A TRAGEDY AND A CRIME?: AMADOU DIALLO, SPECIFIC INTENT, AND THE FEDERAL PROSECUTION OF CIVIL RIGHTS VIOLATIONS

*Michael J. Pastor**

INTRODUCTION

The police shooting of Amadou Diallo presented a difficult problem for federal prosecutors. Under federal law, a U.S. attorney can bring a prosecution against a state official for civil rights violations if that official has acted with the specific intent to deprive a citizen of a right protected by the Constitution.[1] In the case of the Diallo officers, a federal prosecution would be based upon the premise that the officers willfully deprived Diallo of his constitutional right to be free from excessive force.[2] There are serious difficulties to overcome if a prosecutor is going to bring a case accusing an officer of using excessive and deadly force during a street encounter or arrest. Although

* Law Clerk to the Honorable Alexander Williams, Jr., United States District Court, District of Maryland; J.D., 2002, New York University School of Law; B.A., 1998, Yale University. My gratitude goes to Anthony Maul and the editorial staff of the *New York University Journal of Legislation and Public Policy* for their customarily excellent editorial work. For guidance in the preparation of this Note, I wish to thank Professor Stephen J. Schulhofer, Professor Harry I. Subin, Professor Anthony C. Thompson, Eric Womack, and Robert Abrahams. I would also wish to thank Ricardo Mendez, Professor Kim A. Taylor-Thompson, the Honorable Carlos Moreno, Francisco Leal, my family, and, most of all, Kim-Thu Posnett.

1. *See* 18 U.S.C. § 242 (2000). The pertinent parts of that statute are:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year . . . .

Id. For the seminal case upon which the "specific intent" requirement is based, see *Screws v. United States*, 325 U.S. 91 (1945).

2. The right to be free from excessive police force is derived from the due process clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). *See also* Tennessee v. Garner, 471 U.S. 1 (1984) (holding Fourth Amendment prohibits use of excessive or deadly force by police officer to apprehend felon, absent necessity and probable cause of threat of death or serious physical injury to officer or others).

these difficulties have been overcome in a number of cases—most notably in the prosecution of the officers in the beating of Rodney King—the federal prosecutor for the Southern District of New York chose not to bring a civil rights prosecution against the officers who shot Diallo.[3] The question remains whether the U.S. attorney's rationale for not bringing an indictment was proper in light of case law and other policy considerations.

The first hurdle in federal criminal prosecutions involves concerns over federalism and local sovereignty that have led the federal government to move cautiously into areas that traditionally have been under local control. Since state prosecutors handle most criminal law enforcement, with notable exceptions in the areas of drugs and money laundering, a federal prosecutor normally will not step in unless there is a formidable and pressing federal interest (for example, if the state prosecution was manifestly inadequate).[4] If that federal interest is present, then prosecutors must overcome a difficult *mens rea* requirement in order to prove that the officers possessed the specific intent to deprive Diallo of his right to be free from excessive force.[5] In the Diallo case, the federal interest appeared substantial, especially in light of the publicity over the shooting and the arguably shoddy state prosecution. Nevertheless, the prosecutor decided not to bring a prosecution because she felt as though the government could not overcome the second hurdle: proving beyond a reasonable doubt that the officers acted with the specific intent to use unreasonable force in their encounter with Diallo[6].

The facts of the case present a picture that could, from a prosecutorial standpoint, be viewed more optimistically. The four officers of the Street Crimes Unit of the New York City Police Department (NYPD) approached Diallo late one evening as Diallo stood

---

3. *See* Susan Sachs, *U.S. Decides Not to Prosecute 4 Officers Who Killed Diallo*, N.Y. TIMES, Feb. 1, 2001, at B1.

4. Jane Fritsch, *Hurdles Seen for U.S. Rights Case in Diallo Shooting*, N.Y. TIMES, Mar. 1, 2000, at B1 (stating that Justice Department guidelines "have three requirements: that the case involve 'a substantial federal interest,' that the original trial left that interest 'unvindicated' and that there is strong enough evidence to win a conviction").

5. Matthew V. Hess, Comment, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 186 ("The prosecution must prove the officer intended the precise deprivation proscribed by federal law."). *See also* Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 556–57 (1994) ("The federal prosecutor must prove that the officers intended to use force they *knew* was unreasonable.").

6. *See* Sachs, *supra* note 3.

outside his home in the Soundview section of the Bronx. Believing they had reasonable suspicion to stop-and-frisk Diallo on the basis that he might be a rape suspect, the officers, who were not in uniform, approached and announced themselves as police.[7] The following events proceeded with startling speed. According to the officers, they requested a word with Diallo and asked that he keep his hands where they could see them.[8] Diallo then retreated into his vestibule and reached for an object in his pocket. Believing that Diallo was pulling out a weapon, one officer shouted, "Gun!" and the four officers began to shoot into the vestibule. In the confusion, one officer tripped off the stairs. The others, believing that an officer had been shot, emptied forty-one bullets into the vestibule where the suspect was located.[9] At the end of the brief encounter, Diallo was dead with nineteen bullet wounds.[10] Diallo had not been reaching for a gun, but for his wallet.[11] The officers made a terrible mistake. But was their mistake also a crime under federal civil rights law?[12]

A consideration of the precedent and the facts of the case demonstrates that the federal prosecutor should have convened a grand jury to seek an indictment of the officers under § 242.[13] In *Screws v.*

---

7. *See* Jeffrey Toobin, *The Unasked Question: Why the Diallo Case Missed the Point*, NEW YORKER, Mar. 6, 2000, at 38, 40–41.

8. *Id.* at 42.

9. *Id.* at 38, 43.

10. *Diallo Shot While Down, Jury Is Told*, L.A. TIMES, Feb. 9, 2000, at A13.

11. *See* Toobin, *supra* note 7, at 43.

12. Unless a necessary state prosecution was handled poorly, or did not transpire at all, a federal prosecutor generally will not bring a case against officers accused of civil rights violations. The jury in the state trial for the murder and manslaughter of Diallo, held in Albany, New York, found that the officers had not committed a crime under state law. Although many argue that second-guessing state criminal proceedings is a futile, the prosecution in the state trial appears to have suffered from some grave inadequacies and mistakes. For instance, the lead prosecutor had not tried a major case in nearly a decade. *See* Carl W. Thomas, *Shake the Trees*, VILLAGE VOICE, Mar. 28, 2000, at 43. Furthermore, when the four officers—who were, significantly, the only eyewitnesses to the event—testified with inconsistent stories, the prosecution failed to attack their credibility. *Id.* ("The prosecution's incompetence stretches further with the mishandling of the key defense witnesses."). *But see* Stuart Taylor, Jr., *Should the Feds Prosecute the Cops Who Killed Diallo?*, NAT'L J., Mar. 4, 2000, at 673, 674 (arguing that many in courtroom were impressed by eloquence of the prosecutors). The prosecutors failed to call a witness to rebut testimony regarding police procedure, forcing the jury to accept the defense's theories on that issue. *See* Maria Hinajosa, *Diallo Jurors say Prosecutors Made 'Huge Mistakes'*, CNN.COM, Feb. 29, 2000, *at* http://www.cnn.com/2000/US/02/28/diallo.jurors.

13. This note presumes that *but for* the problems in proving specific intent, the U.S. attorney would have brought charges. Decisions to prosecute are often very complex and it is certainly possible that there were other reasons why the U.S. attorney did not want to indict these officers (for example, other issues of evidence and proof). This paper, for the sake of argument, proceeds under the presumption that the U.S. attor-

United States, the Supreme Court held that, in order to indict a state official on a charge of violation of constitutional rights, the federal prosecutor must prove that the state official acted with the specific intent to violate those rights.[14] This *mens rea* requirement continues to be the controlling legal standard, but courts diverge in its actual application. Some courts interpret *Screws* to stand for the proposition that prosecutors can prove guilt only by showing that an officer knowingly and willfully violated a specific constitutional right. Other courts hold that the prosecutor needs to show only a "reckless disregard of the law" in proving a violation under the statute.[15]

This Note argues that the latter courts have the better argument, in terms of both interpretation and policy. Because numerous courts have held that the intent requirement is satisfied when state officials act with reckless disregard, the U.S. attorney in the Diallo case should have convened a grand jury to decide if the police officers acted with such reckless disregard of Diallo's rights.[16] The facts demonstrate that the officers, in their behavior during the encounter with Diallo, may have acted in reckless disregard of the prohibition against the use of unreasonable and deadly force. Therefore, the U.S. attorney should not have claimed, prior to a grand jury examination, that the officers lacked the specific intent to violate the Fourth Amendment. When officers such as those in the Diallo case act in reckless disregard of a suspect's constitutional rights, prosecutors should act to vindicate those rights.[17]

---

ney's public explanation for her decision not to charge—that there was insufficient evidence to prove specific intent—contains the essence of her rationale.

14. Screws v. United States, 325 U.S. 91, 103 (1945).

15. *See infra* Part I.

16. *See, e.g.*, United States v. Bradley, 196 F.3d 762 (7th Cir. 1999) (holding that defendant's reckless disregard for law constituted willful violation of federal rights sufficient to uphold § 242 conviction). For a discussion of why a *federal* prosecution would be necessary as opposed to a state prosecution, see *infra* Part IV.

17. A separate, although relevant, element that any prosecutor would have to prove in a § 242 prosecution is the actual violation of an identifiable constitutional right. *See* United States v. Lanier, 520 U.S. 259 (1997) (holding that defendant accused of sexually assaulting women while serving as state judge had adequate notice that alleged conduct violated women's constitutional rights, even where no prior decision explicitly identified violation of constitutional rights under similar circumstances). After the Supreme Court's ruling in *Graham v. Connor*, the force used by police officers in the course of a street encounter is to be judged under the Fourth Amendment's "objective reasonableness" standard, although the court is free to consider numerous factors such as the severity of the crime and the potential for harm to other civilians. 490 U.S. 386 (1989). The Supreme Court has also held that the use of *deadly* force during an encounter or arrest must be judged for reasonableness. *See* Tennessee v. Garner, 471 U.S. 1 (1985).

Part I of this Note discusses the decision in the historic *Screws* case, where the plurality avoided overturning the statute as unconstitutionally vague by reading the "specific intent" requirement into § 242.[18] This Part then reviews the ways in which the courts of appeal have differed in their reading of the Supreme Court's intent requirement. It analyzes the ways in which some courts have held steadfast to the narrow version of *Screws*, while other courts have tried to expand its reach through the use of the reckless disregard standard. Part II argues that if prosecutors use the narrow reading of the specific intent requirement, they risk the de facto overturning of the statute. Instead, prosecutors should enforce the statute under a reckless disregard standard. This Part posits that if an officer acts in reckless disregard of a suspect's constitutional rights, he or she cannot claim later to have lacked notice that such behavior was criminal. Part III analyzes the Diallo case in juxtaposition with a discussion of the prosecution of the officers in the Rodney King case, another high-profile § 242 case. While these two cases present significant differences, this Note demonstrates that, by comparing the two, one can make a more forceful argument for the use of the reckless disregard standard. This Part also argues that the U.S. attorney erred in claiming that there was not enough evidence to prove that the Diallo officers had the requisite intent to sustain a § 242 violation. Part IV provides justifications for the use of this statute and for the reckless disregard standard as a tool to combat police misconduct. Finally, this Note argues that, even if the number of prosecutions is insubstantial, there are potent justifications for federal involvement.

In light of these holdings, the officers most likely violated Diallo's right to be free from unreasonable and deadly force. While *Graham* held that the risk to the officers should be considered in the reasonableness of the force used, the Supreme Court could not have meant to give officers carte blanche during the course of an arrest. If that were the case, the reasonableness standard would have no meaning because a mistaken belief about whether the suspect was armed would end the constitutional inquiry. In fact, the U.S. attorney tacitly agreed that the force might have been unreasonable in that she decided not to prosecute based upon the *intent* requirement and not upon the reasonableness of the force. *See* Sachs, *supra* note 3.

18. *Screws*, 325 U.S. at 103 (Douglas, J., plurality opinion) ("We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.").

I.
THE SPECIFIC INTENT REQUIREMENT OF *SCREWS* AND DIVERGENT APPLICATIONS OF THE REQUIREMENT IN § 242 CASES

A. The Specific Intent Requirement of Screws

The Supreme Court added the specific intent requirement of § 242 in an effort to narrow the scope of the law. In fact, four justices of the Supreme Court considered the constitutionality of the statute and voted that, if there were no specific intent requirement, the statute would have to be overturned for vagueness.[19] They maintained that if prosecutors proved the specific intent to violate a constitutional right, the accused could not claim lack of notice as to the violation in which he or she was participating.[20] Alternatively, it would seem that if prosecutors read the intent requirement narrowly, they would have a great deal of difficulty proving their case. After all, a U.S. attorney might find it difficult to prove beyond a reasonable doubt that officials such as the officers in the Diallo case acted willfully and knowingly to specifically deprive an individual of his right to be free from excessive and deadly force.

Presumably realizing the difficulty of proving the specific intent element, the Court opened the possibility of a broader reading of the statute. First, the Court held that the officials did not necessarily have to be "thinking in constitutional terms" when they acted.[21] Although

19. *See id*. The plurality looked to the eighty years of Congress renewing the statute and argued that "[o]nly if no construction can save the Act from this claim of unconstitutionality" would they overrule it. *Id.* at 100. For a thorough discussion of the *Screws* case and the specific intent requirement it set out, see Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113 (1993).

20. *Screws*, 325 U.S. at 104 ("One who does act with such specific intent is aware that what he does is precisely that which the statute forbids."). *See also* John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 808. It should be noted that there were two sides of the Court who did not agree with that compromise. Justice Rutledge found no vagueness problem: "Generally state officials know something of the individual's basic legal rights . . . . Ignorance of the law is no excuse for men in general. It is less an excuse for men whose special duty it is to apply it . . . ." *Screws*, 325 U.S. at 129 (Rutledge, J., concurring). The dissent, while also finding vagueness insurmountable, vehemently objected to the statute on the grounds that it was an extreme overextension of federal jurisdiction regarding an issue normally reserved to the states and municipalities. *Id.* at 142. While the plurality sought to assuage the fears of both sides, the arguments of the concurrence and the dissent continue to hold a powerful place in the debate over civil rights prosecutions. *See generally* Edward F. Malone, Comment, *Legacy of the Reconstruction: The Vagueness of the Criminal Civil Rights Statutes*, 38 UCLA L. REV. 163 (1990).

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

this would make prosecutions somewhat more manageable, the essence of the problem would remain unchanged. A prosecutor would continue to face the difficulty of proving the specific intent to commit such an act, even if the official was not thinking in constitutional terms.

Next, the Court expanded the notion of the specific intent requirement: a violation may occur if the official "acts in reckless disregard of [the statute's] prohibition of the deprivation of a defined constitutional or other federal right."[22] In attempting to prosecute cases involving violations of civil rights, federal prosecutors often have been forced into this sphere of the intent requirement. The case law demonstrates that judges accept this rationale as a feasible way to sustain the viability of civil rights prosecutions. Although many judges may dress up their decisions in the narrower specific intent requirement, circuit judges seem to be using the reckless disregard standard, whether it is by using inferred intent or broadly-worded jury instructions.[23]

The *Screws* specific intent standard was hardly a model of clarity.[24] Regardless of the standard's vagueness, this is the law that is applied in § 242 cases.[25] As would be expected from a case that was meant to be a compromise, courts have read the *Screws* test in three different ways: first, some courts steadfastly have held to the narrow specific intent requirement which demands that the government prove beyond a reasonable doubt that the officer *knew* of his illegal acts and willfully violated the constitutional rights of the citizen.[26] These courts read *Screws* as a strict limitation on the reach of § 242.[27] A second grouping of courts have read *Screws* even more strictly, holding that the specific intent requirement of a § 242 violation requires that the officers acted with an evil motive or bad purpose.[28] The last subset[29] of courts uses a broader "reckless disregard" interpretation of

22. *Id.* at 104.

23. *See* United States v. Bradley, 196 F.3d 762, 769–70 (7th Cir. 1999) (approving use of jury instruction that could be read as allowing for reckless disregard standard).

24. *See* Jacobi, *supra* note 20, at 808–09 ("The exact meaning of the specific intent requirement has never been entirely clear . . . .").

25. *See, e.g.*, United States v. Dise, 763 F.2d 586 (3d Cir. 1985); United States v. McQueeney, 674 F.2d 109 (1st Cir. 1982); *see also* Jacobi, *supra* note 20, at 810.

26. *See, e.g.*, United States v. Hayes, 589 F.2d 811 (5th Cir. 1979), United States v. Bradfield, No. 98-2407, 2000 U.S. App. LEXIS 17556, at *30 (6th Cir. 2000).

27. *See infra* Part I.B.

28. *See infra* Part I.C.

29. Here, the term "subset" should be seen as a tool used for the sake of argument. As opposed to other times when a "circuit split" is patently obvious, all of the courts that have decided the § 242 cases presumably would be using the same standard,

the *mens rea* requirement, allowing § 242 to have a longer reach.[30] Within this final subset, two subcategories appear. First, some of the courts explicitly refer to the reckless disregard standard in validating the jury instructions used at the district court level. The second subcategory uses the language of strict specific intent, but it seems to be allowing room for jurors to find guilt on the basis of a reckless disregard standard.

B. Specific Intent as Requiring Knowledge and Willfulness to Violate a Right

As Professor John Jacobi points out, the decision on remand in the *Screws* case itself is a powerful example of a court using the narrow interpretation of the *mens rea* requirement.[31] Called by Justice Douglas' plurality opinion "a shocking and revolting episode in law enforcement," *Screws* was an indictment of three police officers who beat Robert Hall to the brink of death while he lay handcuffed outside the courthouse.[32] He died within an hour of the beating without ever regaining consciousness.[33] At the original trial, the federal jury had found Screws, the county sheriff, guilty of violating § 242. The judge instructed the jury to find guilt if "without it being necessary to make the arrest effectual or necessary to their own personal protection, [the sheriff and his deputies] beat this man, assaulted him or killed him while he was under arrest."[34] On remand from the Supreme Court ruling on the intent requirement, Screws was acquitted under § 242.[35] The lower court jury on remand may have found that Screws had the requisite intent to murder, beat, and maim Hall—a fact that, perhaps, would have led to his conviction for violations of state criminal law. State proceedings were never brought, however, because the only local police officers capable of investigating the crimes were the perpetrators.[36] The jury on remand determined that, notwithstanding the

---

however much the results may differ. However, it seems fair to argue that the rationales behind different court's decisions are so disparate that they can be distinguished for the purpose of analysis.

30. *See infra* Part I.D.

31. *See* Jacobi, *supra* note 20, at 809.

32. *See* Screws v. United States, 325 U.S. 91, 92–93 (1945) ("They claimed Hall had reached for a gun . . . . But after Hall, still handcuffed, had been knocked to the ground they continued to beat him from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the court-house yard into the jail and thrown upon the floor dying.").

33. *See id.* at 93.

34. Jacobi, *supra* note 20, at 809.

35. *Id*.

36. *See* Lawrence, *supra* note 19, at 2173–74.

intent to murder Hall, Screws did not have the requisite specific intent to deprive Hall of his federal due process rights.

The reversal of Sheriff Screws' conviction on remand indicates why judges would demand that federal prosecutors reach a high threshold in proving the intent element of a § 242 charge. However inequitable the acquittal may appear, it is a permissible application of the *Screws* standard. To address powerful concerns about the vagueness of § 242, as well as its implications for federalism, the *Screws* decision lays out a strict *mens rea* standard.[37] Despite this difficult intent requirement, parties can successfully bring § 242 cases involving sufficiently egregious conduct.[38] *United States v. Cobb* exemplifies a case in which an appellate court affirmed a § 242 conviction despite the use of a narrow *mens rea* requirement, although Cobb was actually acquitted on separate grounds.[39] In *Cobb*, three officers arrested suspect Kenneth Pack for public intoxication. While the suspect was in booking, he exchanged insults with Officer Cobb. One officer hit Pack in the back of the head, knocking him to the floor. All the officers "proceeded to beat Pack for almost two hours, insulting and ridiculing him the entire time."[40] The court of appeals determined that the jury instruction was sufficient to ensure that a finding of guilt would not be premised upon mere negligence.[41] The court maintained, "[t]he instruction could not have been more emphatic that conviction was contingent upon a finding that [the defendants] *wilfully* [sic], *knowingly, and intentionally assaulted Pack in contravention of his constitutional rights*."[42] Regardless of which of the two factual accounts one accepts, this case clearly involved an egregious amount of force. In the midst of these emotionally provocative facts, the court nevertheless discerned that the instruction demanded an appropriately strict showing of intent and that the jury found the officers guilty under that strict requirement.

---

37. *See supra* note 19 and accompanying text.

38. *See, e.g.*, United States v. Cobb, 905 F.2d 784 (4th Cir. 1990).

39. *See id*. at 785. For an example of a case remanded by the appellate court because the jury instruction did not contain the narrow intent standard, see *United States v. Kerley*, 643 F.2d 299, 303 (5th Cir. 1981).

40. *Cobb*, 905 F.2d at 785. The officers contradicted that story, claiming that Pack had initiated the confrontation and that the force was necessary under the circumstances. *Id.* at 785–86 n.1. By either account, Pack was left with a "hematoma on the left frontal skull, swelling of the area surrounding the left eye, and a lip so severely lacerated that it required reconstructive surgery." *Id*. at 786.

41. *Id*. at 789.

42. *Id.* (emphasis added). See *infra* Part I.D for a discussion of how this case might also represent an appellate court approving an implied "reckless disregard" standard.

The *Cobb* and *Screws* cases demonstrate the limited reach of § 242 when *Screws* is read narrowly. On the one hand, the strict standard might prove fatal to indictment even in situations where the use of the statute seems justified. On the other hand, the specific intent requirement, when read narrowly, does not prevent convictions altogether.

C. Specific Intent as Requiring Bad Purpose or Evil Motive

To establish guilt, the original *Screws* opinion demands that a § 242 defendant have acted with a bad purpose or evil motive.[43] This requirement, not always present in § 242 jury instructions, has a narrowing effect similar to the specific intent requirement previously discussed. In one case, a lack of bad purpose or evil motive proved dispositive.[44] *United States v. Kerley* involved an officer who struck a restrained suspect in the back of the head with a lead-filled blackjack, even though, according to five other officers on the scene, the suspect offered no resistance.[45] A portion of the trial jury instruction stated that it did not matter "that the defendant may have also been motivated by hatred or revenge or some other emotion."[46] The Fourth Circuit reversed the conviction, arguing that *Screws* demanded a heightened form of willfulness that required the officer to have acted not only knowingly, but also with bad purpose.[47] Obviously, this requirement narrows the scope of the statute, but it does so with less sweeping effect than the narrow standard discussed in the previous section. For example, Screws was acquitted on the charge of willful deprivation of rights, but it seems unlikely that a jury would have entered the same verdict on a charge of bad motive on the facts of that case.

Another case worth noting is *United States v. Shafer*, in which a court again placed emphasis on the *purpose* of the officials.[48] The case involved protests over the Vietnam War on the campus of Kent State University. During the course of the protests, the demonstrators ignored an order to disperse, and the national guardsmen who had been sent to maintain order began to advance with bayonets.[49] A melee ensued with many students heaving rocks and insults at the guards-

43. *See* Screws v. United States, 325 U.S. 91, 101 (1945).
44. *See* United States v. Kerley, 643 F.2d 299, 303 (5th Cir. 1981).
45. *Id*. at 300.
46. *Id*. at 301 n.5.
47. *Id*. at 303 ("The district court's failure to charge the jury that willfully, as used in Section 242, means acting with bad purpose or evil motive was reversible error.").
48. United States v. Shafer, 384 F.Supp. 496 (N.D. Ohio 1974).
49. *Shafer*, 384 F.Supp. at 498.

men. In the chaos, the guardsmen's line broke, and the guardsmen were suddenly surrounded by students. Without an order to fire, twenty-nine guardsmen shot at least fifty-four rounds into the crowd killing four students and wounding nine.[50] The issue presented in federal court was whether the guardsmen had the requisite intent to willfully deprive the students of their constitutional rights.[51] Based upon both intent and federalism concerns, the court held that the officers had not acted with the requisite specific intent.[52]

An important facet of *Shafer* is the way the opinion emphasized that a federal prosecutor needs to show a prior animus of the officer toward the victim in order to prove a § 242 violation.[53] The court concluded that acting out of fear, anger, or frustration did not, in and of itself, amount to the specific intent to violate constitutional rights.[54] This interpretation of specific intent requires the officer to formulate a bad purpose prior to the deprivation of the right. In turn, the court tacitly rejects any use of a reckless disregard standard, keeping the intent requirement narrow. As demonstrated in Part IV, this type of requirement clearly would prevent a federal prosecution against the officers in the Diallo shooting.

---

50. *Id*. at 499.

51. *Id*. at 500 ("Such officials are guilty under § 242 'where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution.'").

52. *Id.* I discuss the federalism issues later in this Note. However, it is worth noting that the rationales behind the *Screws* Court's narrowing of the intent requirement (vagueness and federalism) continue to be the basis for interpreting the statute.

53. *Id*. at 503 ("The defendants in this case, without exception, did not know the identities of the individuals they fired upon. Even considering the students as a group, there is insufficient evidence from which a jury could properly conclude that defendants were possessed of any clear or specific intentions whatever toward the crowd other than fear and a desire to leave the area without injury."). I would argue that, under some current circuit case law, this case, much like *Diallo*, might have come out the other way. In both cases, it could be plausible to claim that fear played strongly in the decision to fire. However, a court should not end its inquiry at this point. If the officers knew that their firing *might* (or might not) entail a risk of constitutional deprivation of the students' constitutional rights and the officers fired nevertheless, then they did act with the requisite reckless disregard for those rights, regardless of their good faith intentions.

54. *Id*. at 502 ("If the defendants fired their weapons out of fear, anger, or frustration, then their actions may be cognizable under the State criminal code. If, and only if they fired with the specific intent to deprive the students of a right secured by the Constitution (e.g. trial by jury), may culpability be found under § 242.").

D. Specific Intent as a Reckless Disregard for Constitutional Rights

If the two previous sections demonstrate a specific intent requirement of extremely narrow proportions—an intent so prohibitive that most prosecutions would not be brought—then they are slightly misleading.[55] While many courts claim to apply the willfulness requirement narrowly, some impliedly approve of a reckless disregard standard.[56] It should be stated at the outset of this section that the reckless disregard standard is no less a part of the *Screws* progeny than is the bad purpose element. If *Screws* was attempting to set up a single, unified standard, then the following cases will demonstrate a schism. Presumably, many contemporary courts would not abide by the narrow version of the intent requirement that allowed the acquittal of Screws. Instead, they would uphold a conviction of Screws because he at least acted in reckless disregard when he participated in Hall's death.

In certain instances, courts *expressly* expand on the intent requirement so that it includes the reckless disregard standard. *United States v. Johnstone* involved an officer who was indicted on various counts of § 242, including one involving the officer hitting a suspect in the back of the head with a flashlight.[57] The jury convicted him after the district court judge instructed it to deal with the alleged constitutional violation according to an objective reasonableness standard.[58] Upholding the conviction, the Third Circuit made reference to the inconsistency of the *Screws* standard, demanding that the accused have acted with specific intent, but not requiring that the actor have thought in constitutional terms.[59] The court concluded that the reckless disregard standard was a way to deal with these inconsistent norms.[60] Therefore, the court held that "to convict a defendant under § 242, the government must show that the defendant had the particular purpose of violating a protected right made definite by rule of law *or*

55. Although this section demonstrates how courts have broadened the scope of § 242 from its limitations under *Kerley*, the specific intent requirement continues to make federal prosecutions very difficult. *See* PAUL CHEVIGNY, EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS 107 (1995).

56. *See, e.g.*, United States v. Messerlian, 832 F.2d 778 (3d Cir. 1987).

57. *See* United States v. Johnstone, 107 F.3d 200, 203 (3d Cir. 1997).

58. *Id.* at 205.

59. *Id*. at 208 ("When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite.") (quoting Screws v. United States, 325 U.S. 91, 105 (1945)).

60. *Id.*

recklessly disregarded the risk that he would violate such a right."[61] In reaching this conclusion, the court clearly rejects the rigidity of cases such as *Cobb*. While this change does not monumentally lower the intent standard, it assuredly has the effect of sweeping with a broader brush in terms of the conduct § 242 covers.[62]

Even if a court refuses explicitly to endorse the reckless disregard standard, in certain cases it would be difficult to justify the holding unless a court was tacitly applying a reckless disregard standard. For example, in *United States v. Langer*, the officer charged under § 242 was accused of pretextually stopping female drivers on the highway for the purpose of propositioning them.[63] The evidence demonstrated that the officer abused his authority on numerous occasions by depriving the women of their right to be free from unreasonable seizures.[64] On appeal the defendant claimed that the right to be free from such seizures had not been made definite enough to be a right protected by the Constitution—that, indeed, the seizure was not a significant constitutional violation.[65] The court summarily rejected this argument, holding that there was a clear Fourth Amendment violation.[66]

The *Langer* court focused its opinion on the fact that it was clearly a violation of the Fourth Amendment to restrain a citizen for the purposes of propositioning her or sexually assaulting her.[67] However, what the court did not say illuminates our discussion of the willfulness requirement. The officer in *Langer* could not have willfully and knowingly violated the Constitution because he understood the Constitution to allow for these types of restraints. In fact, he did not

61. *Id.* at 210 (emphasis added).

62. For another example of an explicit use of the reckless disregard standard, see *United States v. Bradley*, 196 F.3d 762 (7th Cir. 1999). In *Bradley*, two officers approached a driver who they thought had run a stop sign. They were in an unmarked car and the suspect did not pull over when the emergency lights went on. As the unmarked car pulled next to the suspect, one officer pulled out a .357 revolver and shot at the suspect. Another shot was fired before the suspect pulled over, at which point Officer Bradley approached the vehicle screaming. The court held that "[w]illfulness under § 242 essentially requires that the defendant intend to commit the unconstitutional act without necessarily intending to do that act for the specific purpose of depriving another of a constitutional right." *Id*. at 770. *See also* United States v. Dise, 763 F.2d 586, 592 (3d Cir. 1985) ("[A]lthough a defendant may not have expressed an intention to violate the Constitution . . . he may be found *to have willfully violated federal rights if he acted in reckless disregard of the law*.") (emphasis added); United States v. Reese, 2 F.3d 870, 882 (9th Cir. 1993).

63. *See* United States v. Langer, 958 F.2d 522, 522–23 (2d Cir. 1992).

64. *Id*. at 523. On one occasion, the officer kept a woman in his custody for over an hour repeatedly asking that she give him her phone number. *Id*.

65. *Id*. at 524.

66. *Id.*

67. *See id.*

think his behavior was "constitutionally significant."[68] Therefore, the court must have been embracing tacitly a reckless disregard standard. In effect, the court allowed for a conviction, not because the prosecutor had proved that the officer knowingly and willfully violated the Constitution, but instead because the officer had recklessly disregarded the risk that his stops would violate interests protected by the Constitution.

One can also see tacit acceptance of the reckless disregard standard in a case we have previously discussed. As noted earlier, the *Cobb* court premised its decision on the idea that it was holding to a very strict reading of *Screws*.[69] But a close examination of the trial court's jury instruction on willfulness seems to allow for a conviction on a broader finding of intent. The instruction told the jury that they must find that the defendant had the specific intent to (knowingly) deprive Kenneth Pack of his right not to be subjected to unreasonable and excessive force—a standard that resonates with the narrow reading of the *Cobb* appellate court affirmance.[70] However, the following line reads: "If you find that a defendant knew what he was doing and that he intended to do what he was doing, and if you find that he did violate a constitutional right, then you may conclude that the defendant acted with the specific intent . . . ."[71] This instruction seems to allow for a finding on reckless disregard if an actor encounters a known risk of a constitutional violation and ignores that risk. If the jury finds that the actor *knew* that he or she was using excessive force (hypothetically in violation of Georgia state law) and *intended* to do what he or she was doing, it can find a violation regardless of whether he or she has the "specific" intent.

The cases discussed thus far demonstrate that courts vary widely in their interpretation of *Screws*. But a great number of cases involving official misconduct could be tried successfully only under a recklessness standard. For that reason, whether expressly or implicitly, some courts refuse to read *Screws* so narrowly so as to make it difficult to convict in cases where a conviction is warranted. This could be interpreted as a fair reading of *Screws* or as a justifiable expansion driven by the necessity of dealing with a confusing precedent. In either case, it is unlikely that many juries in contemporary district courts would acquit someone like Sheriff Screws in light of this broader standard.

---

68. *Id*.
69. *See supra* notes 39–42 and accompanying text.
70. United States v. Cobb, 905 F.2d 784, 788 (4th Cir. 1990).
71. *Id.*

II.
AN ARGUMENT FOR THE RECKLESS DISREGARD STANDARD AND ANSWERS TO VAGUENESS CONCERNS

A. The Faults in the Strict Specific Intent and the Bad Purpose Requirements

If the Supreme Court wished to overturn § 242 for vagueness, it could do so. Nevertheless, the statute has survived for nearly 130 years. Meanwhile, courts and prosecutors should not read the intent requirement so narrowly that they render the statute meaningless. For the statute to have teeth, prosecutors should openly try cases using the reckless disregard standard. The strict specific intent requirement is overly burdensome because it makes proving an already difficult element in criminal prosecutions—the *mens rea* requirement—even more difficult. State officials rarely will confess explicitly the desire to violate the Constitution. Instead, proof will lie fully in circumstantial evidence, and only the most egregious cases will provide such evidence.

United States v. Messerlian provides a brief example of the distorted nature of the strict standard. In *Messerlian*, a New Jersey trooper put a drunk suspect in his police cruiser, and, while the officer was attending to other business, the suspect kicked out the rear window.[72] The officer returned to the cruiser and struck the suspect in the face and neck three or four times with a flashlight.[73] The suspect later died from the ensuing injuries.[74] Messerlian claimed that his force was reasonable and offered testimony to show that the suspect had been violent in previous arrests.[75] The issue is simple: can anyone justifiably claim that Messerlian returned to the cruiser with the intent—not to beat him over the head and keep him from acting disorderly—but to use excessive and deadly force in violation of the Fourth Amendment? Section 242 prosecutions should not be limited to cases where the prosecutor can prove the specific intent only by showing that the officer beat the suspect for a lengthy time. Even a swift baton blow to the head can inflict a mortal wound, and reckless disregard for the risk that this act will result in a constitutional violation should not be excused.

---

72. *See* United States v. Messerlian, 832 F.2d 778, 782 (3d Cir. 1987).
73. *Id.*
74. *Id.* at 783.
75. *Id*. at 784.

The jury instruction in *Messerlian* included a reckless disregard standard (i.e., requiring knowledge of the risk, intent to do the act, and resulting constitutional deprivation).[76] The appellate court affirmed the jury instruction and upheld Messerlian's conviction.[77] In fact, the reckless disregard standard seems more sensible in that if Messerlian did not knowingly violate the suspect's rights, he at the very least might have known that he would use excessive force. Since it seems as though some courts are embracing the reckless disregard standard, prosecutors should not shy away from cases where they can prove only a reckless disregard on the part of the officers. A strict specific intent requirement might have resulted in the acquittal of Officer Messerlian.

Likewise, courts should abandon the bad faith requirement. While the test for reasonable force, laid out in *Graham v. Connor*,[78] is objective, every use of deadly force will necessarily be a case specific analysis. Since an inquiry for reasonableness will entail analyzing the events from the officers' perspective, without the benefit of 20/20 hindsight, the court will grant leeway for difficult, split-second decisions.[79] Therefore, even before arriving at the *mens rea* analysis, an officer will have a chance to prove good faith at the "reasonableness" stage of the inquiry. An example of this is the history of Officer Kenneth Boss of the NYPD who was involved in the Diallo incident and also in a previous police shooting. Prior to the Diallo shooting, Boss shot a suspect in the vestibule of an apartment in Brooklyn. The suspect was wielding a gun and the police mortally wounded him.[80] The gun was later found to be inoperable.[81] The fact that the gun did not work was irrelevant, and Boss was acquitted on civil charges because his force was found to be reasonable.[82] Therefore, *Graham* acts as a filter for cases where reasonable force is found.

---

76. *Id*. at 789.

77. *Id*. at 798.

78. 490 U.S. 386 (1989).

79. *See id*. at 396–97 ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."). Chief Justice Rehnquist contradicts that statement: "[N]or will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id*. at 397. In either case, it seems fair to assert an officer's good faith mistakes will be taken into account when they use excessive force.

80. Joseph P. Fried, *Diallo Defendant Is Cleared in a '97 Killing*, N.Y. TIMES, Apr. 6, 1999, at B3.

81. *Id.*

82. *Id*.

Furthermore, it is not clear that good faith is a defense to a recklessness charge. Under a recklessness standard, officers can be found guilty if they deprived a suspect of a constitutional right, knew what they were doing, and intended to do what they were doing. The good faith defense is only consistent with a stricter intent requirement. Since that requirement can be seen as overly narrow, prosecutors bring actions against officers who acted recklessly regardless of their good intentions. The bad purpose and the strict specific intent requirements render the statute nearly futile. Additionally, since prosecutions for excessive and deadly force are still needed, the reckless disregard standard should be openly adopted.

B. Why Reckless Disregard? An Example

While some circuit courts have embraced the reckless disregard standard in § 242 cases, the question remains whether this is positive. Those in favor of the stricter standard would most likely argue that officers should be punished only when they *know* with absolute certainty that they will violate a suspect's rights, and they proceed to do so anyway. Those in favor of a broader reckless disregard standard will posit that officers should be punished when they know that they *risk* violating the rights of the victim, disregard those risks, and proceed rashly.

An example of a recent police shooting demonstrates why strong policy reasons support the use of a reckless disregard standard.[83] Cincinnati police were in pursuit of suspect Timothy Thomas, who had a variety of outstanding warrants for traffic offenses and evading arrests.[84] Officer Roach chased Thomas into an alley, at which point Roach claimed he saw the suspect reaching for his waist.[85] The officer thought that the suspect, later found to be unarmed, was reaching for a gun; he mortally shot the suspect once in the chest.[86]

Focusing on the issue of intent, the Thomas scenario provides an example of how police in their encounters with suspects might be held responsible for acting in reckless disregard of a suspect's right to be free from excessive and deadly force. In this incident, as in *Diallo*, the officer would claim that he was acting in self-defense and that, as

83. This example of police shooting is discussed later in the context of justifications for federal prosecutions. *See infra* Part IV.A.

84. *See* Heather Mac Donald, *What* Really *Happened in Cincinnati*, CITY J., Summer 2001, at 28, 30.

85. *See* Laurent Belsie, *The Frustrated View from Race Street*, CHRISTIAN SCIENCE MONITOR, May 9, 2001, at 1, *available at* 2001 WL 3735313.

86. *Id*.

a result, he could not have formed the requisite intent to violate § 242. This argument should not be the end of the matter, however, because the exculpatory claim of self-defense requires objective rather than subjective reasonableness. If a federal judge were to find Roach's actions reasonable under *Graham*, then there would be no constitutional violation, and, in turn, no need to question the intent of the officer.

If, however, the court were to find that Roach violated Thomas's right to be free from excessive force, then the inquiry would turn to the intent of the officer.[87] At that point, the court should apply a reckless disregard standard. That is especially true in situations such as those involving Diallo and Thomas. When police use deadly force, we want to have some assurance that they will not do so despite the risk that their force is unwarranted. If the court applies the stricter intent standard when officers sense that there *might* be a risk, they can still disregard those risks and act without fear of reprisal. However, considering the severity of the constitutional violation in a deadly force case, when officers encounter the risk that they might take life unnecessarily, we should require that they *assure* that their actions are correct. It should be insufficient for Officer Roach to claim that—presuming a U.S. attorney could show that Roach was aware of the risk of the violation—he was not certain that he was violating the Constitution by shooting Thomas. In cases where an officer is forced to make quick decisions as to the amount of force required, the officer will rarely have the knowledge that his or her actions violate the rights of the victim. But an officer might know that he or she recklessly risks violating a suspect's rights and, in those cases, § 242 should be used to prevent excessive use of deadly force.[88]

C. Answers for Vagueness Concerns

The use of the reckless disregard standard has been accused of vagueness.[89] Edward F. Malone points out that the *Screws* decision left us with two unfortunate legacies. First, by requiring specific intent, *Screws* makes warranted prosecutions more difficult to bring.[90] Second, the *Screws* test does not deal adequately with vagueness con-

87. *See supra* note 79 and accompanying text.

88. In no way should this section be read to mean that officers have to wait until fired upon to fire at a suspect. As previously discussed, the *Graham* reasonableness test protects officers in cases where deadly force was required. But one could argue that a fleeing suspect reaching for his waist should not necessitate the use of deadly force. If a judge or jury found such force to be reasonable, intent would not be required as a separate element of § 242, and there would be no constitutional violation.

89. *See, e.g.*, Malone, *supra* note 20, at 192–93.

90. *Id*.

cerns because it might allow for prosecutions of officers who did not know they were acting illegally.[91] Some circuit courts have sought to assure the prosecutions of patently culpable officers by expanding the *mens rea* requirement to include reckless disregard. But the question still remains: should § 242 be overturned because it is inexorably and unconstitutionally vague?[92]

Despite vagueness concerns, two arguments work in favor of the continuing viability of § 242 prosecutions. First, the Supreme Court decided *Screws* in 1947 and, in over fifty years of civil rights prosecutions, not a single court has overturned the statute for vagueness. Additionally, the reckless disregard standard has been adopted by many courts without fear that the officers involved lacked notice as to the criminal nature of their behavior.[93] For example, in the *United States v. Bradley*, the Seventh Circuit seemed to argue that Bradley might not have specifically intended to violate a civil right when he shot at an unarmed motorist. However, the officer clearly acted in the face of a known risk that his action would violate the Constitution. The courts seem to hold that an officer cannot claim to lack notice as to his or her action when he or she acts in reckless disregard of that risk.

Professor Frederick Lawrence puts forth an even more powerful and nuanced argument.[94] Lawrence argues that all federal civil rights crimes committed by state officials (he calls them "official crimes") involve two tiers of liability: a "first-tier" of standard liability for the implicated parallel crime (e.g., the use of excessive force) and a "second-tier" of strict *civil rights* liability stemming from the fact that an official committed the acts.[95] Lawrence draws his argument from Justice Rutledge's concurrence in *Screws* and posits that the vagueness concerns are remedied at the first tier.[96] For example, if an officer acts with recklessness as to the first-tiered crime, then he achieved a satisfactorily criminal level of culpability.[97] At the second (strict liability) tier, state officials are presumably on notice regarding the civil rights of citizens with whom they come into contact.[98] Justice Rutledge articulated the rationale behind such a rule in his *Screws* concur-

91. *Id*.
92. Malone argues that the vagueness infirmities from which § 242 suffers require legislative amendment. *Id*. at 222. This argument is made by others, *see* Jacobi, *supra* note 20, at 848, and is dealt with more fully in Part IV.
93. *See, e.g.*, United States v. Bradley, 196 F.3d 762 (7th Cir. 1999).
94. *See* Lawrence, *supra* note 19, at 2218–19.
95. *Id*.
96. *Id*.
97. *See id.*
98. *Id*.

rence, arguing that officials are responsible for knowing the rights of the citizens and should therefore be held to a higher expectation of notice.[99] Lawrence deals with this harsh level of culpability by arguing that innocent actors at the official level will not be found guilty of the first-tier offense.[100] For example, if officer Bradley was not found guilty of recklessness in shooting from his moving car, then he would not need to worry about the fact that his status as an official makes him guilty of a civil rights crime.

This approach places a demanding burden on police officers to not commit first-tier crimes. Some might argue that officers should not be treated any differently than regular citizens. But police officers, in the service of towns and cities they seek to protect, are given leeway to use a great deal of force. It is in line with the original purpose of § 242 that public officials who act in violation of the Constitution face different consequences than private actors, who face no consequences under the statute. Officers should know the rights of citizens and should not to deprive citizens of those rights. If we allow officers who act recklessly to escape culpability, we create a perverse incentive for officials not to learn the law, and we condone actions that violate the Constitution.[101]

III.
RECKLESS DISREGARD AND AMADOU DIALLO

A. Amadou Diallo and Rodney King: Both Examples of Police Misconduct?

At first glance, it appears as though the violence committed against Rodney King and that committed against Amadou Diallo belong in two completely different discussions.[102] The Rodney King case involved what seemed to be rogue cops who brutally and intentionally beat a helpless victim; the Diallo case seemed to involve good cops who just made a fatal error.[103] But a closer look reveals a picture

99. *See* Screws v. United States, 325 U.S. 91, 129 (1945) (Rutledge, J., concurring).
100. *See* Lawrence, *supra* note 19, at 2220.
101. *See id.* at 2221.
102. The analysis of the Rodney King beating here is taken primarily from a book by Lou Cannon. *See* LOU CANNON, OFFICIAL NEGLIGENCE: HOW RODNEY KING AND THE RIOTS CHANGED LOS ANGELES AND THE LAPD (1997). For another account, see JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE (1993).
103. Although it might go without saying, the acquittal in state court of the officers in the King case led to one of the greatest urban upheavals in modern history. *See* CANNON, *supra* note 102. The disgust at the event went all the way to the top: President George H.W. Bush said that the beating "sickened him." *Id*. at 373.

that is far from clear. Before Rodney King's beating, he had already committed various offenses that would characterize him as a danger to society.[104] He led police on a high-speed chase, barely avoided a crash when he ran a red light, and committed numerous other traffic violations.[105] Despite the subsequent public outcry, Lou Cannon believes that King exacerbated the situation. For example, he taunted the police officers, threw the police off his back when they tried to make the lawful arrest, and charged an officer.[106] In addition, King resisted arrest, ignoring commands to lie on the ground. Lastly, the officers believed that he was "dusted" on PCP, and that he therefore presented a serious threat to them.[107]

While all of these justifications for use of force might have been present during the King beating, none of them were present during the Diallo encounter. It would be more than a stretch to say that Diallo resisted arrest; Diallo could not conceivably have been resisting arrest since he was not under arrest.[108] Also, the officers insisted that Diallo did not keep his hands in sight and that he ran inside the vestibule while searching his pocket. However, under constitutional law, a citizen is free to ignore the police unless legally "stopped" in accordance with the Fourth Amendment, which requires a reasonable suspicion that the suspect might be armed.[109] The most important distinction is the amount of force used. The King beating, while grotesque and frightening, did not involve deadly force. The Diallo shooting involved the most extreme type of force that a peace officer can use, and should therefore be deemed to require an extremely high governmental interest in the use of such force.

---

104. *Id*. at 25.
105. *Id*.
106. *Id*. at 31.
107. *Id.* at 29. Cannon seems to overly credit Koon's story here. Cannon argues that the officers of the LAPD had horror stories about PCP suspects who had super-human strength. *Id.* But rumors that circulate among the rank and file are not normally sufficient to warrant a reasonable inference about a suspect. Additionally, this Note does not seek to espouse the actions of the officers in the King case. It seeks only to highlight potentially indefensible distinctions among those who argue that the King officers, and not the Diallo officers, deserve punishment.
108. *See* Jane Fritsch, *4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, at A1. The officers themselves admit that they wanted only to speak with Diallo and they had only reasonable suspicion to stop him. That claim seems suspect for several reasons. First, the officer admitted that they were in search of a serial rapist and thought that Diallo fit the description. But they could not see Diallo's face clearly. *Id*. And while the officers used words such as "peering" and "slinking" to describe Diallo's behavior, *see id.*, it is hard to imagine a person who would not move back into his or her house if four strangers approached him aggressively in the middle of the night.
109. *See* Terry v. Ohio, 392 U.S. 1 (1968).

The reason for this detour is apparent. The Diallo officers were not tried in federal court because the strict intent requirement presented a difficult hurdle.[110] But under the same requirement, Koon and Powell, the King officers, were tried and convicted for violating King's constitutional rights.[111] However much we might sympathize with the officers in the Diallo shooting—by all accounts, they are far more sympathetic than Koon and Powell—for federal criminal law purposes, the divergence seems less defensible. Criminal law rarely institutionalizes the sympathy we feel for defendants; it is more akin a code which seeks to mete out standards of behavior. If punishing the excessive beating of King is a desirable goal from the perspective of criminal law, can punishing the officers in the Diallo case be any less desirable? The U.S. attorney might have had other reasons for declining to charge the Diallo officers, but the specific intent requirement should not have proved the fatal blow to an indictment.

B. Diallo and Federalism Concerns

Any analysis of the Diallo case surely must start with questions about federalism. The threshold question is: why should the Department of Justice (DOJ) be involved in this case?

First, there is a plethora of evidence that the prosecution in the state trial was not prepared and did a horrendous job.[112] The lead prosecutor had not tried a major case in nine years.[113] The prosecution failed to resist the change of venue motion,[114] assuring that a case that might otherwise have been tried by the local community was tried in Albany. A seemingly critical error, the prosecution failed to counter the defense's expert witness on police testimony.[115] A juror, commenting after the case, questioned the prosecution's failure to present any rebuttal witnesses and called the questioning by the prosecution "weak."[116]

---

110. *See* Fritsch, *supra* note 4.

111. *See* U.S. v. Koon, 833 F. Supp. 769 (C.D. Cal. 1993) (finding that police officers violated § 242 in beating of Rodney King), *aff'd*, 34 F.3d 1416 (9th Cir. 1994).

112. *See, e.g.*, Panel Discussion, *People v. Boss: Forum in Contemplation of the Verdict*, 63 ALB. L. REV. 969, 980–81 (2000) (quoting, in part, former prosecutor for Albany district attorney, after meeting prosecutors one day before cross-examination, as saying, "My first reaction was 'they are not ready.' And one attorney was assigned to do the cross-examination. I know he was not prepared to do it."). For a discussion of the criticisms of the state prosecution, see generally John Caher, *Observers Fault Prosecution for Diallo Shooting Acquittal*, N.Y. L.J., Mar. 1, 2000, at 1.

113. *See* Thomas, *supra* note 12, at 43.

114. *See* Fritsch, *supra* note 4, at B1.

115. *Id*.

116. Hinojosa, *supra* note 12.

Perhaps the most egregious example of poor lawyering was the prosecution's failure to mount a sufficient attack on the officers' testimonies. For example, one commentator noted that the testimony of the four officers came out oddly "orchestrated," with each officer claiming not to remember who fired the first shot.[117] If that was the case, the prosecutor should have found a way to draw out and press inconsistencies between the officers' testimonies. In a case where the four officers were the only eyewitnesses to the event, a forceful attack on their testimonies was all the more crucial. For example, one officer testified that Diallo was standing upright during the firing, while another officer testified that Diallo was in the "combat" position.[118] Such blatant inconsistencies should not survive a proper cross-examination.[119]

Another rationale for federal intervention involves the police union policy called the "48-hour rule."[120] This policy forbids investigators from questioning officers in the immediate aftermath of a serious incident.[121] The rule only encourages the suspicion of police behavior because it allows officers to coordinate their stories. A federal prosecutor, with the superior resources of the DOJ at his or her disposal, might have introduced this policy in order to rebut the officers' testimony. A federal prosecutor could also take advantage of one extremely damaging piece of evidence: the medical examiner testified that several of the bullets that hit Amadou Diallo entered him as he was falling or on the ground.[122] While such evidence might not have swayed a jury in New York state court, a U.S. attorney could use that evidence to begin to establish a case for the reckless disregard of Diallo's rights.

There is a final reason why the U.S. attorney should have prosecuted this case: many people argue that the true villains here are the NYPD system and the Street Crimes Unit and that these cops are just members of a problematic system.[123] As one commentator points out, "Individual cops should not be made scapegoats for systemic

117. *See* Scott Turow, *Presumed Guilty: You Think You Know Why the Diallo Cops Were Acquitted. Think Again*, WASH. POST, Mar. 5, 2000, at B1.

118. *See* Peter Noel, *Blaming the Bronx D.A.*, VILLAGE VOICE, Mar. 7, 2000, at 58.

119. A fair counterargument to this proposition is presented by Duke University Law Professor William Van Alstyne. *See* Fritsch, *supra* note 4. Van Alstyne argues that only gross incompetence—such as a lawyer being drunk in court or not showing up at all—should trigger federal intervention.

120. *See* Thomas, *supra* note 12, at 48.

121. *See id*.

122. *Diallo Shot While Down, Jury is Told*, *supra* note 10.

123. *See, e.g.*, Stuart Taylor, Jr., *Should the Feds Prosecute the Cops Who Killed Diallo?*, NAT'L J., Mar. 4, 2000, at 673.

problems."[124] From a prosecutorial standpoint, that type of commentary seems patently irrelevant. Even though the Street Crimes Unit presents itself as if it were a military squad, employing the slogan "We own the night,"[125] the unit is comprised of individual officers acting with their own discretion. It is clearly a smokescreen to say that the problems are so systemic that particular prosecutions should not be brought. The need to prosecute particular police misconduct is underscored by the fact that the then-mayor would not even concede that racial profiling and harassment are systemic problems in the NYPD.[126] The police force is not an "army" where reckless behavior can simply be excused because the entire force acts in an inexcusable way. A prosecutor must evaluate each case individually, and in this case there was an apparent need for federal intervention.

C. The King and Diallo Examples Compared: Reckless Disregard for Diallo's Rights Under the Fourth Amendment?[127]

The evidence of Diallo's encounter with the police—accepting the officers' uncontested story—could show that they acted in reckless

---

124. *Id*. at 674.

125. *See New York's Police: The Thin Blue Line*, ECONOMIST, May 6, 2000, at 32; TIMOTHY LYNCH, "WE OWN THE NIGHT": AMADOU DIALLO'S DEADLY ENCOUNTER WITH NEW YORK CITY'S STREET CRIMES UNIT 4–5 (CATO Inst., Briefing Paper No. 56, Mar. 31, 2000), *available at* http://www.cato.org/pubs/briefs/bp-056es.html (on file with the *New York University Journal of Legislation and Public Policy*). For a discussion of the problematic effects of treating crime fighting as a "war," see JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW 113–16 (1993).

126. This refers to Mayor Giuliani's response to a draft report by the U.S. Commission on Civil Rights which documented systemic problems in the NYPD. In particular, the report stated that the NYPD employed racial profiling in conducting stop-and-frisks, which, of course, is the type of event implicated in the shooting of Diallo. Giuliani responded to these findings by belittling the panel. The mayor is quoted as saying, "I think they're a joke. I say that most respectfully, if you take what they are saying seriously, they're a big joke." *Giuliani Dismisses Report Critical of New York Police*, CNN.COM, Apr. 27, 2000, *at* http://www.cnn.com/2000/LAW/04/27/NYPD.Civil.Rights/index.html. When the mayor of the city scoffs at the suggestion of a systemic problem, prosecution of individual officers may be the most expedient way to achieve reform.

127. Considering the volatility of this issue, I feel compelled to convey expressly what this Note is *not* about. Two erroneous, yet popular, conceptions of what the Diallo case signifies need to be denounced. The first is that all NYPD officers are gun-toting thugs, consciously seeking to violate the Constitution at every turn. Due to the heroism of the vast majority of police officers (particularly brought to national attention by the Sept. 11, 2001 terrorist attacks on the World Trade Center), such sweeping generalizations seem both baseless and insidious. Demonizing police officers is not only an unfortunate occurrence, but also one that should be fought vigorously. A recent mural in the Bronx exemplifies this demonization. It portrays the officers involved in the Diallo shooting as members of the Ku Klux Klan. *See* Dexter Filkins, *Diallo and Controversy Return to Bronx, as Art*, N.Y. TIMES, Apr. 25, 2001,

disregard of his constitutional rights. The U.S. attorney's finding that the officers lacked the specific intent to violate Diallo's rights seems erroneous in light of the facts of the case and the circuit case law. Before going further, it is only fair to note that the argument for the recklessness standard seems to stand in the minority among commentators.[128] The dominant premise seems to be that mere recklessness does not amount to federal culpability.[129] The case law, however, contradicts that premise. Courts in a majority of circuits hold guilty officers who have acted recklessly, even if it is unclear that they acted with knowledge that their actions violated the subject's constitutional rights.[130]

A second general premise regarding officer culpability is that police who act in good faith or who make a mistake cannot form the requisite intent for conviction.[131] This logic, however, can only apply

---

at B3. This Note seeks only to analyze the shooting from both a legal and a policy standpoint. For that reason, I attempt to analyze the officers' *behavior* rather than their character.

However, those on the other side of the debate are likewise guilty of distorting the core issues. Members of the defense team, for example, have sought to portray the shooting of Diallo as a tragedy rather than a crime. *See* Tom Morganthau, *Cops in the Crossfire*, NEWSWEEK, Mar. 6, 2000, at 22, 24 (quoting defense expert witness Dr. James J. Fyfe as saying, "There was certainly a lot wrong with what happened, but it shouldn't rest on the heads of the police officers"). For an example of the same rationale applied to the King case, see Paul Lieberman, *Prosecution in King Case Must Meet Tougher Standard of Proof*, DALLAS MORNING NEWS, Feb. 11, 1993, at 47A (quoting lawyer for one defendant as saying, "An officer who makes a mistake and uses excessive force isn't guilty"). Such commentary begs the question: does the finding of a tragedy preclude the finding of a crime? Can it not be both? This is noteworthy because a defense is often raised that these were good cops who made a bad mistake. While that may be true, the law generally does not pass over good people who make mistakes. It goes without saying that virtually every crime concerns some "mistake" (in the colloquial sense of the word) by the defendant. If demonizing police deserves discrediting, the notion that police can *never* be guilty of civil rights violations deserves an equally summary disposal. Police officers do not normally commit errors, but when they do, there will be times when those errors rise to the level of criminal acts.

128. *See, e.g.*, Fritsch, *supra* note 4 (quoting Loyola Law School Professor Laurie L. Levenson as arguing, "These guys could be the worst cops in the world, but if this was just a terrible mistake instead of willful misconduct, then it's not a federal crime").

129. *See* Neil A. Lewis, *The Federal Case: Civil Rights Prosecution Is Considered*, N.Y. TIMES, Feb. 26, 2000, at B6 (quoting Professor Theodore Eisenberg). *See also* Sachs, *supra* note 3 ("[L]egal experts said the standards for winning a federal criminal conviction in a civil rights case were usually more stringent than those faced by state prosecutors. Reckless conduct on the part of the officers is not enough . . . .").

130. The Ninth Circuit has posited that the reckless disregard standard, which does not require a knowledge of the law, has the "weight of authority among the courts of appeals" in its support. *See* United States v. Reese, 2 F.3d 870, 885–86 (9th Cir. 1993) (citing seven separate circuits in support of this assertion).

131. *See* Lewis, *supra* note 129.

to cases which use the strict specific intent standard. Under the reckless disregard standard, we no longer consider the motives for an officer's actions; motive, in fact, becomes irrelevant. The law does not consider *why* an officer acted; it simply considers what he or she *intended* to do. For example, if a jury found that the officers knew that there was a risk that they might violate Diallo's rights, but they proceeded to act regardless of those risks, then they recklessly disregarded his right to be free from excessive force. That they may have had good intentions is irrelevant to the fact that they recklessly disregarded a known risk.

Analyzing *Diallo* using the strict specific intent requirement or using the bad purpose requirement, it is easy to see how the prosecutor came to her decision. The officers appeared credible in the parts of their testimony dealing with motive. This testimony would have made it difficult for a prosecutor to argue that these were rogue cops.[132] In fact, the officers appeared genuine in their contrition over the shooting. One officer testified that when he approached Diallo's limp body he started pleading, "Don't die, don't die!"[133] The officer, in recounting his story, broke down in tears on the witness stand.[134] This account does not indicate any evil motive, and it likely would be impossible to demonstrate that any of the officers acted under prior animus towards Diallo.

In contrast, the King beating involved less deadly force, but the main partakers in the beating appeared to be a great deal more malevolent. Officer Koon, who supervised the arrest of King, later joked about the amount of force used: "A big time use of force," he reported after the incident.[135] He then followed up with, "Oh well, I'm sure the lizard didn't deserve it. Ha, ha."[136] Officer Powell, who along with one other officer was responsible for most of the blows struck to King while he was down, later remarked, "I haven't beaten anyone this bad in a long time."[137] This account would imply that under a bad purpose analysis, the officers who beat King would have been convicted under § 242 while the officers who shot Diallo would not.

The analysis changes dramatically when the reckless disregard standard is applied and the question of purpose is removed from the

132. For an example of rogue cops who were prosecuted under the reckless disregard standard after systematically harassing an entire housing complex, see *Reese*, 2 F.3d at 880, 885.
133. Morganthau, *supra* note 127, at 24.
134. *Id*.
135. CANNON, *supra* note 102, at 38.
136. *Id*.
137. *Id.*

discussion. Under the reckless disregard standard, the focus shifts from the officers *motives* to their *actions*. Assuming *arguendo* that the analysis ignores questions of purpose, it flies in the face of both reason and case law to find that the King officers possessed the requisite intent, but that the Diallo officers did not.

One can make a strong argument that the Diallo officers acted with at least as much reckless disregard towards the rights of their victim as did the King officers. King had already proven himself a danger to the public during his high-speed chase.[138] He was a tall, muscular man whom the officers could not contain even through the use of the Taser, a powerful machine that fires small dart cartridges that lodge in the suspect and administer fifty-thousand volts of electricity.[139] Importantly, the first blow that the officers struck against King took place directly after he charged Officer Powell, a move that caused Powell to fear for his life.[140] All of these facts support an argument that the King officers did not initially act with reckless disregard for King's rights because they were not aware of the risk that they were using excessive force. Of course, as the blows continued, even as King became increasingly prostrate, a U.S. attorney could argue that the officers encountered and proceeded through a known risk of constitutional violation. If we analyze the *behavior* of the King officers, the only point at which their behavior clearly turns from self-defense to recklessness is when they increased the severity, number, and length of their blows after King was already unable to present a threat.

If the officers in the King beating had multiple rationales for their use of force (a premise later discredited by a U.S. attorney's prosecution team comprised of "one of the most formidable trial teams ever assembled"),[141] the officers in the Diallo case had only one: a mistaken belief that they were being fired upon. The barrage of fire resulted from the honest mistake of one of the officers, who thought he saw a black handle and yelled, "Gun!"[142] The policemen thought Diallo had shot an officer, when in fact, the officer had tripped.[143] Taking those mistakes into account, did the officers still act with reckless disregard for Diallo's rights?

---

138. *Id*. at 25.
139. *Id.* at 27, 31–32.
140. *Id*. at 32.
141. *Id*. at 385 (quoting U.S. Attorney Terree Bowers).
142. Toobin, *supra* note 7, at 43–44.
143. *Id*. at 44.

While such a question would be left to the jury, the prosecutor should have convened a grand jury on the question of reckless disregard of Diallo's right to be free from excessive force. In order to prove that the officers acted with reckless disregard, a U.S. attorney would need to show that the officers encountered a known risk of a possible violation of Diallo's rights. First, one could argue that, while the officers thought they were in a "combat situation,"[144] they should have been aware of the possibility that the suspect was benign. Every encounter between the police and a citizen needs to be appraised in its full context. From Diallo's perspective, the four officers who approached him could have been any group of strangers. As none were in uniform, and as it was late in the evening, they could have appeared menacing to Diallo. Considering this full context, a federal prosecutor could argue that the officers needed to take these facts into consideration before they started shooting at the suspect. A prosecutor could demonstrate that when Diallo reached for his pocket, there was at least a *risk* that the officers would violate Diallo's rights by firing their weapons at him.[145]

Even if defense attorneys for the Diallo officers could prove that the first shot fired at Diallo was justified, the continued barrage of forty-one shots might indicate that, at some point, the officers acted recklessly. The officers would undoubtedly claim that the encounter took place in the span of ten seconds and that if they acted properly upon first shooting, then they acted properly throughout the whole episode. In response, a federal prosecutor could have argued that as the officers continued to fire rounds, they encountered a risk that they were violating the Constitution. In an alleged § 242 violation, it is infeasible that the intent of an officer is measured only at the first instance of an encounter. For example, in the King case, the first blow (after King charged one of the officers) might not have been an action in reckless disregard, but the seventy-fifth baton blow nevertheless could have involved disregard for King's rights.

---

144. *See* Kevin Flynn, *Panel Urges Retraining, Not Discipline, for Diallo Officers*, N.Y. TIMES, Apr. 26, 2001, at B1 (reporting that police investigators concluded that officers in Diallo shooting should not be disciplined, as they thought that they "perceived a very real danger from Diallo").

145. A contrary point is that the officers told Diallo to keep his hands where they could see them, and that he refused. However, it is unclear that those demands were made loudly or in a way that would assure reception. This was not a case analogous to a traffic stop, for example, where the suspect knows that the police are demanding his or her attention. Four undercover police officers approaching a suspect at night should take steps to ensure that the suspect receives their message.

Buttressing this argument is a striking piece of evidence from the Diallo case. The coroner discovered that one of the bullets fired by the officers entered the bottom of Diallo's foot and came out the top.[146] This indicates that at least one of the shots was fired while Diallo, having sustained the initial shots, was falling or lying prostrate on his back.[147] The officers could argue that the shooting occurred so spontaneously that none of them noticed that Diallo was already on the floor while the shooting continued. But the point of using the reckless disregard standard in § 242 cases is to demand that officers, when they encounter the risk of a constitutional violation, take the necessary steps to avoid it.

Any inquiry into the intent of the officers would necessarily be fact-intensive. As such, a grand jury would have an easier time in deciphering the actions of the officers than the general public. Taken as a whole, however, the evidence would appear sufficient to warrant an indictment, at least on the issue of specific intent. The U.S. attorney should have given the grand jury the opportunity to investigate whether the officers acted in reckless disregard for Diallo's right. The amount of force used and the fact that a bullet entered the bottom of Diallo's foot both seem to demonstrate that such reckless disregard was present.

IV.
A CONTINUING NEED: RIGOROUS ENFORCEMENT OF THE § 242 STATUTE

The Diallo shooting was a particular use of police force in a unique situation. Unfortunately, the wider problem of the police's use of deadly force against minorities persists. Until municipalities find a way to stem the tide, federal prosecutions should be a viable option to curtail police violence.[148] Four major justifications exist for the continued use of federal prosecutions for civil rights violations. First, city governments have proven unable to curtail the practices of racial profiling and the use of excessive force against minorities. Until such

146. *Diallo Shot While Down, Jury is Told*, *supra* note 10.

147. *Id*.

148. *See* CHARLES OGLETREE, JR. ET AL., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES 32 (1995) ("[E]xcessive force remains a problem throughout the country, especially as it involves minorities."). Ogletree also argues that the *Terry* stop—the kind of stop involved in the Diallo shooting—has broadened from its original purpose when the case was handed down: "In the context of drugs, guns, and the popular perception of a crime epidemic, the mere status of being a minority-group member in a poor urban area has come to justify a *Terry* stop." *Id.* at 24.

practices are remedied, the need for federal involvement remains pressing.[149] A related concern is the need to prevent the urban upheavals that sometimes result after official uses of deadly force.[150] A second justification is deterrence. Despite the many calls for reform of police behavior, internal accountability seems ill-equipped to deal with violations of constitutional rights.[151] Third, the DOJ and the federal courts have many indubitable advantages to the state system. Those advantages should be put to good use in situations where federal intervention is appropriate. Lastly, the calls for legislative reform of § 242 suffer from a fatal flaw: the reforms will never be enacted. It is hard to imagine any congressperson successfully amending § 242 without running the risk of political damage.

A. State/Municipal Failure: Social Upheaval

For an example of a city that has been unable to deal with police violence, one need look no further than the recent case of the police shooting in Cincinnati. Many members of the minority community were outraged when unarmed suspect Timothy Thomas was shot to death fleeing from police.[152] The killing and the urban upheaval that followed prompted the DOJ to open an investigation concerning the treatment of minorities.[153] But, if the shooting itself was troubling, a more disturbing fact was that federal reports detailing both the police's and the city's intransigence in the face of unrest stretched back to 1968. Since 1995, in Cincinnati, there have been fifteen fatal shootings of black suspects but no white ones.[154] Despite report upon report, no major changes have been made to prevent unnecessary violence.[155]

---

149. *See* Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1516 (1993) ("The problem of police abuse in urban America in the 1990s presents a civil rights emergency requiring a national commitment. Thousands of minority youths have been subjected to unjustified official violence or other violations of basic constitutional rights.").

150. *See* Hess, *supra* note 5, at 150–51.

151. *See* Flynn, *supra* note 144. An administrative panel recommended that the officers in the Diallo shooting be "retrained" but not disciplined. *Id.* Local authorities seem unwilling to take steps to curb infractions within their ranks.

152. *See* Kevin Sack, *Despite Report After Report, Unrest Endures in Cincinnati*, N.Y. TIMES, Apr. 16, 2001, at A1.

153. *Id*.

154. *Id*. Twelve of the shootings involved men who were armed or in vehicles, but three of the fatally wounded suspects were on foot and unarmed. *Id*.

155. *Id*. ("The city's civilian review panel does not have subpoena powers. And each of the last 10 officers who have appealed disciplinary measures have persuaded arbitrators to overturn their punishments.").

The perceived inability of the police in Cincinnati to discipline themselves has two damaging effects. First, it has the inevitable result of widening the divide between the community and the police department. For example, many black leaders in Cincinnati commented that they could understand why the suspect who was shot would run from the police.[156] The black leaders said that many black youths would be afraid of encounters with the police for fear that the police would beat them unnecessarily.[157] But the second consequence of the city's failure to improve its force is urban upheaval; in this case, the city erupted into three days of rioting.[158] Rioting disproportionately injures the members of minority communities, but often, rioting is the only catalyst the spurs governmental involvement.[159]

The federal government should not wait while cities such as Cincinnati prove unwilling or unable to enact significant police reform. Although the problems with § 242 prosecutions are numerous, a rigorous enforcement under a reckless disregard standard can serve to make sure that egregious misconduct is punished. This seems all the more appropriate in light of the open defiance to federal findings displayed by certain municipal leaders. The U.S. Commission on Civil Rights recently found the NYPD's "overall approach to race relations flawed in everything from training to promotions."[160] The mayor of the city responded by calling the findings "a big joke."[161] Such glib sarcasm demonstrated from the top of the municipal hierarchy inspires cynicism regarding police discipline at all levels. If the mayor himself refuses to even admit that racism is a problem, then the federal government's role remains as necessary as ever.[162]

B. Deterrence

Professor Paul Chevigny expresses the feeling that criminal prosecutions are not necessarily the best way to deal with the accountabil-

156. *Id*. ("[B]lacks often run from the police because 'they're thinking, "If I don't run, I get beat up, get my head pushed into the ground, I get hit with the sticks, I get pushed into the car door."'" (quoting Rev. Damon Lynch III)).
157. *Id*.
158. *See Mayor Scales Back Curfew After Calm Night in Cincinnati*, N.Y. TIMES, Apr. 16, 2001, at A17.
159. *See* Levenson, *supra* note 5, at 511 ("The federal prosecution [of the King officers] followed on the heels of, and some believe was generated by, the riots that consumed Los Angeles immediately following the verdicts in the state trial.").
160. *See Giuliani Dismisses Report Critical of New York Police*, *supra* note 126.
161. *Id*.
162. For a general discussion of the continued prevalence of police misconduct, see generally Jacobi, *supra* note 20.

ity of officials.[163] He points out that cases are brought infrequently and, in those times, only when compelling evidence is available.[164] This results in federal prosecutions being a poor tool for deterring police misconduct.[165] He also argues that prosecution is a "powerful and socially explosive tool that should only be used in the clearest cases," because criminal law should not be a system of discipline.[166]

Nevertheless, in a case like the Diallo situation, a federal role to deter this type of behavior seems necessary. First, it is a reasonable goal of the NYPD to instill confidence in the public. The Diallo incident and others like it convey the impression that the police are above the law, and this effect is carried out further when the state prosecution is blundered. In addition, when a case is moved from its home community to the state capital, the public impression is that justice has been slighted. While Chevigny's argument might be correct in that the most egregious examples of police misconduct should be prosecuted, it fails to recognize that reckless uses of force can be sufficiently egregious. It may be true that system-wide reform is needed, but that should not preclude a vigilant U.S. attorney from using § 242 to deter police officers' violations of constitutional rights.

C. Advantages of the U.S. Attorney's Office

In cases such as the Diallo case, the U.S. Attorney's Office should be involved because it is better equipped to deal with civil rights violations on the part of the police. State district attorneys face insurmountable hurdles in bringing excessive force cases.[167] The first problem they face is one which dates all the way back to *Screws*: "There is a tremendous amount of pressure on officers not to attack the actions of fellow officers."[168] In addition to officers with divided loyalties,[169] there is the problem of prosecutors who are often working in tandem with police officers.[170] That type of close-knit relationship makes it difficult for state prosecutors to turn their prosecutorial efforts against the police officers that, in all other cases, they rely upon

163. *See* CHEVIGNY, *supra* note 55, at 98 ("Criminal prosecution is the most cumbersome tool for the accountability of officials.").
164. *Id.* at 99.
165. *Id*.
166. *Id.* at 101.
167. *See* Levenson, *supra* note 5, at 536–37.
168. *Id*. at 537.
169. *Id*.
170. Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 663 (Supp. 2002).

in their efforts to fight crime.[171] These problems, among others, call for a federal role.

This is not to say that federal prosecutors have an easy time bringing these cases either. They face similar problems to those faced by the state district attorneys. If police officers are going to stonewall efforts to investigate, then they will do that to the Federal Bureau of Investigation or Internal Affairs.[172] Despite these disadvantages, as the Rodney King example demonstrates, the federal government has many advantages as well. Professor Laurie Levenson has described them as possessing more resources, the incentive to conduct better investigations, less divided loyalty, and the grand jury power.[173] The resulting conviction in the King case is indicative of this superiority.[174] Overall, the Diallo case exemplifies the ways in which local prosecutors have trouble prosecuting local law enforcement. If the rationale for federal intervention in *Screws* involved the implausibility of having Sheriff Screws investigate the murder in which he partook, the inadequacies of the state trial of the Diallo officers shows that many of those rationales persist to this day.

D. Legislative Reform of Police Misconduct

Professor Jacobi and others have asserted that the best way to reform the § 242 statute is through the legislature.[175] Jacobi, in particular, has pointed out the need for a federal role in police misconduct, and he has gone on to map out an innovative legislative reform proposal. He deals with the federalism issues by reaffirming the primacy of local control over law enforcement. The federal government's role would be reserved for instances where the local government fails to prosecute police misconduct.[176] He then confronts concerns over vagueness by adding to the specificity of the proposed statute.[177]

Despite the appeal of Jacobi's proposal, there are two major snags. One is that the chances of a member of Congress rising to amend § 242 in a manner that challenges police conduct are slim. In this law-and-order age, a politician would risk the immediate branding of being anti-cop and soft on crime, despite the prudence of the con-

171. *See id.*
172. *See* Levenson, *supra* note 5, at 539–42.
173. *Id*. at 539–50.
174. *See* U.S. v. Koon, 833 F. Supp. 769 (C.D. Cal. 1993), *aff'd*, 34 F.3d 1416 (9th Cir. 1994).
175. *See* Jacobi, *supra* note 20, at 791. *See also* Hess, *supra* note 5, at 151–52; Malone, *supra* note 20, at 170.
176. *See* Jacobi, *supra* note 20, at 812–16.
177. *Id*. at 814–15.

gressperson's ideas. In light of the fact that police misconduct affects minorities more that it does members of the majority, legislative reform seems a distant goal. Additionally, this Note has shown that courts and prosecutors have sought to expand the reach of § 242 in ways that are consistent with the notice requirement.[178] Considering that vagueness concerns can be dealt with judicially, the statute is not so infirm as to require amendment.

CONCLUSION

By any accounts, the shooting of Amadou Diallo was a saddening tragedy. Reasonable minds could certainly disagree as to the culpability of the officers. The specific intent requirement, however, should not have been the fatal blow to a possible federal prosecution. While the U.S. attorney might have had other pressing concerns that also informed her decision, a grand jury should have been left to investigate whether the Diallo officers acted in reckless disregard of a constitutional prohibition. It is of local and national interest that violence committed against innocent victims be curbed. Although *Screws* has left the law on federal civil rights violations in partial disarray, the circuits have come up with a coherent way of dealing with cases. If the intent requirement of § 242 is to expand, due care should be taken to ensure that offenders are not swept unnecessarily within its reach. Notice is a concern, but the use of excessive force is also.

This Note limited its analysis to a specific case and a specific issue. Nevertheless, the federal prosecution of civil rights abuses is widely needed because police reform at the local levels progresses at a numbingly slow speed, if at all. If the result of a broader civil rights law seems harsh on police defendants, then that may be a fair criticism. But a look to the criminal justice system in general will show that in every arrest and in every prosecution, the interests of the society and the defendant are balanced. Without question, for many citi-

178. *See* James P. Turner, *Police Accountability in the Federal System*, 30 MCGEORGE L. REV. 991, 1010 (1999). Turner addresses both of these issues:

> Similarly, there continues to be a serious problem for prosecutors and judges in applying the specific intent requirement of *Screws* in a way that makes sense. But, in most instances, by developing standard jury instructions and other techniques, prosecutors have been able to coexist with this complication. While it would be possible to ask Congress to consider enacting a better intent standard, that would expose the whole program to redesign. Unless some future high visibility case is dismissed because of the lack of specific intent, legislative intervention seems unlikely and inadvisable.

Id. (citation omitted). Even though the Diallo case was "high visibility," Congress seems unlikely to enact reform.

zen defendants who find themselves in the criminal system, they feel themselves wronged. But our system has an ideal of enforcing the law equally among all citizens, police included. Should police be granted broad discretion in light of the vital and difficult work they do day in and day out? While the law must definitely give officers that discretion, it must simultaneously impose limits in order to safeguard against misuse that may result in injustice. The federal civil rights code stands ready to prevent such injustice.