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FORUM

McALESTER AND AFTER: SECTION 242, TITLE 18 OF THE UNITED STATES CODE AND THE PROTECTION OF CIVIL RIGHTS

Robert L. Spurrier, Jr.*

The recent trial and acquittal of nine Oklahoma state penitentiary guards¹ on federal civil rights charges arising out of the May 1974 disturbances at the McAlester, Oklahoma, facility raises the question of the utility of section 242, title 18 of the United States Code² as a vehicle for dealing with official invasions of constitutional rights.³ The grand jury's indictment in the case consisted of five counts, two of which were dismissed by the trial judge before the case went to the jury.⁴ The three remaining counts alleged infliction of cruel and unusual punishments in violation of the laws and Constitution of the United States through the gassing and assaulting of prisoners, resulting in the death of one inmate, all in violation of section 242. The jury's verdict of "not guilty" in the case effectively ended the federal criminal law aspect of the particular prosecution; however, it opens the broader question of whether section 242 has generally proved to be a useful tool in dealing with state officers' inflictions of constitutional deprivations. Particularly in a time in which the efficacy of the law, and the willingness of those who enforce it, to protect the constitutional rights of individuals is being

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1. At the time of the trial only four of the nine remained on the staff of the McAlester prison, but for purposes of brevity the defendants will be considered together.

2. 18 U.S.C. § 242 (1970).

3. *United States v. Cacy*, Cr. No. 75-19 (E.D. Okla. 1975).

4. A conspiracy count under 18 U.S.C. § 241 (1970) and a perjury count under 18 U.S.C. § 1623 (1970) were dismissed by the trial judge.

called into question as part of what has come to be called a "crisis of confidence" in American political institutions and officials, this question is one of significant proportions.

I. THE STATUTE AND ITS CONSTRUCTION

A product of Reconstruction, the ancestor of the present section 242⁵ emerged from the Radical Republican dominated Congress.⁶ Unwilling to rely on local authorities (who all too often were personally involved in racially motivated acts of terror) to enforce state law for the protection of federal rights, Congress provided for separate federal enforcement as a device to cure the harassment and terror being employed against the newly freed blacks in the South.⁷

Although the original statutory language may have seemed sufficiently broad to support vigorous federal enforcement on a grand scale, actual practice did not live up to the expectations of the Act's drafters.

5. 18 U.S.C. § 242 (1970) provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

6. Act of April 9, 1866, ch. 31, § 2, 14 Stat. 27 provided:

And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

The Act of May 31, 1870, ch. 64, § 16, 16 Stat. 144, added the provision concerning aliens, changed the provision regarding "ordinary" parties from "white persons" to "citizens," and omitted the word "willfully."

The Revised Statutes of 1874-1878 made the important alteration in language to include rights, privileges, or immunities protected by the Constitution and laws of the United States.

The Criminal Code of 1909, ch. 3, § 20, 35 Stat. 1092, reinserted the word "willfully" and added the word "District."

The most recent amendment came about by the Act of April 11, 1968, Pub. L. 90-284, tit. I, § 103(b), 82 Stat. 75, which added the provision for longer periods of imprisonment for deprivations resulting in death.

7. Note the broadening effect of the later changes in statutory language outlined in note 6 *supra*.

Not until 1883 did the Supreme Court have occasion to treat the criminal provision of the statute, and even then the Court's remarks were merely *dictum*. In the course of his opinion emasculating the portions of Reconstruction civil rights legislation dealing with purely private actions in the *Civil Rights Cases*⁸ Justice Bradley indicated the Court's approval of the criminal penalties provided for by Congress in the event *state action* were involved. Following this *dictum*, the statute remained dormant for all practical purposes at the Supreme Court level for the next sixty years.⁹ Thus for a total of seventy-five years the predecessors of section 242 remained on the statute books without benefit of authoritative construction by the nation's highest tribunal. Even as late as 1944, three members of the Court were accurate in stating that "for all practical purposes it has remained a dead letter all these years."¹⁰

When the Roosevelt Court finally received the first cases calling for interpretation of the forerunner of section 242 it faced three important questions: first, what constitutes action "under color of" state law; second, what meaning is carried by the word "willfully" in the first sentence of the section; and third, what rights are "secured or protected by" the Constitution? The answers provided by the Court would largely decide the fate of section 242 as a viable tool for the protection of federal constitutional rights against infringement by state officials.

*United States v. Classic*¹¹ was the vehicle for the Court's first construction of the section. The case came on direct appeal by the United States from a federal district court order sustaining a demurrer to an indictment against Louisiana election commissioners who were alleged to have altered some ninety-seven ballots in a primary election for Congress. The trial judge ruled section 242 inapplicable¹² to the facts

8. 109 U.S. 3 (1883).

9. The only mention of the section came in passing references in *Bowman v. Chicago & Northwestern Ry.*, 115 U.S. 611 (1885), a private civil suit; *Hodges v. United States*, 203 U.S. 1 (1906), a criminal conspiracy action against a private party defendant; and *O'Sullivan v. Felix*, 233 U.S. 318 (1914), another private civil proceeding.

10. *Screws v. United States*, 325 U.S. 91, 139 (1945) (Roberts, Frankfurter, & Jackson, JJ., dissenting). Prior to the creation of the Civil Rights Section in the Department of Justice there were only four reported cases involving prosecutions under section 242. See Caldwell & Brodie, *Enforcement of the Criminal Civil Rights Statute*, 18 *U.S.C. Section 242, in Prison Brutality Cases*, 52 *Geo. L.J.* 706, 707 (1964) [hereinafter cited as Caldwell & Brodie].

11. 313 U.S. 299 (1941).

12. Actually the statute was then section 20 of the Criminal Code, but for the purpose of continuity in the text the section will be denoted as section 242 unless otherwise noted.

and unconstitutional if applicable. Under the terms of the direct review statute the Court limited itself to consideration of the district court rulings on construction and validity of the statute. Writing for the four-man majority, Justice Stone dealt with two of the issues sketched above in a fashion which promised a broad federal power to protect individual rights. He concluded that the right to vote, and the corollary right to have one's vote counted, was one of those "secured or protected" by the Constitution under the provisions of article I, sections 2 and 4. The fact that this case involved a primary election was of no consequence to the constitutional protection afforded as seen by Justice Stone. Thus, those whose ballots allegedly had been altered and miscounted had been deprived of a federally secured right—and one test of section 242 had been met.¹³

Having found the deprivation of a federally secured right, the majority turned to the meaning of "under color of" law. Two plausible interpretations of the phrase were available, one which would confer broad enforcement power on the national government and another which would give the Act relatively narrow scope. Stone opted for the broad interpretation. Rejecting the view that "under color of" law meant only those activities affirmatively sanctioned by state law, he wrote: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."¹⁴ Under this construction of the section a federal prosecutor could seek indictments for deprivations of federally secured rights even when the state officer in question had acted *in violation of state law*. So long as the alleged deprivation was in some way related to his official capacity, the "under color of" law test was met. Given the well-known reluctance of states to prosecute their own officers for civil rights violations, it is fair to say that Stone's choice may well have been between federal criminal enforcement and no enforcement at all. The Court's choice left open the very real possibility of an active federal enforcement program designed to protect individuals from constitutional violations at the hands of state officers.

The word "willfully" did not play a major part in the *Classic* decision for the majority—other than as a way to meet the issue of potential vagueness of the statute raised by the dissenters. Justice

13. Although the primary election aspect of the case is not of crucial importance to the development of section 242 this holding presaged *Smith v. Allwright*, 321 U.S. 649 (1944), which struck down the white primary as violative of the Constitution.

14. 313 U.S. at 326.

Douglas (writing for himself and Justices Black and Murphy) argued that the statute was overbroad. Although he confined most of his dissent to section 241, title 18 of the United States Code dealing with private conspiracies, a reference to section 242 in his opinion apparently includes it within his reasoning.¹⁵ While willing to accept the power of Congress to deal with primary elections for federal office, Douglas argued that “[a] crime, no matter how offensive, should not be spelled out from such vague inferences.”¹⁶ Even though Douglas was unsuccessful in this first skirmish over the lack of specificity of the section, he would in three short years be able to parlay his misgivings into a position supported by five members of the Court and by so doing effectively undermine the apparently far-reaching promise of federal enforcement.¹⁷

Douglas’s chance came in *Screws v. United States*,¹⁸ a case involving a deprivation of rights which made *Classic* pale by comparison. The victims in *Classic* lost their votes in a primary election; the victim in *Screws* lost his very life. Screws, the sheriff of Baker County, Georgia, and two law enforcement cohorts were found guilty of depriving one Robert Hall, a young Negro, of his life and opportunity for trial before a state court without due process of law (thus violating his fourteenth amendment rights) by beating him for approximately fifteen to twenty minutes (while he was handcuffed and after he had been knocked to the ground) until he was rendered unconscious. Within the hour Hall died from the injuries he sustained at the hands of those sworn to uphold the law.¹⁹

On two issues the *Screws* majority followed in the broad swath cut by Justice Stone in *Classic*. Once again the Court rejected an attempt to narrow the “under color of” law language to include only those acts affirmately sanctioned by the laws of the state. “It is clear that under ‘color’ of law means under ‘pretense’ of law.”²⁰ And, once again the

15. *Id.* at 332 (Douglas, Black & Murphy, JJ., dissenting).

16. *Id.* at 341.

17. One other issue of construction in *Classic* involved the defense contention that there could be no violation unless differential penalties were inflicted upon the victim because of his race, etc. The Court rejected this view, holding that the section created two separate crimes—deprivation of rights secured or protected on the one hand and infliction of differing penalties on the other. *Id.* at 327 (majority opinion).

18. 325 U.S. 91 (1945).

19. The maximum penalty at the time of the *Screws* case was still one year imprisonment and a fine of \$1,000. The life imprisonment penalty for deprivations resulting in death was not added until 1968.

20. 325 U.S. at 111.

Court was willing to give broad meaning to the phrase "rights secured or protected by the Constitution." Deprivations of life, liberty, or property without due process of law in violation of the fourteenth amendment were held to be within the scope of section 242, and this brought multitudes of sins within the reach of federal criminal prosecution.²¹ It was precisely this expanse which gave Douglas pause. For one who had been troubled by the election violations in *Classic* by the lack of precision in the penal statute, the denial of "due process of law" was far too uncertain to accept as a standard of criminality. After all, even the members of the Court could not agree on its meaning. The "broad and fluid definition of due process" provided no acceptable guide to the action of the state officer. Yet Douglas was also unwilling to strike down the statute which might bring to justice the perpetrators of such shocking official misconduct. Rather, he sought a middle ground made possible by the failure of the trial judge to stress the word "willfully" in his jury instructions. To give the Act the requisite specificity, Douglas interpreted the word "willfully" to mean specific intent to deprive the victim of some federally secured right made definite by judicial interpretation "or other rule of law," and by so doing he attempted to escape the problem of lack of advance warning to one whose actions might contravene section 242. "He who defies a decision interpreting the Constitution knows precisely what he is doing," wrote Justice Douglas for the plurality of the Court.²²

Douglas' views became the majority position only with considerable difficulty. Stone (now Chief Justice) joined his opinion, as did Justices Black and Reed, but it was the vote of Justice Rutledge which converted the plurality into a five-man majority. Although his personal preference was to affirm the convictions outright, Rutledge realized that, given the distribution of the other Justices' preferences, this course would deadlock the Court. Preferring solution to deadlock, and because he found his views closer to those of Douglas than to those of the dissenters, Rutledge cast the deciding vote to reverse and remand. In this less than convincing fashion Douglas' "specific intent" interpretation of section 242 became the prevailing view.

Justice Murphy—the father of the Civil Rights Section (now division) in the Department of Justice, the agency which has resurrected

21. This broad interpretation allowed the use of the cruel and unusual punishments rationale employed in the McAlester prosecution.

22. 325 U.S. at 104-05.

section 242—was appalled by the Douglas approach. Preferring to affirm the convictions outright, he dissented. Three other Justices—Roberts, Frankfurter, and Jackson—filed a single dissent.²³ They again argued for the narrower view of “under color of” law and objected to the unearthing of a statute that had “remained a dead letter all these years.”²⁴

In *Screws* then, section 242 had survived another attack—but at what a price. The section was upheld, but the rationale employed would make prosecutions exceptionally difficult because of the increased burden on the prosecution.²⁵ Not 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. The decision in *Screws*, while it gave the government some measure of success, did not augur well for future enforcement. As C. Herman Pritchett noted:

While the Civil Rights Section considered the *Screws* decision a victory, the legislation construed there can never be a very strong reed for a positive program of federal protection of civil rights, and the Court will never be free from difficulties in interpreting it.²⁶

Before passing to a discussion of the enforcement success, or relative lack thereof, achieved in the last ten years under section 242, there are two additional Supreme Court decisions interpreting the statute which are of importance, although neither restores the section to anything like its pre-*Screws* potency. *Williams v. United States*²⁷ held, 5-4, that securing a confession by force and violence constitutes a violation of section 242. According to Justice Douglas who once again spoke for the Court,

23. The United States Reports do not indicate the author of the opinion.

24. 325 U.S. at 139. For a contrary view see Alfange, “*Under Color of Law*”: *Classic and Screws Revisited*, 47 CORNELL L.Q. 395 (1962).

25. On remand the case was again tried before a jury, and all defendants were acquitted. They subsequently returned to their duties as law enforcement officers. See Shapiro, *Limitations in Prosecuting Civil Rights Violations*, 46 CORNELL L.Q. 532, 535 (1961) [hereinafter cited as Shapiro]. The *Screws* specific intent rule is often blamed for the failure to secure section 242 convictions. Shapiro reports the comments of a jury foreman who indicated that although there was a consensus that the defendant was guilty of manslaughter or second-degree murder and that the state should do something about it in a criminal action, the jury felt bound by the judge’s instructions under the *Screws* rule to acquit the defendant of the misdemeanor charge under section 242.

26. C. PRITCHETT, *THE ROOSEVELT COURT* 152 (1948).

27. 341 U.S. 97 (1951).

[i]t is as plain as a pikestaff that the present confessions would not be allowed in evidence whatever the school of thought concerning the scope and meaning of the Due Process Clause. This is the classic use of force to make a man testify against himself. The result is as plain as if the rack, the wheel, and the thumb screw—the ancient methods of securing evidence by torture . . . —were used to compel the confession.²⁸

Insofar as “willfully” was concerned under such circumstances, according to the majority, “Petitioner and his associates acted willfully and purposefully; their aim was precisely to deny the protection that the Constitution affords.”²⁹

The final Supreme Court decision concerning section 242 which is important for the purposes of this article is *United States v. Price*³⁰ which arose out of the murders of civil rights workers near Philadelphia, Mississippi, in 1964. The issue of importance here was the scope of “under color of” law when the indictment alleged that private parties and a deputy sheriff acted in concert to deprive their victims of federally protected rights. The Court held that section 242 was sufficiently broad to reach private parties as well as state officers in this situation.

Private persons, jointly engaged with state officials in the prohibited action, are acting “under color” of law for purposes of this statute. To act “under color” of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents. . . . Those who took advantage of participation by state officers in accomplishment of the foul purpose alleged must suffer the consequences of that participation. In effect, if the allegations are true, they were participants in official lawlessness, acting in willful concert with state officers and hence under color of law.³¹

The *Price* case also opened the possibility of another route for federal prosecution of state officers who violate the federal rights of their victims, holding that section 241, title 18 of the United States Code is applicable to state officers as well as private parties. The importance of this holding requires a brief comment on *United States v. Williams*,³² in which the Court sustained the reversal of a state officer’s conviction

28. *Id.* at 101 (citations omitted).

29. *Id.* at 102. Justice Black dissented without filing an opinion, and Justices Frankfurter, Jackson, and Minton dissented for the reasons set out in the three-man dissenting opinion in *Screws*.

30. 383 U.S. 787 (1966).

31. *Id.* at 794-95 (footnote omitted).

32. 341 U.S. 70 (1951).

under section 241.³³ Four Justices concluded that section 242 was intended to occupy the field with regard to official action and that section 241 therefore was applicable only to private actions. Justice Black, who cast the fifth vote, concurred in the result on *res judicata* grounds. The four dissenters argued that the two sections were meant to go hand-in-hand and that there was no decision to the contrary by any court prior to the court of appeals holding in the instant case.³⁴

The fact that the *Williams* Court split four to four on the scope of section 241's application did not escape the dissenters when a second opportunity presented itself in *Price*. After reciting the even division of the Court on the issue in its previous attempt to settle the point, Justice Fortas for the Court concluded that "it is incumbent upon us to read section 241 with full credit to its language. Nothing in the prior decisions of this Court or of other courts which have considered the matter stands in the way of that conclusion."³⁵ With these words the Court opened the way (or reopened it) for the use of section 241 against officers of the state who act to deprive individuals of their federal constitutional rights. Of perhaps the greatest importance from the enforcement point of view is that section 241 carried penalties ten times as severe as section 242 (except in the case of the death of a victim). Lest it seem that a vast new avenue has been opened by *Price* because of the absence of "willfully" in section 241, attention is directed to a footnote in the opinion of the Court in which Douglas reaffirms the necessity for specific intent in criminal prosecutions for deprivation of federally secured rights, even under section 241.³⁶

By way of summary, the construction of section 242 by the United States Supreme Court, beginning with the *Classic* case in 1941, has presented a less than satisfactory solution for those favoring a vigorous federal enforcement program. *Classic* and *Screws* rejected the narrow view of "under color of" law in favor of one which reaches even official acts of misconduct which violate state law, and *Screws* adopted the view that section 242's breadth reaches that of "due process of law" under the fourteenth amendment. These points scored for a broad federal enforcement power were countered by the *Screws* inclusion of a specific intent requirement through interpretation of the word

33. 18 U.S.C. § 241 is the conspiracy section of the civil rights statutes. One count under this section in the McAlester prosecution was dismissed by the court.

34. 341 U.S. at 92 (Douglas, Reed, Burton & Clark, JJ., dissenting).

35. 383 U.S. at 806.

36. *Id.* at 806 n.20.

“willfully” in the statute which makes successful prosecution more difficult. The *Williams* and *Price* cases indicate that the Court has not made successful prosecution impossible, but at the same time they allowed the majority to reassert its demand for the specific intent standard, even for prosecutions under section 241.

II. THE LEVEL OF ENFORCEMENT OF SECTION 242: 1965-1974

Having traced the doctrinal development of section 242 at the Supreme Court level, we now turn to enforcement efforts and their results. For the purpose of this analysis, the period selected is the ten years 1965-1974.³⁷ Basic data were provided by the Administrative Office of the United States Courts concerning disposition of cases in the United States district courts, but unfortunately the records maintained do not distinguish between individual sections of title 18 relating to civil rights violations; rather, sections 241-44 are combined into a single “civil rights” category.³⁸ Nevertheless, this information can provide at least a general impression of the zeal of prosecution and the level of success achieved at the trial court level.

It is fair to assume that those defendants with whom we are concerned—state officers—make up less than the whole of the total; thus, the composite figures are likely substantially in excess of the number of state officers indicted and tried during the period in question. If the figures show a substantial prosecution and conviction rate, the findings might be suspect on the grounds that it is not certain how many persons tried and convicted were private individuals not acting in any governmental capacity. On the other hand, however, if the figures reveal a miniscule prosecution and conviction effort, this shortcoming in the data would only tend to suggest that the true level of enforcement is most likely even less impressive.

In the ten-year period, 1965-1974, the federal district courts disposed of cases involving a total of 830 defendants charged under sections 241-44. Of these defendants, no less than 68.4 percent

37. The dates are based on fiscal years. The data collection periods used by the Administrative Office of the United States Courts are fiscal years, and there is no convenient method for translating the data into calendar years.

38. Section 241 involves conspiracy to deprive of rights; section 242, acts under color of law; section 243, racially motivated exclusion from juries; section 244, public accommodations discrimination against persons wearing the uniform of the United States armed forces. 18 U.S.C. §§ 241-44 (1970).

escaped conviction altogether. Of the 568 not convicted, 305 were found not guilty by juries, 30 were acquitted after trial to the court alone, and the remaining 233 secured dismissal of the charges against them. On the conviction side of the ledger, 29 defendants were convicted after trial to the court alone, juries convicted 84, and 149 entered pleas of guilty or nolo contendere for a total of 262 convictions (31.6 percent). These data, by year, are presented in Table I.

TABLE I. DEFENDANTS CHARGED WITH VIOLATIONS OF
18 U.S.C. §§ 241-44 DISPOSED OF IN
UNITED STATES DISTRICT COURTS
FISCAL YEARS 1965-1974

| Year | Total Defendants | Not Convicted | | | | Convicted and Sentenced | | | |
|-------------------|------------------|---------------------|-----------|--------------|------|-------------------------|-----------------------------------|--------------|------|
| | | Total Not Convicted | Dismissed | Acquitted by | | Total Convicted | Plea of Guilty or Nolo Contendere | Convicted by | |
| | | | | Court | Jury | | | Court | Jury |
| Total 10 Years | 830 | 568 | 233 | 30 | 305 | 262 | 149 | 29 | 84 |
| 1965 | 43 | 34 | 15 | 1 | 18 | 9 | 7 | — | 2 |
| 1966 | 29 | 26 | 5 | — | 21 | 3 | — | — | 3 |
| 1967 | 58 | 55 | 43 | 5 | 7 | 3 | 1 | — | 2 |
| 1968 | 47 | 36 | 4 | 3 | 29 | 11 | 3 | — | 8 |
| 1969 | 65 | 46 | 20 | 2 | 24 | 19 | 8 | — | 11 |
| 1970 | 52 | 31 | — | 5 | 26 | 21 | 11 | 1 | 9 |
| 1971 | 139 | 124 | 57 | 3 | 64 | 15 | 6 | — | 9 |
| 1972 | 95 | 74 | 23 | 3 | 48 | 21 | 9 | — | 12 |
| 1973 | 148 | 88 | 44 | 5 | 39 | 60 | 49 | — | 11 |
| 1974 | 154 | 54 | 22 | 3 | 29 | 100 | 55 | 28 | 17 |

Source: Administrative Office of the United States Courts
Washington, D.C.
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The total number of defendants disposed of for the period in question is less than impressive, to say the least, when compared with prosecutions for other federal offenses. The *ten-year* total of civil rights prosecutions disposed of amounts to less than 8 percent of the federal drug law offenders tried in the last *single year* (10,989 in 1974).³⁹ Even the "bumper crop" of civil rights prosecutions in 1974 (a total of

39. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 290 (1974).

154 defendants) measures up poorly on a single year comparison basis. In the same year, there were over seventy-one times as many drug law defendants disposed of (10,989), eighteen times as many firearms violations defendants (2,783), thirteen times as many immigration cases (2,034), and thirteen times as many selective service violations (2,094), and these comparisons are based on total numbers of civil rights defendants (not all of whom were state officers).⁴⁰

Another way to demonstrate the paucity of prosecutions of state officers for deprivation of constitutional rights is to consider documented violations. For example, every time a court grants a motion to suppress evidence on fourth and fourteenth amendment grounds in a state criminal proceeding, a constitutional violation has been authoritatively determined to have occurred. Using Dallin Oaks' data for purposes of comparison, we may conclude that the total number of prosecutions disposed of in the entire ten-year period under section 241-44 is less than three times the number of search and seizure violations demonstrated to the satisfaction of two branches of the circuit court in Chicago in *twelve days* in 1969.⁴¹ Considering that these cases in Chicago involved only a fraction of the caseload of a single court and involved only one type of constitutional deprivation—the results of which led to the filing of criminal charges against the victim—the infinitesimal scope of federal prosecution in relation to violations of the commandments of the Constitution and section 242 is soberingly evident.

What of the penalties imposed by the courts on the relative handful of state officers who have been convicted in the last ten years? Table II presents the distribution of sentences, by year. 34 percent (90 defendants) received some form of prison term, including split sentences, while 135 (51.5 percent) were placed on probation. 14 percent (37 defendants) were sentenced only to pay a fine. These sentences seem less than severe for defendants who, by the requirements of *Screws* and subsequent cases, have been proved to have brought about a constitutional deprivation—and to have specifically intended to accomplish just that result. One of the few reported cases involving section 242 may be used to illustrate what can go wrong in the sentencing process. *Miller v. United States*⁴² involved an almost incredible example of the perverse

40. *Id.*

41. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) [hereinafter cited as Oaks]. Data are developed from his Table 5. *Id.* at 685.

42. 404 F.2d 611 (5th Cir. 1968), *cert. denied*, 394 U.S. 963 (1969).

TABLE II. SENTENCES IMPOSED FOR VIOLATIONS OF
18 U.S.C. §§ 241-44 IN
UNITED STATES DISTRICT COURTS
FISCAL YEARS 1965-1974

| Year | Total Convicted | Imprisonment | | | | Probation | Fine Only |
|----------------|-----------------|------------------|----------------|-------------|-------------------|-----------|-----------|
| | | Total Imprisoned | Split Sentence | 0-12 Months | One Year and over | | |
| Total 10 Years | 262 | 90 | 27 | 17 | 46 | 135 | 37 |
| 1965 | 9 | 1 | — | 1 | — | 6 | 2 |
| 1966 | 3 | 3 | — | — | 3 | — | — |
| 1967 | 3 | 2 | — | — | 2 | 1 | — |
| 1968 | 11 | 8 | — | — | 8 | 3 | — |
| 1969 | 19 | 8 | 3 | — | 5 | 10 | 1 |
| 1970 | 21 | 11 | 4 | 4 | 3 | 7 | 3 |
| 1971 | 15 | 10 | 1 | 6 | 3 | 5 | — |
| 1972 | 21 | 10 | 7 | 1 | 2 | 10 | 1 |
| 1973 | 60 | 12 | 5 | 3 | 4 | 48 | — |
| 1974 | 100 | 25 | 7 | 2 | 16 | 45 | 30 |

Source: Administrative Office of the United States Courts
Washington, D.C.
1975

devices employed by two deputy sheriffs in Louisiana in their attempts to secure a confession to a burglary.⁴³ The deputies, Miller and Vallee, apprehended two suspects, Dyle and Gauthé, and arrested them on suspicion of burglary. Under orders from a superior to take the suspects to the station, the deputies instead drove to a secluded alley and sought confessions. In what must rank as a classic example of judicial understatement, the court of appeals noted that their "methods of interrogation were somewhat bizarre."⁴⁴ Miller opened the door of the squad car, and Vallee turned his police dog loose on the suspect Dyle. Every time Vallee touched part of Dyle's body, the dog bit the suspect at that location. A superior officer arrived on the scene and brought a halt to the performance—but only temporarily. The suspects were transported to the jail where Miller and Vallee found the opportunity to

43. Both the deputies and their victims were white, so this is not a case of "racial justice" in the South.

44. 404 F.2d at 612.

continue their "interrogation." To quote the court of appeals, "Vallee again turned his dog on Dyle. Miller, for his part, lifted Gauthe by his feet, and holding him upside down, pounded his head against the lockup floor."⁴⁵ On the basis of these facts, the defendants were convicted, and the district judge imposed sentence: two years in prison—*suspended*. One may legitimately wonder what it would have taken to have brought on a substantial fine or an actual jail term in this Louisiana federal judicial district.

Before concluding this survey of the enforcement of section 242, a few words are in order from other than a statistical viewpoint. Why is it that the number of federal criminal prosecutions against state officers under the section is so minute in comparison with the number of constitutional violations committed? One reason, no doubt, is that the nature of our federal system is such that the primary responsibility for criminal law enforcement rests with the states rather than the federal government. The primacy of the states in this area of law enforcement is in turn reflected by the number of personnel allocated to the task. While every county (and most municipalities) in the United States has some form of prosecuting agent (not to mention the veritable legions of enforcement personnel to investigate crimes and apprehend suspects), the national government has only a relative handful of officers committed to criminal law enforcement—and civil rights crimes are only one small portion of that effort. Even the most zealous civil rights oriented United States Attorney would soon run up against the insuperable barrier of lack of time to prepare and try the cases if he attempted to proceed against even a fraction of the offenses within his jurisdiction. Without truly massive increases in the number of federal officers, both investigatory and prosecutorial, assigned to civil rights crimes committed by state officers, no federal effort is likely to bring a significant portion of section 242 violators to justice.

Even if a significant reordering of priorities were to occur in this area of criminal law, however, it is by no means certain that the increased effort would, in and of itself, bear fruit of sufficient quality and quantity to justify the added expense. One particularly thorough case study, with broad implications, recites a litany of problems facing Civil Rights Division personnel including the hostility of state officials and some members of Congress, hostile federal grand juries which make the securing of indictments difficult if not impossible in many instances,

45. *Id.*

the resistance of many local police departments to FBI investigations and the corresponding reluctance of the FBI to jeopardize working relationships with these departments by arresting local officers on civil rights complaints, the lack of regional Civil Rights Division offices with forces to carry out investigations (which forces reliance on information provided by federal officers who are local residents and subject to local pressures), the low chances for securing convictions even when indictments are forthcoming, and the meager sentences imposed after the relatively infrequent convictions are obtained.⁴⁶

The perceived chance of securing a conviction has, in the past at least, played a key role in the Civil Rights Division's decision whether to prosecute, together with the credibility of the victim⁴⁷ and the nature of his injuries. This in turn is said to have led to a "go slow" approach by the Division.⁴⁸ Given the ratio of convictions to cases filed in the ten-year period discussed above, it would appear that the success criterion has been downgraded somewhat in the Division's scheme of things—or that its attorneys have been seriously off course in recent estimates of what a court or jury is likely to do in a civil rights prosecution.

The use of a probable success yardstick for instituting criminal proceedings has been criticized, either directly or implicitly by those desiring a more active enforcement program,⁴⁹ largely on the grounds that even an unsuccessful prosecution is likely to have some salutary effects: "Regardless of the outcome of his trial, a defendant is very reluctant to go through the same experience again."⁵⁰ This rationale for attacking the probable success criterion is open to at least four rejoinders. First, while the individual has indeed been tried he also has been acquitted. The critics offer no evidence whatsoever that the individual defendants proceed to follow the civil rights straight and narrow after their trials. Second, while it is true that the fact of a prosecution may have "educative" value that extends beyond the individual defendant, it is likewise true that an acquittal (particularly in what seems to have been an open-and-shut case) may have a contrary

46. Shapiro, *supra* note 25, at 545-46.

47. In the *Miller* case, a witness for the prosecution was a fellow deputy sheriff of the defendants. This factor, no doubt, facilitated the conviction. In the *McAlester* case, the prosecution law enforcement witness did not in fact testify to support the government's case, and this factor may well have lessened the credibility of the prosecution efforts in the eyes of the jury.

48. See Comment, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 *YALE L.J.* 1297 (1965).

49. *Id.*; Shapiro, *supra* note 25; Caldwell & Brodie, *supra* note 10.

50. Caldwell & Brodie, *supra* note 10, at 740.

"instructive" effect. This latter bit of education seems to escape the attention of the critics.⁵¹ Third, there is something repugnant about a policy of subjecting persons to criminal trial when the prosecution is almost certain that acquittal will result. To argue for what amounts to trial by ordeal⁵² for its supposed "educative value" is to espouse a principle that could open a Pandora's box of "instructive trials" for all manner of causes thought noble or worthy by some prosecutor. The spate of so-called political trials in the late sixties and early seventies which ended in acquittal of the defendants, and the attendant vocal criticism of such trials as tactics of repression (whether or not such criticism was justified), gives a taste of what could result from the adoption of an "educative trial by ordeal" test by which the federal prosecutor decides when to institute criminal proceedings. Finally, there still remains the problem of the limited manpower and other resources. Given these limits, it does not seem unwise to adopt a policy of targeting in on those cases in which chances for conviction seem to be the greatest. So long as the Civil Rights Division must pick and choose its cases anyway, it might just as well pick those in which it appears that there is a reasonable chance of victory in return for the time and effort expended.

Whatever position one takes on the issue of when to institute criminal actions against state officers for violation of federal statutes dealing with deprivation of civil rights, the factors surveyed above taken in conjunction with the patterns developed in our analysis of the ten-year period under study lead to one conclusion: The federal criminal law has not been, and does not appear likely suddenly to become, particularly effective in bringing to justice those officers clothed with the authority of the state who violate federal constitutional standards in exercising their authority.

51. The "good" effect here is more a postulate than a demonstrated fact presented by these writers. Of course, so is the potential "bad" effect of the object lesson noted in rebuttal, but until the impact of acquittals on perceptions and behavior of state officials who might otherwise undertake unconstitutional activities is examined in a thorough study it would seem that either "educative effect" is possible. Certainly one cannot rule out the "bad" and accept the "good" effect by mere fiat.

52. At least one writer minces no words about trial by ordeal. See Comment, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297 (1965), where it is argued that

Even an acquittal would serve a deterrent function by exposing a criminal defendant to the ordeal of trial. If this constitutes harassment of a defendant ultimately acquitted, it is not illegal harassment, so long as the Justice Department has cause to believe him guilty. And if the ordeal of trial serves in any way to deter unlawful actions, it is not only legal but desirable.

Id. at 1300.

III. A NOTE ON DETERRENCE

While the paucity of successful prosecutions under section 242 demonstrates its inadequacy as a device for punishing offenders, it may be argued that the chief benefit of the statute lies not in punishment but in deterrence. This study has not attempted systematically to investigate this aspect of the problem, but based on the data above the deterrent effects of section 242 would seem to be limited at best. There can be relatively little in the way of special deterrence⁵³ because there have been so few convictions. The general deterrent⁵⁴ aspects in the short run are likewise less than promising. Compliance induced by the threat of sanction requires that the threat be credible. The ratio of prosecutions to violations in the ten-year period studied suggests that the threat borders on the negligible. The longer range (indirect) effects are more difficult to assess, but once again the prospects are not heartening.⁵⁵ Possibly there are fewer violations of constitutional rights than otherwise would occur because of the long range impact of the statute considered here, but the magnitude of the existing problem of constitutional deprivations at the hands of state officers so overwhelms the demonstrable results from the criminal law that it is obvious that we cannot rest on the criminal sanction alone as our solution.

IV. CONCLUSION

The national government, for all the hopes of the Radical Republicans in Congress immediately following the Civil War, has proved

53. In his 1970 article, Oaks, *supra* note 41, summarized the theoretical developments in deterrence literature. *Special deterrence* is the effect on one who has already experienced the sanction. In the case of section 242, special deterrence would be present only in the cases of those state officers who have been convicted under the section, a relative handful of defendants.

54. *General deterrence*, as summarized by Oaks, *supra* note 41, comes in two varieties—*direct* (short range) and *indirect* (long range). Direct deterrence is that species in which compliance with the norm is induced by threat of sanction. This in turn suggests a conscious weighing of the costs and benefits of violating the constitutional standards which call section 242 into play. When there is insufficient threat for special deterrence, it seems unlikely that the direct deterrent forces will be present.

55. *Indirect* (long range) deterrence is said to come about in three ways. There is the potential "moral or educative influence" of the law which demonstrates that certain actions have been condemned by society. There is the possibility that behavior which began as the result of conscious weighing of costs and benefits will continue as habit long after the weighing comes to an end. Finally, there is the possibility that the statute's existence may serve as an argument for avoiding certain conduct when peers may wish to indulge. It may provide "something tangible," says Oaks, to give fellow officers as a reason. Oaks, *supra* note 41. These aspects of deterrence are of course the most difficult to measure in any precise fashion.

ineffective in mobilizing the criminal justice process against state officers who deprive individuals of their federal constitutional rights. The McAlester prosecution, rather than being an exception, seems to be in line with the overall pattern of section 242 success in the last ten years. The United States Supreme Court in a series of decisions has contributed to the pattern by imposing the specific intent standard to avoid the problem of unconstitutional vagueness in the statute so that even the broad interpretation of "under color of" law has not sufficed to make the statute a viable tool for protecting constitutional liberties. In the period 1965-1974 analysis of the information compiled by the Administrative Office of the United States Courts indicates relatively few prosecutions under section 242 and even fewer successful ones. The section simply is not demonstrating a capacity for punishing state officers who violate its commands. In terms of deterrence, it seems unlikely that there is sufficient credible threat of sanction to deter official misconduct on any significant scale. From the point of view of the student of the American legal system, the sad conclusion is that section 242 has proved to be no more than the shadow of a paper tiger.