . by the People"[91]—along with the Elections Clause and the Necessary and Proper Clause—gave Congress the power to regulate both general and primary elections and that the criminal civil rights statutes, as applied to the defendants, were valid exercises of that power.[92] This holding was a victory for the nascent Civil Liberties Unit.[93] It was the first time

82. 313 U.S. 299 (1941).
83. 325 U.S. 91 (1945).
84. CARR, *supra* note 1, at 85.
85. *Id.*
86. *See Classic*, 313 U.S. at 308; *see also* CARR, *supra* note 1, at 85–86.
87. *See Classic*, 313 U.S. at 307; *see also* CARR, *supra* note 1, at 87.
88. United States v. Classic, 313 U.S. 299, 308 (1941).
89. *See id.* at 309; *see also* CARR, *supra* note 1, at 87.
90. CARR, *supra* note 1, at 88.
91. U.S. CONST. art. I, § 2, cl. 1.
92. *See Classic*, 313 U.S. at 318–22.
93. *See* CARR, *supra* note 1, at 89–90, 93.

Section 242 was before the Court,[94] and it not only survived intact but also served as a vehicle for a broadened interpretation of the Elections Clause.[95] Thus, *Classic* markedly expanded the Unit's authority to defend voting rights.[96]

The Court, however, had not given the Unit all the clarity it sought on Section 242.[97] Given the absence of reported appellate case law on the statute, the Unit hoped for a ruling definitively establishing its constitutionality.[98] But both Sections 241 and 242 undergirded the *Classic* indictment, and the Court did not analyze the latter in particular detail, leaving its constitutionality an open question.[99] Further, because the criminal civil rights statutes were most successfully utilized in vindicating electoral rights, the Unit sought a Supreme Court decision upholding Section 242 as applied to a nonelectoral right.[100] Specifically, the Unit sought to determine how effective the statute could be in prosecuting police brutality—many complaints of which poured into the Unit in the years after its creation—and other Due Process violations.[101] In 1945, four years after the Unit became the Civil Rights Section, the long-awaited clarification came in *Screws*.

The actions of the defendant in that case, Claude Screws, can be described only as a lynching. Along with two codefendants, Screws—the sheriff of Baker County, Georgia—arrested Robert Hall, a Black man, late at night at his home, ostensibly for stealing a tire.[102] Upon bringing Hall to the courthouse, the three defendants began mercilessly beating him until he was unconscious.[103] An ambulance was called soon thereafter and brought Hall to the hospital, where he died.[104]

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94. *See id.* at 89.

95. *See* United States v. Classic, 313 U.S. 299, 315 (1941). ("[W]e are now concerned with the question whether the right to choose at a primary election, a candidate for election as representative, is embraced in the right to choose representatives secured by Article I, § 2.").

96. *See* CARR, *supra* note 1, at 93.

97. *See id.* at 93, 105.

98. *See id.* at 105 ("At the time of the creation of the [Civil Liberties Unit] in 1939, [Section 242] had been involved in only two reported cases, neither of which progressed beyond the lower courts.").

99. *See id.*; Watford, *supra* note 15, at 477 ("[*Classic*] involved a prosecution under both Sections 241 and 242, and most of the Court's analysis focused on Section 241.").

100. CARR, *supra* note 1, at 105.

101. *See id.* at 105–06.

102. *Id.* Although it was not proven conclusively at trial, "[a]ll indications were that Screws had forged the arrest warrant." Watford, *supra* note 15, at 468.

103. *See* Screws v. United States, 325 U.S. 91, 93 (1945).

104. *See id.*

After Georgia prosecutors rejected the federal government's repeated requests to charge Screws and the other two officers responsible,[105] the Department of Justice indicted them for violating Section 242 and for conspiracy to violate the same provision.[106] On the substantive count, the government charged that the defendants, "acting under color of the laws of Georgia, 'willfully' caused Hall to be deprived of 'rights, privileges, or immunities secured or protected' to him by the Fourteenth Amendment—the right not to be deprived of life without due process of law."[107] A jury found the defendants guilty, the Fifth Circuit affirmed, and the Supreme Court granted certiorari.[108]

The primary challenge before the Court was grounded in a claim of unconstitutional vagueness.[109] The defendants argued that Section 242 was unconstitutional insofar as it criminalized violations of the Fourteenth Amendment's Due Process Clause.[110] Criminally proscribing due process violations, the defendants maintained, presented vagueness and notice issues because doing so would require that "the [statute] . . . be read as if it contained . . . broad and fluid definitions of due process and that if it is so read it provides no ascertainable standard of guilt."[111]

Construing the statute narrowly for a plurality of four Justices, Justice William O. Douglas rejected this analysis.[112] He found that the offense's willfulness requirement "connote[s] a purpose to deprive a person of a specific constitutional right."[113] Such a construction, he held, relieves the statute of any vagueness or fair notice objections because a defendant receives adequate warning if punished "only for an act knowingly done with the purpose of doing that which the statute prohibits."[114] Therefore, on the plurality's view, the statute's stringent mens rea element alleviated

105. *See* Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2173–74 (1993) (explaining Georgia prosecutors' failure to indict the *Screws* defendants).

106. *See Screws*, 325 U.S. at 93.

107. *Id.* (quoting 18 U.S.C. § 242).

108. *Id.* at 94.

109. *See* Screws v. United States, 325 U.S. 91, 94–95, 107 (1945).

110. *Id.* at 94.

111. *Id.* at 95.

112. Justice Wiley Rutledge and Justice Murphy also wrote in favor of Section 242's constitutionality, but the former concurred in the result, *see id.* at 113–34 (Rutledge, J., concurring in the result), and the latter dissented on other grounds, *see id.* at 134–38 (Murphy, J., dissenting).

113. *Id.* at 101 (plurality opinion).

114. *Id.* at 102.

vagueness concerns because it established "a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law."[115] Justice Douglas clarified, however, that defendants need not be "thinking in constitutional terms" for the offense's mental component to be established.[116]

In several respects, *Screws* set the stage for the later development and application of Sections 241 and 242. Most immediately, the Court's plurality opinion was a victory for the nascent Civil Rights Section: It upheld Section 242, as applied to a due process violation resulting from police brutality, as constitutional.[117] It also accepted the interpretation of "under color of law" that the Section had sought.[118]

On the other hand, that the case "elicited four separate opinions" from a badly splintered Court indicated that the statute's constitutionality was scarcely a settled question.[119] And the *Screws* plurality's holding regarding Section 242's willfulness requirement is hopelessly convoluted, as its insistence that defendants need not be "thinking in constitutional terms" contradicts its facially strict "requirement of a specific intent to deprive a person of a federal right."[120] This internal inconsistency has endlessly vexed judges and lawyers attempting to devise coherent jury instructions explaining Section 242's willfulness element[121] and has engendered a threefold circuit split regarding

115. *Id.* at 103; *see also* 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, 353 (1976) (explaining that, under *Screws*, "[n]ot only must the government prove beyond a reasonable doubt that the defendant committed the acts which constituted the deprivation; it must also prove, again beyond a reasonable doubt, that the perpetrator intended to bring about that particular deprivation").

116. *Screws,* 325 U.S. at 106.

117. *See* CARR, *supra* note 1, at 114.

118. *See id.*

119. *Id.* at 108; *see also* Watford, *supra* note 15, at 477.

120. Screws v. United States, 325 U.S. 91, 103, 111 (1945); *see also* United States v. Johnstone, 107 F.3d 200, 208–09 (3d Cir. 1997) ("*Screws* is not a model of clarity. Some of the sentences therein, examined in isolation, resist easy explanation and can be reconciled only by way of tortuous logic. . . . *Screws* is less than satisfying in its attempt to reconcile its internally inconsistent mandates."); *see also* Lawrence, *supra* note 105, at 2180–86 ("Justice Douglas' opinion for a plurality of four justices attempted, unsuccessfully, to solve the vagueness problem. . . . The flaws in Justice Douglas' approach emerge because the specific intent standard that he proposes cannot withstand analysis.").

121. *See* Watford, *supra* note 15, at 482.

its exact formulation.[122] But on any reading, *Screws*' specific intent requirement has made Section 242 convictions harder to obtain.[123]

Worse still, since *Screws* was decided, the Department of Justice and legal commentators have seen it as a looming existential threat to Section 242 and thus the Civil Rights Division itself.[124] If a conviction supported by a weak record reaches the Supreme Court, a majority may well find *Screws*' willfulness standard too tortured to stand and overrule it or craft an even more demanding mental requirement, rendering Section 242 all but dead.[125] Thus, both *Screws* itself and concerns about its tenability have continually informed courts' and prosecutors' approach to federal criminal civil rights litigation.

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122. *See* Aneri Shah, Comment, *Reinvigorating the Federal Government's Role in Civil Rights Enforcement Under 18 U.S.C. § 242: The George Floyd Justice in Policing Act's Not So Reckless Proposal*, 52 SETON HALL L. REV. 1601, 1613–16 (2022).

The first group of courts, including the Fifth Circuit, have construed "willfully" "to mean that the government must prove the [defendants] acted with an evil motive or bad purpose." *Id.* at 1614; *see also* United States v. Garza, 754 F.2d 1202, 1210 (5th Cir. 1985). Notably, the Department of Justice itself also seems to adhere to this view. *See* DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 11 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [https://perma.cc/9VQX-ZS7N] ("[W] e must prove that the defendant intended to engage in the conduct that violated the Constitution and that he did so knowing that it was a wrongful act.").

The second collection of courts, including the Fourth Circuit, have interpreted "willfully" "to mean that the government must prove that the defendant intended to commit the physical act, but not necessarily that he intended to violate the constitutional rights of another." *See* Shah, *supra* note 122, at 1615; *see also* United States v. Cobb, 905 F.2d 784, 785 (4th Cir. 1990) (upholding a jury instruction establishing that the willfulness requirement may be satisfied by a finding "that a defendant knew what he was doing and that he intended to do what he was doing, and . . . that he did violate a constitutional right").

The third batch of courts, including the Seventh and Ninth Circuits, have found that "willful" conduct includes actions taken in reckless disregard of a constitutional right. Shah, *supra* note 122, at 1616; *see also* United States v. Bradley, 196 F.3d 762, 769 (7th Cir. 1999); United States v. Gwaltney, 790 F.2d 1378, 1386 (9th Cir. 1986) (upholding a jury instruction establishing that, to prove willfulness, "it is not necessary for the government to prove the defendant was thinking in constitutional terms[,] . . . for a reckless disregard for a person's constitutional rights is evidence of specific intent to deprive that person of those rights" (internal quotation marks omitted)).

123. *See* Watford, *supra* note 15, at 482.

124. *See* Paul Savoy, *Reopening Ferguson and Rethinking Civil Rights Prosecutions*, 41 N.Y.U. REV. L. & SOC. CHANGE 277, 319 (2017).

125. *Id.*

3. *Later Jurisprudence:* Lanier *and* Baroni

The threat *Screws* poses to Section 242 was realized, if only briefly, in *United States v. Lanier*.[126] The defendant, David Lanier, was a Tennessee state judge indicted under Section 242 for violating five women's constitutional right "not to be deprived of liberty without due process of law" by sexually assaulting them during his judicial service.[127] The jury found Lanier guilty, and a panel of the Sixth Circuit affirmed his conviction.[128] But the full court, rehearing the case en banc, reversed Lanier's conviction and dismissed the indictment for "lack of any notice . . . that [Section 242] includes simple or sexual assault crimes within its coverage."[129] In reaching this disposition, the Sixth Circuit was openly hostile to *Screws*, disparaging the decision as diverging from "well established canons of construction of criminal law."[130] Unsurprisingly, then, the court's interpretation of *Screws*[131] was extremely constrained: The predicate right in a Section 242 prosecution, the court held, must be one the Supreme Court both has identified and has held to apply "to a factual situation fundamentally similar to the one at bar."[132]

This demanding construction would have effectively halted the statute's doctrinal development. After all, if a federal civil rights indictment may stand only if the Supreme Court has identified the predicate right, then any Section 242 prosecution attempting to garner recognition of a right unannounced by the Court is inherently defective. The government appealed this ruling, and a unanimous Supreme Court vacated the decision.[133] The Court

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126. 520 U.S. 259 (1997).

127. *Id.* at 261–62. For more on conceptualizing the right to be free from sexual assault by state actors as a substantive due process right, see generally Johanna R. Shargel, United States v. Lanier*: Securing the Freedom to Choose*, 39 ARIZ. L. REV. 1115 (1997); Stephanie Weiler, Comment, *Bodily Integrity: A Substantive Due Process Right to Be Free from Rape by Public Officials*, 34 CAL. W. L. REV. 591 (1998).

128. *See Lanier*, 520 U.S. at 262 (citing United States v. Lanier, 33 F.3d 639 (6th Cir. 1994)).

129. United States v. Lanier, 73 F.3d 1380, 1384 (6th Cir. 1996).

130. *Id.* at 1391. With similar antipathy, the court remarked that "*Screws* is the only Supreme Court case in our legal history in which a majority of the Court seems willing to create a common law crime." *Id.*

131. Specifically, the Sixth Circuit was interpreting *Screws*' requirement that, to undergird a Section 242 prosecution, a right must have been "made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." Screws v. United States, 325 U.S. 91, 104 (1945).

132. *Lanier*, 73 F.3d at 1392–93.

133. *See* United States v. Lanier, 520 U.S. 259, 260, 263 (1997).

roundly rejected the Sixth Circuit's analysis, holding, first, that decisions of the federal courts of appeals and other courts may provide the requisite notice under *Screws* and, second, that such precedents need not apply the pertinent right to a "fundamentally similar" factual situation.[134] In so holding, the Court saved Section 242 from the obsolescence to which the Sixth Circuit's holding would have relegated it.

Nevertheless, although *Lanier* rescued Section 242 from near complete irrelevance, lower court opinions applying it have given the Civil Rights Division reason enough to continue to restrain the statute's application. In *United States v. Baroni*, for instance, the Third Circuit held that, although its own precedent clearly recognized a Fourteenth Amendment due process right to intrastate travel, the circuit split on the issue indicated that the right's existence was insufficiently concrete for it to serve as a basis for criminal liability under Sections 241 or 242.[135]

Baroni thus demonstrates that, even after *Lanier*, innovative uses of Section 242 risk prompting restrictive appellate interpretations of the statute. In this sense, *Baroni* reveals that the time-honored doctrinal paradigm of the federal criminal civil rights statutes—in which prosecutors and courts, apprehensive of the statutes' common law character and the fair notice issues it poses, remain determined to restrict their application—is potent as ever.

II. THE DEPARTMENT OF JUSTICE'S ABDICATION OF FEDERAL RIGHTS ENFORCEMENT TO THE PEOPLE

Practically since its origin,[136] Section 242's ostensibly exacting specific intent requirement[137] and disputed adherence to constitutional fair notice principles have given federal prosecutors pause before pursuing a prosecution under the statute.[138] But this caution and the resulting Department of Justice policies have rendered civil rights prosecutions a vanishing proportion of the federal criminal docket, thereby placing the burden of federal

134. *Id.* at 268–72 (quoting *Lanier*, 73 F.3d at 1393).
135. *See* 909 F.3d 550, 556, 585–88 (3d Cir. 2018).
136. *See infra* text accompanying notes 160–162.
137. *See supra* notes 121–122 and accompanying text.
138. *See infra* notes 180–181, 183 and accompanying text.

rights enforcement almost entirely on the public.[139] The resulting federal rights–enforcement regime is ineffectual and fails to adequately express moral condemnation of violations of fundamental rights.[140] Part II.A demonstrates that private plaintiffs are federal rights' principal vindicators and that federal criminal civil rights laws are woefully underenforced, and examines the reasons for these phenomena. Part II.B discusses the practical, legal, and expressive costs of this state of affairs.

A. SECTION 1983'S ECLIPSE OF ITS CRIMINAL COUNTERPARTS

1. *The Relative Volume of Civil and Criminal Federal Rights–Vindicating Litigation*

Despite the statutes' cognate origins, common purpose,[141] and applicability to similar conduct,[142] Section 1983 has overshadowed its criminal analogs. While several factors undoubtedly contribute to the gap between the number of cases brought under the two statutes—from the amount of potential civil plaintiffs to the lack of federal interest in the conduct at issue in many Section 1983 suits—the sheer scale of the disparity points to systemic underenforcement of the criminal civil rights statutes.

During the 12-month period ending March 31, 2023, for instance, private plaintiffs commenced 37,267 civil cases in federal district court under Section 1983 and other federal civil rights statutes.[143] In the same period, however, federal prosecutors

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139. *See infra* notes 143–145 and accompanying text.

140. *See infra* Parts II.B.1–2.

141. *See supra* Part I.A.1.

142. Indeed, Sections 1983 and 242 reach virtually *the same* conduct, as evidenced by their similar statutory language. Section 1983 creates a civil cause of action against those who, "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subject[ ], or cause[ ] to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Section 242, on the other hand, makes it a crime to, "under color of any law, statute, ordinance, regulation, or custom, willfully subject[ ] 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." 18 U.S.C. § 242.

143. *Table C-3—U.S. District Courts–Civil Federal Judicial Caseload Statistics (March 31, 2023)*, U.S. CTS., https://www.uscourts.gov/statistics/table/c-3/federal-judicial-caseload-statistics/2023/03/31 [https://perma.cc/R9QN-NSJ9] [hereinafter *Table C-3*] (last visited Oct. 29, 2023).

brought only 194 civil rights prosecutions.[144] These two statistics alone indicate that federal rights enforcement is conducted, in relative terms, almost entirely by private plaintiffs: Over 99% of federal rights–vindicating suits are civil rather than criminal.[145]

Of course, one could rebut that such a disparity is unremarkable because the number of potential Section 1983 plaintiffs, including those willing to proceed pro se, is much larger than the number of federal prosecutors. And some disparity *should* result for that reason. But the number of federal civil rights prosecutions is minute relative to not only the volume of analogous civil suits but also the Department of Justice's overall caseload. From March 2022 to March 2023, for example, civil rights cases constituted less than a third of a percent of all criminal cases commenced in federal district courts, an *increase* from years prior.[146] And Section 242 prosecutions represent an even smaller fraction of the federal criminal docket, recently less than one in 3,000.[147] These minuscule figures strongly suggest that the

144. *Table D-2—U.S. District Courts–Criminal Federal Judicial Caseload Statistics (March 31, 2023)*, U.S. CTS., https://www.uscourts.gov/statistics/table/d-2/federal-judicial-caseload-statistics/2023/03/31 [https://perma.cc/6YWY-374N] [hereinafter *Table D-2*] (last visited Oct. 29, 2023). For a list of federal criminal civil rights statutes encompassed in this statistic, see *Statutes Enforced by the Criminal Section*, U.S. DEP'T OF JUST. C.R. DIV., https://www.justice.gov/crt/statutes-enforced-criminal-section [https://perma.cc/WL79-ZRAJ] (last updated Aug. 15, 2023).

145. *Compare Table C-3*, *supra* note 143, *with Table D-2*, *supra* note 144.

146. *See Table D-2*, *supra* note 144. This increase may reflect a shift in departmental policy between the first Trump and Biden Administrations. *See Readout of Justice Department Leadership's Meeting with Civil Rights Groups Ahead of 60th Anniversary of the March on Washington*, U.S. DOJ OFF. OF PUB. AFFS. (Aug. 25, 2023), https://www.justice.gov/opa/pr/readout-justice-department-leaderships-meeting-civil-rights–groups-ahead-60th-anniversary [https://perma.cc/MP8S-ADB4] ("'When I became Attorney General, I laid out three co-equal priorities for this Justice Department: to uphold the rule of law, to keep our country safe, and to protect civil rights,' [said] Attorney General Merrick B. Garland . . . ."). *Compare* UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT 11 tbl.3A (2022), https://www.justice.gov/media/1279221/dl?inline [https://perma.cc/A3P9-CEF6] (showing that federal prosecutors brought 179 civil rights prosecutions in the fiscal year ending September 30, 2022), *with* UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT 11 tbl.3A (2020), https://www.justice.gov/media/1138376/dl?inline [https://perma.cc/U5CS-QRQE] (reporting that federal prosecutors brought 134 such prosecutions in the fiscal year ending September 30, 2020). But that such an increased number of civil rights prosecutions still constitutes far less than one percent of the federal criminal docket only highlights federal prosecutors' relative inattention to such cases.

147. *See* TRAC REPS., POLICE OFFICERS RARELY CHARGED FOR EXCESSIVE USE OF FORCE IN FEDERAL COURT (June 17, 2020), https://trac.syr.edu/tracreports/crim/615/ [https://perma.cc/C7W9-URYB] [hereinafter POLICE OFFICERS RARELY CHARGED] ("Altogether in . . . 2019, federal prosecutors brought § 242 charges in just 49 cases in the United States. This compares with 184,274 total federal prosecutions [that] year. Thus, these cases represent just a minute fraction of offenses that are prosecuted—only 27 out of

Department of Justice has failed to take up the rights-vindicating role at the heart of its Reconstruction-era creation.[148]

This paucity of federal civil rights prosecutions, moreover, is not for lack of referrals. On the contrary, the Department of Justice receives thousands of Section 242–related complaints yearly from citizens and federal investigators alike.[149] Many of these referrals, of course, may be meritless.[150] But, despite reviewing and investigating a substantial proportion of these complaints,[151] federal prosecutors charge only around 11% of them[152]—"among the very lowest prosecution rates" for federal crimes[153]—suggesting that systemic factors lead federal prosecutors away from the vast majority of civil rights cases.[154] Indeed, based on

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every 100,000 prosecutions or 0.027 percent."); *see also* HUM. RTS. WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 125–26 tbl.1 (1998), https://www.hrw.org/reports/pdfs/u/us/uspol986.pdf [https://perma.cc/N8UD-2M7R] ("Not only are police misconduct cases prosecuted at the lowest rate among civil rights prosecutions, but civil rights offenses themselves are prosecuted less than any other category of offense handled by the U.S. Justice Department.").

148. *See* KACZOROWSKI, *supra* note 30, at 62–66.

149. Johnson & Bridgmon, *supra* note 17, at 199–200, 204; HUM. RTS. WATCH, *supra* note 147, at 125–26 tbl.1 (showing that, from 1994 to 1996, the Civil Rights Division never received fewer than 8,000 complaints annually, with approximately a third coming from the Federal Bureau of Investigation and the remainder from citizens). The Civil Rights Division accepts complaints from the public online. *See Contact the Department of Justice to Report a Civil Rights Violation*, U.S. DEP'T OF JUST. C.R. DIV., https://civilrights.justice.gov/report/?utm_campaign=d43e2eb1-f108-4164-adcd-3cd945a58093 [https://perma.cc/P2H9-8HHR] (last visited Mar. 17, 2025).

150. HUM. RTS. WATCH, *supra* note 147, at 125.

151. *See* HUM. RTS. WATCH, *supra* note 147, at 126–27 tbl.2 (showing the number of complaints that the Civil Rights Division received, reviewed, investigated, and prosecuted in 1996); *see also* Johnson & Bridgmon, *supra* note 17, at 198–99 (describing the investigatory process for § 242–related complaints).

152. Stunningly, this figure is a marked increase from prior decades. Between 1986 and 2003, for instance, the Department of Justice received 43,331 § 242–related referrals, but it only prosecuted 690 of these—a declination rate of more than ninety-eight percent. This is an extraordinarily high declination rate, especially relative to contemporaneous rates for crimes such as tax evasion (40%), sexual exploitation of minors (51%), embezzling funds from federal programs (61%), and attempting to reenter the United States after being previously removed (7%). TRAC REPS., UNDER COLOR OF LAW (Dec. 1, 2004), https://trac.syr.edu/tracreports/civright/107/ [https://perma.cc/YL85-6GKB].

153. POLICE OFFICERS RARELY CHARGED, *supra* note 147. Yet again, this figure is a substantial increase from previous years: Between 1990 and 2006, for instance, federal prosecutors never pursued more than three percent of Section 242 referrals. *See id.* Hence, in 1998, Human Rights Watch concluded that "civil rights offenses . . . are prosecuted less than any other category of offense handled by the U.S. Justice Department." *Low Rate of Federal Prosecutions*, HUM. RTS. WATCH (June 1998), https://www.hrw.org/legacy/reports98/police/uspo34.htm#TopOfPage [https://perma.cc/9STT-HCWH].

154. *See* Johnson & Bridgmon, *supra* note 17, at 206 ("Even though the DOJ states that they actively pursue [Section 242] complaints, the data may suggest that a de facto policy of not aggressively pursuing 242 cases exists.").

these and similar statistics, commentators have concluded that the Department of Justice prioritizes high-profile cases, leaving less notorious rights violations unpunished by federal prosecution.[155] The fact that two of the relatively few Section 242 prosecutions in recent years[156] were brought against the police officers responsible for the killings of George Floyd[157] and Breonna Taylor[158]—both of which received extensive national media attention[159]—illustrates this point well.

And this state of affairs is by no means novel. Rather, the Department of Justice's restraint in employing Section 242 is as old as the statute itself. As discussed, federal prosecutors deployed the statute in only two reported cases in the time between its enactment and the Civil Rights Section's establishment in 1939.[160] Between the Civil Rights Section's founding and *Screws*, although the Section received between 8,000 and 14,000 thousand complaints annually, the number of yearly prosecutions under Sections 241 and 242 never exceeded a mere 76.[161] But that was the high-water mark: In 1944, the year *Screws* was argued, federal

155. *See, e.g.*, Johnson & Bridgmon, *supra* note 17, at 198; *see also* ALEXIS AGATHOCLEOUS, VERA INST. OF JUST., PROSECUTING POLICE MISCONDUCT: REFLECTIONS ON THE ROLE OF THE U.S. CIVIL RIGHTS DIVISION 5 (1998) (relating the recollection of a former Assistant Attorney General for the Civil Rights Division that at the height of the civil rights movement, while the Division "did address some exceptionally serious and high-profile" instances of police misconduct, it did not focus on "non-egregious" cases); HUM. RTS. WATCH, *supra* note 147 at 125 ("Informally, some representatives of U.S. Attorney's offices did speak with Human Rights Watch and acknowledged that many of the decisions regarding which cases to pursue were fueled by media attention . . . .").

156. *See supra* note 147 and accompanying text.

157. *See* Press Release, U.S. Dep't of Just., Former Minneapolis Police Officer Derek Chauvin Sentenced to More Than 20 Years in Prison for Depriving George Floyd and a Minor Victim of their Constitutional Rights (July 7, 2022), https://www.justice.gov/archives/opa/pr/former-minneapolis-police-officer-derek-chauvin-sentenced-more-20-years-prison-depriving [https://perma.cc/JP38-VFTW].

158. *See* Press Release, U.S. Dep't of Just., Former Louisville, Kentucky, Metro Police Officer Found Guilty of Federal Civil Rights Crimes Related to the Breonna Taylor Case (Nov. 1, 2024), https://www.justice.gov/archives/opa/pr/former-louisville-kentucky-metro-police-officer-found-guilty-federal-civil-rights–crimes [https://perma.cc/FD3P-YHCN].

159. *See, e.g.*, *George Floyd*, N.Y. TIMES, https://www.nytimes.com/topic/george-floyd [https://perma.cc/4GVN-4G3S] (last visited Mar. 17, 2025) (collecting articles related to George Floyd); *Breonna Taylor*, N.Y. TIMES, https://www.nytimes.com/topic/breonna-taylor [https://perma.cc/WRS9-XQGH] (last visited Mar. 17, 2025) (collecting articles related to Breonna Taylor).

160. *See* Brief for the United States, *supra* note 75, at 49. In contrast, prosecutors utilized Section 241 in numerous cases during this period. *See, e.g.*, United States v. Mosley, 238 U.S. 383 (1915); Guinn v. United States, 238 U.S. 347 (1915); United States v. Waddell, 112 U.S. 76 (1884); *Ex parte* Yarbrough, 110 U.S. 651 (1884).

161. Brief for the United States, *supra* note 75, at 49.

prosecutors brought but 12 prosecutions under Section 242, an increase from three prosecutions the year prior.[162]

Connecting these points creates an outline of federal prosecutorial practice, past and present, regarding the criminal civil rights statutes. Despite receiving thousands of civil rights–related complaints yearly, federal prosecutors pursue only a select few, mostly high-profile cases, rendering civil rights prosecutions a vanishing fraction of the federal criminal docket. It is through this paradigm that the Department of Justice has abdicated federal rights enforcement to the people. Thus, examining the reasons for this abdication is necessary to understanding the prevailing federal rights–enforcement regime.[163]

2. *Bases for the Current Paradigm of Federal Civil Rights Prosecutions*

One of the most significant factors shaping the federal criminal civil rights landscape is the centralized control "Main Justice"—the Department of Justice's headquarters in Washington, D.C.—exercises over it.[164] When a United States Attorney's Office initiates any criminal investigation "that may implicate federal criminal civil rights statutes," the United States Attorney must "advise the Civil Rights Division in writing."[165] The Office undertaking the investigation must keep the Civil Rights Division abreast "of new information relating to . . . the case and whether it is one of 'national interest.'"[166] Although prior approval is not required to indict except in cases of national interest,[167] the

162. Screws v. United States, 325 U.S. 91, 91 (1945) (indicating the year *Screws* was argued); Brief for the United States, *supra* note 75, at 49–50 (presenting statistics on Section 242 prosecutions).

163. Curiosity about the extraordinarily low number of federal civil rights prosecutions is hardly a recent phenomenon. *See, e.g.*, Spurrier, *supra* note 115, at 356–61.

164. *See* DANIEL C. RICHMAN ET AL., DEFINING FEDERAL CRIMES 444 (2d ed. 2018) (online edition); *see also* Ben Covington, Comment, *State Official Misconduct Statutes and Anticorruption Federalism After* Kelly v. United States, 121 COLUM. L. REV. F. 273, 280–81 (2021); Daniel Richman, *Defining Crime, Delegating Authority—How Different Are Administrative Crimes?*, 39 YALE J. ON REGUL. 304, 332 (2022) (noting that, "to this day," the Department of Justice "has exercised considerable control on [the] deployment" of Sections 241 and 242).

165. U.S. DEP'T OF JUST., JUSTICE MANUAL § 8-3.120 (2018).

166. *Id.*

167. *Id.* § 8-3.140. Yet more process is required when a "high-profile civil rights incident" is at issue. *Id.* § 8-3.135. Such an incident is one that, first, "may become an investigation or prosecution under a federal criminal civil rights statute" and, second, "has garnered significant public interest in the local or national community or has the potential

relevant Office must notify the Civil Rights Division of its "intention to seek an indictment."[168] Even so, the Assistant Attorney General for the Civil Rights Division "may exercise the ultimate authority to disapprove the prosecution."[169]

All this means that, in practice, a federal criminal civil rights case is unlikely to proceed without Main Justice's approval, whether formal or informal.[170] And again, these circumstances are not new: At least as early as *Screws*, the Department of Justice required all United States Attorneys to obtain approval from Main Justice before proceeding with a civil rights prosecution, a measure that the federal government itself recognized in its *Screws* brief as "a policy of strict self-limitation with regard to prosecutions under the civil rights acts."[171] Unlike other areas of federal criminal law, then, the Civil Rights Division's staffing and budgetary restrictions constrain the nationwide federal civil rights prosecutorial apparatus.[172] Further, the capacious definition of cases of "national interest"—encompassing, among others, cases that present "a novel issue of law" or that are "urgent or sensitive"—likely gives prosecutors pause that formal approval will be required for a criminal civil rights charge.[173] As a result, federal prosecutors even considering pursuing such charges will, in most cases, face significant administrative hurdles.[174] Indeed,

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to become a flashpoint or catalyst for tensions and concern among the community." *Id.* In such cases, the pertinent Office must immediately contact the Civil Rights Division and file a report. *See id.*

That such rules even exist, and that Main Justice has taken pains to draw the fine distinction between "high-profile civil rights incidents" and cases of "national interest," emphasizes the disproportionate focus afforded only the most egregious civil rights violations.

168. *Id.* § 8-3.140.

169. *Id.*

170. RICHMAN ET AL., *supra* note 164, at 444.

171. Brief for the United States, *supra* note 75, at 48.

172. *See* U.S. COMM'N ON C.R., ARE RIGHTS A REALITY? EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT 80 (2019), https://www.usccr.gov/files/pubs/2019/11-21-Are-Rights–a-Reality.pdf [https://perma.cc/88FY-K6CR] (hypothesizing a connection between budgetary challenges facing the Civil Rights Division and decreases in the number of civil rights cases brought by the federal government nationwide); *see also* Andrea J. Ritchie & Joey L. Mogul, *In the Shadow of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States*, 1 DEPAUL J. FOR SOC. JUST. 175, 234 (2008) ("The Criminal Section of the U.S. DOJ Civil Rights Division is insufficiently resourced and therefore unable, as a practical matter, to prosecute the number of cases of racial profiling, racially discriminatory use of excessive force, abuse, harassment, and false arrests which take place each year.").

173. U.S. DEP'T OF JUST., *supra* note 165, § 8-3.130.

174. *See* RICHMAN ET AL., *supra* note 164, at 444.

that the Trump Administration could so easily freeze national civil rights litigation only underscores the perils of such centralized control over federal criminal civil rights enforcement.[175]

This bureaucratic framework is substantially responsible for the past and present dearth of federal civil rights prosecutions.[176] Less clear is why Main Justice erected it in the first place. For an adequate explanation, one must return to the Supreme Court's decision in *Screws* and lower courts' and the Department of Justice's interpretations of it.[177]

As their history shows,[178] the federal criminal civil rights statutes have received judicial skepticism practically since their inception. Indeed, Section 242 barely survived its brush with the Court in *Screws*, and that the plurality there could hardly craft a coherent opinion upholding the statute only emphasizes the difficulty of squaring it with constitutional fair notice principles.[179] Since *Screws*, novel applications of these statutes have led appellate courts, grappling with such fair notice concerns, to narrow their scope considerably, sometimes to the point of effectively extinguishing their development.[180] The threat of such catastrophic opinions looms so large for the Civil Rights Division that, out of extreme caution, it has adopted the most stringent interpretation of Section 242's willfulness requirement,[181] even though most lower courts eschew that demanding standard.[182]

That Main Justice has adopted this exacting interpretation of Section 242 is itself largely responsible for the dearth of federal

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175. *See* Alanna Durkin Richer, *Trump's New Justice Department Leadership Orders a Freeze on Civil Rights Cases*, ASSOCIATED PRESS, https://apnews.com/article/civil-rights–division-justice-department-trump-2dcb45cca7c9c9cdaea78282d4279c35 [https://perma.cc/79YZ-LBXB] (last updated Jan. 22, 2025).

176. *See* RICHMAN ET AL., *supra* note 164, at 444 ("The Department of Justice has established a policy of strict self-limitation with regard to prosecutions under the civil rights acts. . . . The number of prosecutions which have been brought under the civil rights statutes is small."); *see also* Covington, *supra* note 164, at 280–81.

177. *See supra* Parts I.B.2–3.

178. *See supra* Parts I.A.2–B.3.

179. Watford, *supra* note 15, at 477.

180. *See, e.g.*, *supra* Part I.B.3.

181. *See* Savoy, *supra* note 124, at 304 ("[F]ederal prosecutors, in adopting a definition of willfulness that requires a defendant to recognize the unlawfulness of his conduct, . . . choose [the] interpretation that . . . poses the highest hurdle to prosecution . . . ."); *see also supra* note 122. That Main Justice must give a United States Attorney's Office formal approval to indict in cases presenting "a novel issue of law" suggests that concerns about adverse appellate opinions in response to innovative charging theories at least partially animate Main Justice's strict control over the criminal civil rights statutes. *See supra* notes 167, 173 and accompanying text.

182. *See supra* note 122.

civil rights prosecutions, as such a stringent standard defeats many prosecutions before they even begin.[183] But the caution that led the Department of Justice to adopt this interpretation in the first instance likely has also driven it to ensure its uniform application to effectively all federal civil rights prosecutions,[184] further constraining the criminal civil rights statutes' utility.[185] Ultimately, then, the paucity of federal civil rights prosecutions flows from caution born of *Screws*' rigorous and tortured willfulness analysis. Civil litigation must fill the resulting void—to the detriment of victims of federal rights violations, the criminal justice system, and American society more broadly.

B. THE COSTS OF LEAVING FEDERAL RIGHTS ENFORCEMENT TO THE PEOPLE

However prudent the Department of Justice's failure to bring more civil rights prosecutions may be, its effective abdication of federal rights enforcement to the people has several costs. Indeed, "[w]hile private enforcement provisions may on face have a 'democratizing' effect on constitutional promises by providing more access to plaintiffs," in fact, "claims under private enforcement regimes are substantially limited by the legal, political, and institutional environments faced by" private plaintiffs but not federal prosecutors.[186] This section first examines such practical costs of the prevailing federal rights–enforcement regime and then analyzes its equally grave expressive harms.

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183. *See Low Rate of Federal Prosecutions*, *supra* note 153 ("In explaining the low rate of prosecution, . . . [the] chief of the Criminal Section of the Civil Rights Division . . . [said] that federal civil rights prosecutions are difficult due to the requirement of proof of the accused officer's 'specific intent' to deprive an individual of his or her civil rights . . . ."); *see also* John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 809–10; Shah, *supra* note 122, at 1617–20 (discussing three "highly publicized and deeply disturbing cases" that the Department of Justice declined to prosecute specifically because of Section 242's willfulness requirement).

184. *See* Covington, *supra* note 164, at 280–81 ("Main Justice exercises a significant degree of control over 18 U.S.C. §§ 241 and 242 prosecutions, and it has been cautious in deploying these statutes—perhaps out of concern with bringing their common law–like quality into too stark of relief before the Supreme Court."); *see also supra* text accompanying note 170. That Main Justice must give a United States Attorney's Office formal approval to indict in cases presenting "a novel issue of law" suggests that concerns about adverse appellate opinions in response to innovative charging theories at least partially animate Main Justice's strict control over the criminal civil rights statutes. *See supra* text accompanying notes 155, 159.

185. *See supra* notes 164–169 and accompanying text.

186. Gardner, *supra* note 34, at 89–90.

1. *Practical Costs*

Perhaps most obviously, private civil rights plaintiffs directly bear the monetary costs of legal action while federal prosecutors do not. Of course, private plaintiffs and their attorneys also stand to *gain* financially from legal action in ways that prosecutors do not.[187] Nevertheless, those more likely to suffer civil rights violations—members of protected classes[188]—are also less likely to have the means to fund litigation and thus less likely to initiate legal action.[189] For instance, Black and Hispanic Americans' relatively low median income compared to white Americans[190] renders them less likely to legally vindicate their rights,[191] even though their rights are more frequently violated.[192] Because of such economic considerations, along with the social and legal factors discussed below, the potential for a damages award is insufficient to convince many victims of discrimination to seek legal redress.[193]

This perverse paradigm also extends beyond the financial realm. Victims of race- or sex-based discrimination most often fail

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187. For a recent treatment of the damages framework for Section 1983 claims, see E. Garrett West, *Refining Constitutional Torts*, 134 YALE L.J. 858, 909–911 (2025).

188. *See* Michael Evangelist, *Narrowing Racial Differences in Trust: How Discrimination Shapes Trust in a Racialized Society*, 69 SOC. PROBLEMS 1109, 1118–19 tbl.1 (2022) (showing that, relative to white respondents, a greater number of Black and Hispanic respondents reported unfair treatment by police); *see also What Are the Most Typical Civil Rights Violations?*, FBI, https://www.fbi.gov/about/faqs/what-are-the-most-typical-civil-rights–violations [https://perma.cc/5AQC-HUKG] (last visited Dec. 30, 2023) (noting that "complaint[s] involv[ing] racial violence" are a "common" type of civil rights complaint).

189. *See* Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 551, 552 tbl.4, 553 tbl.5 (1980) (demonstrating that the likelihood of a legally redressable grievance being translated into a claim "increases steadily with income and educational levels"); *Median Annual Earnings by Sex, Race and Hispanic Ethnicity*, U.S. DOL, https://www.dol.gov/agencies/wb/data/earnings/median-annual-sex-race-hispanic-ethnicity [https://perma.cc/C838-7L7U] (last visited Dec. 30, 2023).

In the analogous context of civil discrimination litigation, researchers have asked individuals who experienced illegal or otherwise unfair treatment because of their membership in a protected class who did not file a complaint why they did not do so. Approximately five percent of respondents stated that "[e]xcessive time or cost" informed their decision. *See* Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421, 424–26 (1987). This result suggests that financial concerns may prohibit many, but by no means most, potential § 1983 actions. But given that the costs of litigation are substantially greater than those of filing a nonlegal complaint, cost may indeed be more prohibitive in the Section 1983 context.

190. *See Median Annual Earnings by Sex, Race and Hispanic Ethnicity*, *supra* note 189.

191. *See* Miller & Sarat, *supra* note 189, at 551, 552 tbl.4, 553 tbl.5.

192. *See supra* note 188 and accompanying text.

193. *See* Gardner, *supra* note 34, at 90.

to bring suit because of unfamiliarity with the legal system and fear that "legal intervention will disrupt the delicate balance of power between themselves and their opponents."[194] Worse still, many victims of discrimination are generally distrustful of the legal system.[195] Indeed, in the prevailing private rights-enforcement regime, victims of illegal discrimination are far less likely to file suit than those with any other type of legally remediable grievance. One study, for instance, found that only 29.1% of those with legally cognizable discrimination claims filed suit, compared to 79.9% of those with property claims, the type of claim with the next-lowest figure on this metric.[196] Accordingly, in a private civil rights–enforcement regime, countless violations are legally unpunished because economic and social factors disproportionately render victims less likely to seek legal vindication.

Even when victims of civil rights violations do pursue legal redress, they inevitably run headlong into the qualified immunity doctrine, under which "government officials . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[197] As the case law has developed, the doctrine essentially requires civil rights plaintiffs to find a precedent "with nearly identical facts and circumstances in order to prove their rights were 'clearly established'"[198] and thereby effectively protects "all but the plainly incompetent or those who knowingly violate the law."[199] Although the doctrine has received significant criticism,[200] it is in many ways stronger than

194. *See* Bumiller, *supra* note 189, at 438.
195. *See id*. at 433–38.
196. Miller & Sarat, *supra* note 189, at 537 tbl.2.
197. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
198. Rafferty, *supra* note 28, at 107.
199. Malley v. Briggs, 475 U.S. 335, 341 (1986). For recent, broad discussions of the contours of the Supreme Court's qualified immunity jurisprudence, see William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 80–84 (2018); Taylor Kordsiemon, *Challenging the Constitutionality of Qualified Immunity*, 25 U. PA. J. CONST. L. 576, 578–92 (2023); Rafferty, *supra* note 28, at 112–16.
200. *See generally* Baude, *supra* note 199 (arguing that the doctrine is legally unjustified); Nathan S. Chapman, *Fair Notice, the Rule of Law, and Reforming Qualified Immunity*, 75 FLA. L. REV. 1 (2023) (criticizing the fair notice rationale for qualified immunity and proposing reforms); Rafferty, *supra* note 28 (evaluating several potential reforms to qualified immunity); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) (maintaining that qualified immunity has no common law basis, does not achieve its supposed policy aims, and undermines the Constitution).

ever,[201] with the Supreme Court's recent docket strongly signaling that lower courts should err toward finding public officers immune from suit.[202] Thus, the qualified immunity doctrine constitutes a significant barrier to plaintiffs attempting to vindicate their rights through civil legal action.[203]

At bottom, then, on account of prevailing social, economic, and legal conditions, private plaintiffs are particularly poorly positioned to stand as the primary enforcers of federal civil rights.[204] Yet, the burden of federal rights enforcement has been placed upon them. The results of this perverse rights-enforcement regime are that most federal rights violations are likely uncharged;[205] a substantial proportion of those charged are immunized;[206] and government agents, knowing as much, are consequently less cautious about infringing constitutional rights.[207] In practical terms, this regime largely fails in its most basic purpose: enforcing civil rights and ensuring their violation is legally vindicated.

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201. *See* Schwartz, *supra* note 200, at 1798.

202. *See* Baude, *supra* note 199, at 82–84.

203. *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1522 (2016).

204. *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 467–68 (2004) (concluding that the many "practical obstacles to bringing and winning a § 1983 case . . . put[ ] the civil rights plaintiff at a distinct, practical disadvantage").

205. *Cf. supra* notes 146–154 and accompanying text.

206. *See supra* note 202 and accompanying text.

207. *See* Carbado, *supra* note 203, at 1524 ("If police officers know that their violent conduct will be considered justifiable force, or that they will be immune from civil liability or indemnified if they are found civilly liable, they are less likely to exercise care with respect to when and how they employ violent force."). Some scholars have even suggested that the qualified immunity doctrine—and, by extension, the current federal rights–enforcement regime—is at least partially responsible for civil unrest in response to police brutality. *See, e.g.*, Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), https://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html (on file with the *Columbia Journal of Law & Social Problems*) ("[The Supreme Court's qualified immunity decisions] mean that the officer who shot Michael Brown and the City of Ferguson will most likely never be held accountable in court. How many more deaths and how many more riots will it take before the Supreme Court changes course?").

2. *Expressive Costs*

Equally profound are the expressive costs of a civil, rather than criminal, federal rights–enforcement regime.[208] Perhaps the most fundamental distinction between civil and criminal liability is the expression of stigmatic condemnation accompanying the latter.[209] In the rights-enforcement context, for instance, Section 1983 liability may lead to only a damages award or injunctive relief,[210] but Section 242 liability may result in life imprisonment or even a death sentence.[211] That criminal punishment thus functions to communicate social opprobrium in response to certain conduct is known as the expressive theory of punishment,[212] and several corollaries flow from its core principle.

First, because criminal punishment is unique in expressing stigmatic social condemnation, civil punishment communicates something different entirely.[213] This contrast emerges most clearly

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208. The formulation "expressive cost" is derived from Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1 (2012), in which Gilchrist uses the term to refer to "materially harmful expression[s]," *id.* at 1.

209. *See id.* at 42–43. In Henry M. Hart's well-known formulation, "[crime] is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community." Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

210. *See* 42 U.S.C. § 1983 ("Every person who, under color of any [law] of any State or Territory or the District of Columbia, subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution and laws, *shall be liable* to the party injured *in an action at law, suit in equity, or other proper proceeding for redress* . . . ." (emphasis added)); West, *supra* note 187, at 862 ("If a constitutional tort is established [under Section 1983], the court orders the officer to pay money damages—at least if no immunity doctrine precludes relief. If the tort is imminent but not complete, prospective relief may be available in the form of an injunction.").

211. *See* 18 U.S.C. § 242 ("[I]f death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, [the defendant] shall be fined under this title, or *imprisoned for any term of years or for life, or both, or may be sentenced to death*." (emphasis added)).

212. Kenworthey Bilz, *Testing the Expressive Theory of Punishment*, 13 J. EMPIRICAL LEGAL STUD. 358, 358 (2016). For influential treatments of the expressive theory of punishment, see generally Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

Several empirical studies demonstrate the theory's validity. *See* Bilz, *supra*; Jessica Bregant et al., *Crime Because Punishment? The Inferential Psychology of Morality and Punishment*, 2020 U. ILL. L. REV. 1177; Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135 (2007).

213. *See* Feinberg, *supra* note 212, at 400 ("[P]enalties have a miscellaneous character, whereas punishments have an important additional characteristic in common. That

when comparing the punishments most associated with findings of tort and criminal liability: damages and imprisonment, respectively. In tort law—the framework governing Section 1983 litigation[214]—violation of a rule of conduct is conceptualized as a wrong against an individual or closed group of individuals and results in a merely financial penalty. Tort law, then, is a pricing system, in which one must pay to engage in certain types of conduct.[215] In criminal law, on the other hand, violation of a rule of conduct is conceptualized as an offense against the state[216] and thus *society*,[217] and often results in imprisonment, a punishment so severe it is designed to deter conduct entirely.[218] And even when the result is only a financial penalty, a criminal conviction carries a social stigma absent from civil liability that itself serves as a potent deterrent.[219] Rather than a pricing system, then, criminal

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characteristic, or specific difference, I shall argue, is a certain expressive function . . . . Punishment, in short, has a symbolic significance largely missing from other kinds of penalties.").

While punitive damages serve a similar expressive function to criminal punishment, *see*, *e.g.*, Feinberg, *supra* note 212, at 407–08, criminal sanctions express *public* condemnation in a way that punitive damages do not, as punitive damages are awarded to private plaintiffs rather than the public at large, *see Punitive Damages*, BLACK'S LAW DICTIONARY (12th ed. 2024).

214. *See* West, *supra* note 187, at 862 (discussing how "constitutional tort" claims may be "brought under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*").

215. *See* Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982) ("The penalties Congress names for disobedience [of economic regulatory laws] are a measure of how much it wants firms to sacrifice in order to adhere to the rules; . . . managers not only may but also should violate the rules when it is profitable to do so."); Gilchrist, *supra* note 208, at 44–45; Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else."). *But see* John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1576 (2006) ("If tort law were really, as Holmesians support, a regulatory scheme for deterring and compensating, the traditional vocabulary and syntax of tort ought to have developed quite differently than it did.").

216. *See Crime*, OXFORD ENGLISH DICTIONARY (online ed.) (defining "crime" as "[a]n act or omission constituting an offence (usually a grave one) against an individual or the state and punishable by law").

217. *See Crime*, A DICTIONARY OF LAW (9th ed.) (defining "crime" as "an act (or sometimes a failure to act) that is deemed by statute or by the common law to be a public wrong and is therefore punishable by the state in criminal proceedings").

218. *See* John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1876 (1992).

219. *See* Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757, 758 (1993) (finding that "the reputational cost of corporate [criminal] fraud is large and constitutes most of the cost incurred by firms accused or convicted of fraud").

law is a set of dictates that one is simply *not* to engage in certain types of conduct.[220]

Second, because criminal punishment expresses social condemnation of an offender, it "acknowledges that the victim was treated as 'lower' in social standing than she deserved."[221] Accordingly, punishing the "offender should increase the victim's social standing in the community, and failing to punish [sh]ould diminish it."[222] These propositions are indeed borne out by empirical research: Victims of criminal conduct are seen to have higher social standing when offenders are punished than when they are not.[223] Further, combined with the distinction between the expressive content of tort and criminal liability,[224] these propositions suggest that civil punishments do not restore a victim's social standing and, like failing to punish, may even communicate that a victim was not treated *inconsistently* with her social standing.

Third, because criminal law prohibits rather than prices conduct deemed especially egregious, whether certain conduct is criminalized influences societal views about it. Specifically, criminalizing an act attaches the stigma of having violated the law to those who commit it and thus creates a behavioral norm, leading society to view the proscribed conduct as more immoral than if it were not criminalized.[225] Moreover, as empirical evidence demonstrates, criminally punished actions are perceived as more harmful and reprehensible than unpunished, but still illegal, conduct.[226] Thus, although criminalizing conduct expresses that it is condemnable and causes it to be viewed as such, failing to

220. *See* Gilchrist, *supra* note 208, at 45. Empirical research corroborates the view that, in contrast to torts, crimes are not perceived as merely "departures from accepted norms of proper behavior." *See* Bilz, *supra* note 212, at 381–82, 385.

221. Bilz, *supra* note 212, at 358.

222. *Id.* at 359. Or, in Dan Kahan's words, "To express condemnation, then, society must respond with a form of punishment that unequivocally evinces the community's repudiation of the wrongdoer's valuations" of the victim's worth. Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1641 (1998).

223. *See* Bilz, *supra* note 212, at 381–82, 385.

224. *See supra* notes 213–220 and accompanying text.

225. *See* Gilchrist, *supra* note 208, at 49–50. *See generally* Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1 (arguing that substantive criminal law shapes preferences). For examples of laws and enforcement schemes that may have influenced public views of the morality of certain types of conduct, see Gilchrist, *supra* note 208, at 49–50 n.283.

226. *See* Bregant et al., *supra* note 212, at 1203.

criminally punish proscribed conduct communicates, and leads the public to believe, that it is *not* immoral.[227]

Fourth, because criminalizing and punishing an action expresses its immorality, failure to criminally sanction conduct widely viewed as immoral diverts the law from its societally expected course and thereby undermines its perceived legitimacy.[228] And when the public loses trust in the law, it is less likely to obey it.[229] Punishing conduct broadly viewed as condemnable with only civil penalties could engender such repercussions.[230] Conversely, criminally punishing reprehensible conduct can increase the law's perceived legitimacy and thus the public's inclination to follow it.[231]

Finally, in addition to expressing moral condemnation, criminal punishment also communicates a host of other political and social messages.[232] For instance, patterns of criminal punishment, such as disproportionate underpunishment or overpunishment of certain classes of people, may reflect dynamics of social control.[233] Thus, the overpunishment of Black Americans expresses a message of racial subjugation, while underpunishment of

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227. In the federal context, a successful criminal prosecution practically always entails some form of punishment, as the sentence of "unconditional discharge," which allows a defendant to be released "without imprisonment, fine or probation supervision," *e.g.*, N.Y. PENAL LAW § 65.20 (McKinney 2025), does not exist under the Federal Sentencing Guidelines, *see* U.S. SENTENCING GUIDELINES MANUAL (U.S. SENT'G COMM'N 2024).

228. *See* Gilchrist, *supra* note 208, at 50–51.

229. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 64 (2006) ("The most important normative influence on compliance with the law is the person's assessment that following the law accords with his or her sense of right and wrong . . . ."); Gilchrist, *supra* note 208, at 51 ("[T]he more the substance of the law deviates from a person's normative views, the less likely the person is to recognize the law as an authority meriting compliance for its own sake."); Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 663 (2007) ("More than anything else, people react to whether they believe that the courts are dealing with conflicts in a just manner . . . [N]umerous studies . . . have consistently found this to be true.").

230. *See* Gilchrist, *supra* note 208, at 51–52 (maintaining that, because "[c]ivil penalties lack the expression of condemnation inherent in criminal penalties," "[t]he failure to impose criminal liability" when it is broadly viewed as warranted "would expose the criminal justice system to accusations of favoritism and undermine its appearance of equal application of laws").

231. *See* MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 173 (2007) (arguing that law's expressive function can "strengthen faith in rule of law among the general public").

232. *See* Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between the Moral Limits of the Criminal Law and the Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 168 (2001).

233. *See id.*

misconduct by public officials communicates those actors' relative privilege.[234]

Together, these principles lay bare the expressive costs of the current federal rights–enforcement regime. Ostensibly, federal constitutional rights are the most sacred precepts in American government.[235] Yet, that the overwhelming majority of federal rights–vindicating actions are civil tort suits[236] communicates that one may simply pay to violate these fundamental principles—that federal rights violations are not *prohibited* but *priced*.[237] And the Department of Justice's failure to prosecute nearly all federal rights violations[238] expresses that such violations are morally acceptable,[239] that their victims are unimportant or even deserve their treatment,[240] and that government officials largely stand above the law.[241] These messages, implicit in the current federal rights–enforcement regime, often conflict with common morality and thus erode the legitimacy of, and respect for, the law.[242]

Not only, then, is the prevailing federal rights–enforcement apparatus woefully ineffectual;[243] in being so, it acquiesces in the violation of supposedly fundamental precepts and thereby undermines faith in the very rights it is supposed to vindicate.

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234. *See* Gregory M. Gilchrist, *Condemnation Without Basis: An Expressive Failure of Corporate Prosecutions*, 64 HASTINGS L.J. 1121, 1137 (2013).

235. *See* Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring) ("[T]he Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))); Gitlow v. New York, 268 U.S. 652, 666 (1952) (noting that "the due process clause of the Fourteenth Amendment" "protect[s] . . . from impairment by the States . . . fundamental personal rights and 'liberties,'" including those enshrined in the Bill of Rights).

236. *See supra* note 145 and accompanying text.

237. *See supra* notes 213–220 and accompanying text.

238. *See supra* notes 149–153, 213–220 and accompanying text.

239. *See supra* note 226 and accompanying text.

240. *See* Bregant et al., *supra* note 212, at 1203–05 ("When punishment varies in the real world, some crimes or victims of crimes may be perceived as more or less important, especially if the presence and absence of punishment is repeated or systematic."); *supra* notes 221–222 and accompanying text.

241. *See supra* notes 232–234 and accompanying text.

242. *See supra* notes 228–230 and accompanying text.

243. *See supra* text accompanying notes 205–207.

III. REVITALIZING FEDERAL CRIMINAL CIVIL RIGHTS ENFORCEMENT THROUGH SECTION 242 MISDEMEANOR PROSECUTIONS

The failures of federal rights enforcement have received considerable scholarly attention,[244] and commentators have suggested several potential reforms to this area of law.[245] But most of these proposals would entail fundamental changes to federal civil rights law and have not garnered the legislative or administrative approval required to enact them. Even without such rapid systemic change, however, federal prosecutors may be able to gradually shift the current rights-enforcement paradigm with a tool already at their disposal. Part III.A briefly summarizes previously suggested reforms and explains why such proposals need not be effectuated for gradual change to occur. Part III.B argues for the revitalization of the Section 242 misdemeanor prosecution as a means of effecting such change.

A. PREVIOUSLY PROPOSED REFORMS

In proposing reforms to Section 242, most commentators have called for legislative action.[246] For example, several have suggested amending Section 242 either to eliminate its willfulness requirement[247] or to change it to a recklessness standard,[248] with the latter approach even having been adopted by several lower courts.[249] But, although some members of Congress have heeded such calls for reform,[250] for decades they have come to no avail: Section 242's willfulness requirement remains intact.[251] In the absence of legislative action, reformers must seek out other avenues to change.

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244. *See, e.g.*, Armacost, *supra* note 204, at 467–68; Baude, *supra* note 199, at 80–84; Chemerinsky, *supra* note 207.

245. *See, e.g.*, *infra* note 246.

246. *See, e.g.*, James M. Durant III, *An Accountability Cometh: Amend 42 USC Section 1983 and 18 USC Sections 241, 242, Thereby Initiating a Path to Re-Imaging Peace Officers Acting Under the Color of State Law*, 14 DEPAUL J. SOC. JUST. 1, 27–33 (2021); Jacobi, *supra* note 183, at 811–25; Shah, *supra* note 122, at 1622–31.

247. *See, e.g.*, Durant, *supra* note 246, at 27–33; Shah, *supra* note 122, at 1622–31.

248. *See* Shah, *supra* note 122, at 1622–31.

249. *See* Shah, *supra* note 122.

250. *See, e.g.*, George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 101 (2021) (proposing, among other amendments, that "knowingly or recklessly" replace "willfully" in Section 242).

251. *See* 18 U.S.C. § 242.

Fortunately, the exacting specific-intent interpretation of Section 242's willfulness requirement that stymies so many Section 242 prosecutions is neither legislatively nor judicially imposed on federal prosecutors.[252] Rather, the Department of Justice itself subjects potential Section 242 prosecutions to this high standard, as it has interpreted the statute to contain it[253] and requires effectively all prosecutions under Section 242 to receive at least informal approval from the Civil Rights Division.[254] The Department of Justice therefore need not await legislative or judicial action to more zealously pursue Section 242 prosecutions and thereby begin remedying the ills of the current federal rights–enforcement regime. But again, Main Justice closely controls civil rights prosecutions nationally[255] and often hews to the prohibitively exacting specific-intent interpretation of Section 242's willfulness requirement.[256] If the Civil Rights Division's leadership stays this course, systemic change is unlikely. But Section 242's history reveals a potential path to gradual change largely compatible with the current administrative framework surrounding federal civil rights prosecutions: revitalizing the Section 242 misdemeanor prosecution.

B. THE CASE FOR SECTION 242 MISDEMEANOR PROSECUTIONS

Increasing Section 242 misdemeanor enforcement would revitalize the statute by vindicating a large class of federal rights violations that the current rights-enforcement regime leaves unpunished. This section examines the past and present of Section 242 misdemeanor prosecutions, discusses their benefits, and addresses concerns that increased enforcement could raise.

1. *History and Current Practice*

As originally envisioned, Section 242 was solely a misdemeanor offense.[257] In fact, it was not until 1968, at the close of the civil rights movement, that Congress amended the statute to provide for imprisonment for any term of years or for life if death results

252. *See supra* note 122.
253. *See supra* note 122.
254. *See supra* text accompanying note 170.
255. *See supra* notes 165–169 and accompanying text.
256. *See supra* notes 122, 183.
257. *See* Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27.

from a rights violation.[258] Although Congress has amended Section 242 several times to provide for enhanced penalties for rights violations involving specific aggravating circumstances[259]—including bodily injury, use of a dangerous weapon, and kidnapping[260]—the foundation of the statute is a misdemeanor offense: Absent any specified aggravating circumstances that would render the conduct a felony, misdemeanor liability will result from a Section 242 conviction.[261]

Data shows, however, that federal prosecutors now largely ignore this fundamental aspect of Section 242. From 1998 to 2021, of 1,862 federal criminal civil rights defendants, the final offense charged was a misdemeanor for a mere 43 defendants, under three percent of the total.[262] By comparison, in 2021 alone, the

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258. *See* Civil Rights Act of 1968, Pub. L. No. 90-284, § 103(b), 82 Stat. 73, 75 (codified as amended at 18 U.S.C. § 242).

259. *See* Federal Death Penalty Act of 1994, Pub. L. No. 103-322, § 60006(b), 108 Stat. 1959, 1970–71 (codified as amended at 18 U.S.C. § 242); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320103(b), 108 Stat. 1796, 2109 (codified as amended at 18 U.S.C. § 242); Minor and Technical Criminal Law Amendments Act of 1988, Pub. L. No. 100-690, § 7019, 102 Stat. 4395, 4396 (codified as amended at 18 U.S.C. § 242); Civil Rights Act of 1968 § 103(b).

260. *See* 18 U.S.C. § 242.

261. *See id.*

262. *See Federal Criminal Case Processing Statistics Data Tool*, BUREAU OF JUST. STAT., https://fccps.bjs.ojp.gov/home.html?dashboard=FJSP-Prosecution&tab=ProsecutionCourtsOffendersSentencedAdvanced [https://perma.cc/737G-P9DW] (last visited Jan. 9, 2024). These figures are likely liberal estimates of the number of federal criminal civil rights misdemeanors charged in federal court. As used here, "federal criminal civil rights defendant" refers to a defendant against whom the government filed a civil rights charge at the outset of the relevant litigation. Thus, because the government may charge a defendant with a non-civil-rights misdemeanor offense after initially charging a civil rights felony offense, this figure may capture defendants not charged with civil rights misdemeanors.

By contrast, from 1998 to 2021, of 1,778 defendants against whom the final offense charged was a civil rights offense, the final offense charged was a felony for all 1,778 defendants, indicating that *zero* civil rights misdemeanors were final charges in federal criminal cases in the relevant period. *See Federal Criminal Case Processing Statistics Data Tool*, BUREAU OF JUST. STAT., https://fccps.bjs.ojp.gov/home.html?dashboard=FJSP-Prosecution&tab=ProsecutionCourtsOffendersSentencedAdvanced [https://perma.cc/7VEP-HLBY] (last visited Jan. 9, 2024). Because this figure is rather extreme, the more liberal figure of annual Section 242 misdemeanor charges is used here as an upper-bound approximation.

Old data suggest that the true number of Section 242 misdemeanor charges filed annually is somewhere between these two figures. In 1996, the Civil Rights Division filed 79 civil rights cases, 70 of which were sent to a grand jury, indicating that the Division charged only nine nonfelonies that year. But, because only a fraction of the civil rights cases it filed were official misconduct prosecutions, most of those nine nonfelony charges likely were not Section 242 misdemeanor charges. These figures therefore suggest that federal prosecutors charged fewer than *five* Section 242 misdemeanors in 1996. *See* HUM. RTS. WATCH, *supra* note 147, at 126–27 tbl.2.

equivalent figure for drug-related offenses was 768 criminal defendants, nearly 18 times the figure for civil rights offenses in 2021 and the previous 23 years *combined*.[263] And the percentage is substantially lower than the proportion of defendants in all federal criminal cases for whom the terminating offense was a misdemeanor, approximately 12%.[264] Thus, despite the flood of both Section 242–related complaints[265] and civil rights tort suits[266] filed each year, federal prosecutors charge single-digit numbers of Section 242 misdemeanors annually.[267]

As a result, the Department of Justice leaves large classes of federal rights and interests unvindicated through Section 242 prosecutions. Indeed, in almost entirely neglecting Section 242 misdemeanors, federal prosecutors disregard virtually all those rights infringements not involving bodily injury, death, or other elements that render a rights violation a felony under Section 242.[268] Increasing Section 242 misdemeanor enforcement not only would entail the vindication of this broad swath of federal rights but also may yet remedy many of the ills of the prevailing federal rights–enforcement regime.

2. Expressive Benefits of the Section 242 Misdemeanor Prosecution

Despite the relatively minor punishments resulting from misdemeanor convictions—typically a year's imprisonment or less[269]—revitalizing the Section 242 misdemeanor would also

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263. *Compare* HUM. RTS. WATCH, *supra* note 147, at 126–27 tbl.2, *with Federal Criminal Case Processing Statistics Data Tool*, BUREAU OF JUST. STAT., https://fccps.bjs.ojp.gov/home.html?dashboard=FJSP-Prosecution&tab=ProsecutionCourtsDefendantsinCriminalCasesClosedAdvanced [https://perma.cc/8P59-VLP3] (last visited Jan. 9, 2024).

264. *Federal Criminal Case Processing Statistics Data Tool*, BUREAU OF JUST. STAT., https://fccps.bjs.ojp.gov/home.html?dashboard=FJSP-Prosecution&tab=ProsecutionCourtsOffendersSentencedAdvanced [https://perma.cc/92ZG-KPFV] (last visited Jan. 9, 2024).

265. *See supra* note 149 and accompanying text.

266. *See supra* note 143 and accompanying text. Because Sections 1983 and 242 reach virtually the same conduct, a substantial proportion of Section 1983 claims could be charged criminally. *See supra* note 142.

267. *See supra* note 250 and accompanying text.

268. *See* 18 U.S.C. § 242.

269. See *Misdemeanor*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining "misdemeanor" as a crime that is "usu[ally] punishable by fine, penalty, forfeiture, or confinement (usu[ally] for a brief term) in a place other than prison (such as a county jail)"

remedy the expressive costs of the federal government's failure to criminally punish the vast majority of federal rights violations.[270]

On a purely theoretical understanding of the expressive theory of punishment, criminally sanctioning conduct should communicate social condemnation of it, regardless of the gravity of the punishment imposed. This should be so because criminalizing an act prohibits it, expresses its immorality, and stigmatizes those who commit it.[271] Of course, a life sentence communicates a greater *degree* of opprobrium than a heavy fine, but both should express the same *kind* of social condemnation unique to criminal punishment.[272] And indeed, empirical scholars share this view, even finding that the public may prefer relatively light punishments—such as mediations in which offenders are forced to confront their victims—if such sanctions formally acknowledge that the offender treated the victim improperly.[273] On this view, what matters most for expressive purposes is thus not how much punishment is imposed but *that* it is imposed; in other words, how unacceptable courts declare certain conduct to be matters less than the fact of their condemning it.

On balance, then, given the significantly shorter average time to disposition in misdemeanor cases relative to felony cases,[274] Section 242 misdemeanor prosecutions may in fact be more efficient than corresponding felony prosecutions in expressing social condemnation of federal rights violations. And while relatively light punishments may be inappropriate for violent, felonious rights violations, misdemeanor liability would express apt condemnation of nonviolent—but still criminal—rights infringements. Consequently, federal prosecutors' failure to prosecute practically *all* those broad categories of misdemeanor rights violations not typically involving bodily injury, death, or

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and that, "[w]hen punishable by confinement, . . . most commonly entails incarceration for less than a year").

270. *See supra* Part II.B.2.

271. *See supra* note 225 and accompanying text.

272. This variety of social condemnation stands in contrast to the pricing system that is tort law. *See supra* note 215 and accompanying text.

273. *See* Bilz, *supra* note 212, at 387.

274. *See, e.g.*, BRIAN J. OSTROM ET AL., NAT'L CTR. FOR STATE CTS., TIMELY JUSTICE IN CRIMINAL CASES: WHAT THE DATA TELLS US 7 (2020), https://www.ncsc.org/__data/assets/pdf_file/0019/53218/Timely-Justice-in-Criminal-Cases-What-the-Data-Tells-Us.pdf [https://perma.cc/GTF2-LD55] ("Nationally, the average time to disposition is 256 days for felony cases and 193 days for misdemeanor cases, with considerable variation among courts.").

other factors concerning physical harm[275]—such as rights so fundamental[276] and clearly established[277] as the right to vote—constitutes a failure to vindicate a class of federal interests that is not only broad but also able to be relatively quickly avenged.

But reviving the Section 242 misdemeanor not only would allow the Department of Justice to readily vindicate a broad swath of federal interests but also, in doing so, would gradually remedy the expressive failures of the prevailing rights-enforcement regime. Specifically, increasing Section 242 misdemeanor enforcement would express the social value of the victims of nonfelonious federal rights violations;[278] lead the public to view such violations as more immoral and thus to consider the rights violated more sacred;[279] and slowly increase trust in, and thus willingness to obey, the law.[280]

3. Navigating Practical Concerns Regarding Increased Section 242 Misdemeanor Enforcement

Any proposal to increase Section 242 enforcement must contend with the bureaucracy surrounding federal civil rights prosecutions and, more importantly, the doctrinal reasons Main Justice erected that bureaucracy in the first place—namely, courts' doubts about whether criminal civil rights statutes provide constitutional fair notice.[281] Loosening Main Justice's grip on civil rights even slightly, an opponent may argue, could invite adverse appellate rulings and cause Section 242 to slip from federal prosecutors' grasp entirely.[282]

Yet, revitalizing Section 242 misdemeanor prosecutions would not necessarily run afoul of such concerns. Indeed, reviving Section 242 misdemeanor enforcement need not involve opening the floodgates to creative charging theories such as those that led to the adverse appellate rulings in *Lanier* and *Baroni*.[283] Increased enforcement could, in fact, simply entail greater federal

275. *See* 18 U.S.C. § 242.
276. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[T]he political franchise of voting . . . is regarded as a fundamental political right, because preservative of all rights.").
277. *See supra* text accompanying notes 286–287.
278. *See supra* text accompanying notes 221–224.
279. *See supra* text accompanying notes 225–226.
280. *See supra* text accompanying 228–229.
281. *See supra* Part II.A.2.
282. *See supra* text accompanying note 180.
283. *See supra* Part I.B.3.

intervention in protecting clearly established rights, whose vindication through criminal prosecution would not raise the fair notice concerns courts often cite in narrowing Section 242.[284]

There are indeed numerous clearly established federal rights whose infringement could be prosecuted without inordinate appellate risk.[285] Voting rights are particularly illustrative, as they have long been vindicated through federal prosecution under Sections 241 and 242. Over a century ago, in *United States v. Stone*, prosecutors indicted election officials in Maryland under both statutes for intentionally preparing ballots for a congressional election such that it would be difficult for Black voters to vote for Republican candidates.[286] In a long line of cases since,[287] infringements on the right to vote have been prosecuted under the federal criminal civil rights statutes. Thus, while the virtual nonprosecution of Section 242 misdemeanors under the current federal rights–enforcement regime[288] means that nonviolent voting rights violations such as that in *Stone* almost always go unpunished, increased Section 242 misdemeanor enforcement would safeguard voting rights' sanctity by vindicating such infringements.

Reviving the Section 242 misdemeanor prosecution thus need not substantially implicate the risks typically associated with criminal civil rights prosecutions, as increased misdemeanor enforcement could target violations of only clearly established rights, such as the right to vote.[289] And to ensure that it reaps the benefits of increased Section 242 misdemeanor enforcement while avoiding its risks, the Department of Justice could amend the

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284. *See supra* notes 110–116, 129–132 and accompanying text.

285. For a jurisdictionally sorted compilation of clearly established rights, in the sense that that term is used in qualified immunity jurisprudence, see Marie Miller et al., *Constitutional GPA*, INST. FOR JUST., https://ij.org/report/constitutional-gpa/ [https://perma.cc/E37H-P5HU] (last visited May 1, 2025).

286. *See* 188 F. 836, 838 (D. Md. 1911).

287. *See* United States v. Mackey, 652 F. Supp. 3d 309, 332–35 (E.D.N.Y. 2023) (collecting cases).

288. *See supra* text accompanying notes 265–267.

289. It is true that the prosecution of President Donald Trump under Section 241 for allegedly infringing voting rights led to the Supreme Court's holding in Trump v. United States that the President has at least "some immunity from criminal prosecution for official acts during his tenure in office." 603 U.S. 593, 606 (2024). But that decision in no way flowed from the government's charging theory: The only question the Court granted certiorari to consider was "[w]hether and if so to what extent . . . a former President enjoy[s] presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office." *Id.* at 605 (internal quotation marks omitted) (quoting Trump v. United States, 144 S. Ct. 1027, 1027 (2024)).

Justice Manual to explicitly exclude prosecutions for violations of clearly established rights from its criminal civil rights notice and preapproval requirements.[290] Such an approach need not entrench federal criminal rights enforcement to a closed subset of rights, either—as civil litigation pushes rights jurisprudence forward, the Department of Justice could adjust its notice and preapproval requirements accordingly.

While shifting federal civil rights enforcement from private plaintiffs to the government by resurrecting the Section 242 misdemeanor therefore need not imperil the statute, it would bear all the practical and legal advantages of a criminal, rather than civil, rights-enforcement regime. None of the economic and social factors that render civil plaintiffs poorly suited to operate the federal rights–enforcement apparatus similarly hinder federal prosecutors. Unlike private civil rights plaintiffs, prosecutors do not directly bear the costs of litigation and are intimately acquainted with the legal system.[291] Further, the qualified immunity doctrine, the bête noire of so many legal scholars,[292] is inapplicable to criminal suits,[293] rendering criminal prosecutors yet more potent avengers of civil rights violations compared to private plaintiffs. Accordingly, by prosecuting a fraction of the thousands of federal civil rights cases private plaintiffs bring every year[294]—or even a fraction of those they do *not* bring every year[295]—as misdemeanors under Section 242, federal prosecutors could begin to ameliorate the ills of the current federal rights–enforcement regime without risking irreparable damage to the federal government's civil rights–enforcement capabilities.

CONCLUSION

From the twin statutes' Reconstruction-era origins to the present, Sections 1983 and 242 have been inextricably connected.

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290. *See* U.S. DEP'T OF JUST., *supra* note 165, §§ 8-3.120, 8-3.140.

291. *See supra* Part II.B.1.

292. *See supra* note 200.

293. *See* O'Shea v. Littleton, 414 U.S. 488, 503 (1974) ("[W]e have never held that the performance of the duties of judicial, legislative, or executive officers, . . . contemplates the immunization of otherwise criminal deprivations of constitutional rights. . . . [T]he judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress . . . .'" (omission in original) (quoting Gravel v. United States, 408 U.S. 606, 627 (1972))).

294. *See supra* text accompanying note 143.

295. *See supra* text accompanying note 196.

In effect, they are two sides of a single law, assigning civil and criminal liability for the same conduct. These two statutes' doctrinal similarities, though, only highlight their practical and expressive differences. Ultimately, these variations make clear that the burden of federal rights enforcement is not fit for private plaintiffs to bear. The systemic obstacles facing private civil rights plaintiffs are too great for an almost solely civil, rather than substantially criminal, rights-enforcement regime to be effective. If the guarantees enshrined in the Constitution are to be properly protected and their sanctity impressed upon the public, the legal apparatus enforcing them must in substantial part be criminal.

Yet, a confluence of doctrinal and bureaucratic factors has effectively rendered civil rights enforcement a backwater of the federal criminal docket. For federal criminal civil rights enforcement to be anything more than a paper tiger,[296] systemic change is necessary. But such change need not come rapidly. By revitalizing the Section 242 misdemeanor prosecution, federal prosecutors could begin to gradually shift the burden of federal rights enforcement from the people and once again make known, as Justice Murphy once envisioned,[297] that the federal government will use its might to protect the rights of the vulnerable.

296. *See* Spurrier, *supra* note 115, at 364.
297. *See supra* text accompanying note 1.