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STATE OFFICIAL MISCONDUCT STATUTES AND ANTICORRUPTION FEDERALISM AFTER *KELLY V. UNITED STATES*

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In Kelly v. United States*, the Supreme Court vacated the federal corruption convictions of the three government officials behind "Bridgegate." In the process of doing so, the Court flagged an interesting tool that states have in their anticorruption toolkits that might've applied to the conduct before the Court: official misconduct statutes. These dynamic statutes are on the books in twenty-three states and territories, and another three recognize official misconduct as a common law crime. Though there's state-by-state variation, official misconduct generally prohibits (1) a public official (2) acting with the intent to obtain a benefit (3) from committing an act relating to his or her government office (4) knowing that such act is unlawful.*

This Comment examines these statutes. First, it uses Kelly *and related Bridgegate proceedings to situate official misconduct alongside federal criminal prohibitions that apply to state and local officials who abuse their office. Second, it walks through the statutes' elements and sentencing consequences. Third, it lays out the statutes' pros and cons—enforcement utility on the one hand and a potentially worrisome amount of executive discretion on the other. Finally, the Comment concludes by offering a tentative endorsement of official misconduct statutes and proposing structural safeguards that can mitigate the risk of prosecutorial abuse under the statutes.*

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INTRODUCTION

Two Terms ago in *Kelly v. United States*, the Supreme Court vacated the convictions of the three government officials behind "Bridgegate."[1] The defendants in *Kelly* used a series of lies (or in their words, a "cover story") to get the Port Authority of New York and New Jersey to change the traffic-lane allocation on the world's busiest drive-on bridge in order to mete out political punishment to a suburban mayor.[2] Justice Elena Kagan, writing for a unanimous Court, certainly didn't mince words when describing the defendants' conduct; they had engaged in "wrongdoing—deception, corruption, [and] abuse of power."[3] But the Court's opinion just as forcefully drove home another point: The defendants hadn't committed a *federal crime*.

Kelly is the most recent Supreme Court decision in a decades-long line of cases pushing back on the application of federal criminal statutes to state and local government officials who abuse their office. Federal criminal law, as the Court emphasized in *Kelly*, can and should go only so far in this politically sensitive area:

1. 140 S. Ct. 1565, 1568–69 (2020).
2. Id. at 1569–71.
3. Id. at 1568.

> The upshot is that federal fraud law leaves much public corruption to the States (or their electorates) to rectify. Cf. N.J. Stat. Ann. § 2C:30-2 (2016) (prohibiting the unauthorized exercise of official functions). . . .
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> . . . .
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> To rule otherwise would undercut this Court's oft-repeated instruction: Federal prosecutors may not . . . "set[] standards of disclosure and good government for local and state officials."[4]

While limiting federal authority, the Court (in the quote above) pointed out an interesting tool that states have in their anticorruption toolkits: official misconduct statutes. Though relatively obscure heading into the decision, these statutes boast an impressive common law pedigree, and they've had quite the year and a half since *Kelly* when it comes to headlines. A former Oregon state representative pleaded guilty to official misconduct for letting rioters into the state capitol during a special legislative session, leading to an altercation with the police that left six officers injured;[5] the Michigan Attorney General indicted nine former and current officials allegedly responsible for the Flint water crisis for official misconduct;[6] a landmark New Jersey criminal justice bill stalled after a state senator added official misconduct to the list of offenses the bill would remove mandatory minimums from;[7] and former aides to the Texas Attorney General wrote a public letter alleging that he—among other things—violated Texas's version of the statute.[8]

Official misconduct is on the books in twenty-three states and territories and recognized as a common law crime in another three.[9] Though there's state-by-state variation, the statutes generally prohibit (1) a public official (2) acting with the intent to obtain a benefit (3) from committing an act relating to his or her government office (4) knowing that such act is unlawful.[10] As the elements and above examples suggest, these statutes are dynamic prohibitions that apply to a wide array of

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4. Id. at 1571–72, 1574 (quoting McNally v. United States, 483 U.S. 350, 360 (1987)).

5. Connor Radnovich, Mike Nearman Pleads Guilty to Official Misconduct, Receives 18 Months Probation, Salem Statesman J. (July 27, 2021), https://www.statesmanjournal.com/story/news/politics/2021/07/27/mike-nearman-pleads-guilty-official-misconduct-gets-18-months-parole/8048943002/ [https://perma.cc/D6RF-WXAJ] (last updated July 28, 2021).

6. Courtney Covington Watkins, Nine Indicted on Criminal Charges in Flint Water Crisis Investigation, Michigan (Jan. 14, 2021), https://www.michigan.gov/ag/0,4534,7-359-82917_97602_97604-549541–,00.html [https://perma.cc/PE2T-7HH6].

7. Tracey Tully, It Was a Landmark Crime Bill. Then a State Senator Added a Special Favor., N.Y. Times (Dec. 17, 2020), https://www.nytimes.com/2020/12/17/nyregion/nj-mandatory-minimum-public-corruption.html (on file with the *Columbia Law Review*).

8. Tony Plohetski & Chuck Lindell, Top Aides Accuse Texas Attorney General Ken Paxton of Bribery, Abusing Office, Austin Am.-Statesman (Oct. 3, 2020), https://www.statesman.com/story/news/local/2020/10/03/top-aides-accuse-texas-attorney-general-ken-paxton-of-bribery-abusing-office/114215708/ [https://perma.cc/R8CB-NQ3D].

9. See infra Appendix.

10. See infra section II.A.

conduct. Importantly, they allow states to prohibit actions by officials that are both difficult to anticipate ex ante and which federal statutes (either because of judicially imposed limits or institutional caution) cannot reach. *Kelly* itself provides one example of culpable conduct not reached by federal criminal law but most likely cognizable as official misconduct. And others are unfortunately not too hard to come by. Think of the police chief who covers up the involvement of the mayor's son in a string of local crimes;[11] the special prosecutor (not quite that kind, but the irony is still there) who gives favorable treatment to friends and the politically connected without agreeing to a clear quid pro quo;[12] the county commissioner who doesn't recuse himself from a vote, knowing that a conflict of interest law requires doing so;[13] or the police officer who knowingly fails to file use-of-force paperwork, undercutting democratically imposed oversight measures.[14]

But at the same time, the open-textured nature of official misconduct statutes should give us pause. Whether as a policy matter or doctrinally under the void for vagueness framework, there's a real concern that such dynamic statutes can't provide defendants with adequate notice or channel prosecutorial discretion in a way that avoids abuse. Moreover, some might object on democratic legitimacy grounds to the heavy role courts and agencies—not legislatures—play in fleshing out the contours of what counts as official misconduct.

Weighing these competing features, this Comment offers tentative support for state official misconduct statutes. That said, the conduct the statutes reach is indeed broad, and the determination of whether particular conduct is worthy of criminal sanction or more appropriately left to internal, administrative discipline will often be a difficult one. Therefore, states with official misconduct statutes should pay close attention to structural safeguards that can channel prosecutorial discretion and help ensure official misconduct statutes are used responsibly. Specifically, this Comment argues that states should increase the control exercised by state attorneys general (compared to county or city prosecutors) over official misconduct statutes in particular and the prosecution of government misconduct in general.

Proceeding in four Parts, this Comment overviews the official misconduct landscape, using *Kelly* and related Bridgegate proceedings to set the scene. Part I sketches the two broad categories of federal criminal statutes applicable to state and local officials who abuse their office. Part II turns to state official misconduct statutes and walks through their elements and sentencing consequences. Part III discusses the pros and cons of these statutes: enforcement utility on the one hand and a potentially worrisome

11. State v. Secula, 380 A.2d 713, 714 (N.J. Super. Ct. App. Div. 1977).
12. In re Weissmann, 105 N.Y.S.3d 124, 125 (App. Div. 2019).
13. State v. Furey, 318 A.2d 783, 787 (N.J. Super. Ct. App. Div. 1974).
14. People v. Castaldo, 46 N.Y.S.3d 115, 119–20 (App. Div. 2017).

amount of discretion on the other. Part IV concludes by weighing these competing features and proposing ways of mitigating the risk of prosecutorial abuse under official misconduct statutes.

I. FEDERAL CRIMINAL LAW THROUGH BRIDGEGATE'S LENS

This Part uses the Supreme Court and Third Circuit's Bridgegate decisions to briefly overview the two main areas of federal criminal law that apply to state and local government officials who abuse their office. Bridgegate arose out of three political actors' mismanagement of the resources of the Port Authority of New York and New Jersey.[15] With the aim of winning reelection for then-Governor Chris Christie, the *Kelly* defendants "avidly courted Democratic mayors."[16] One hoped-for endorsement was that of the Mayor of Fort Lee; as a result, the town received "an expensive shuttle-bus service" and other pork-barrel spending.[17]

When the mayor nonetheless declined to endorse Christie, the defendants shifted from courtship to punishment.[18] For decades, three east-bound lanes on the George Washington Bridge had been set aside exclusively for Fort Lee commuters heading into New York City.[19] The defendants decided to alter this practice on "the (traffic-heavy) first day of school," cutting Fort Lee's lanes from three to one.[20] To do so, they came up with a "cover story" and described the change as part of a traffic study.[21] The lane-allocation change had its intended result, and traffic came to a halt. School buses arrived hours late; an ambulance sat in traffic unable to reach a 911 caller; and the police struggled to respond to a missing-person report.[22] Moreover, Bridgegate cost taxpayers thousands of dollars in wasted wages. The scheme's perpetrators dedicated (and were paid for) upward of fifty hours of work; three employees spent nearly forty hours analyzing data from the "study"; and the Port Authority had to pay toll-booth workers overtime rates.[23]

When the smoke cleared, federal prosecutors—historically the primary enforcers of anticorruption law at the local, state, and federal level[24]—charged the three individuals behind Bridgegate. The charges fall

15. Kelly v. United States, 140 S. Ct. 1565, 1569–71 (2020).
16. Id. at 1569.
17. Id.
18. Id.
19. Id. at 1568.
20. Id. at 1570.
21. Id. at 1569–70.
22. Id. at 1570.
23. See United States v. Baroni, 909 F.3d 550, 565–67 (3d Cir. 2018), rev'd and remanded sub nom. Kelly v. United States, 140 S. Ct. 1565 (2020).
24. See Peter J. Henning, Federalism and the Federal Prosecution of State and Local Corruption, 92 Ky. L.J. 75, 83–93 (2004).

into two categories: official corruption and intentional civil rights deprivations. The following sections take these categories in turn.

A. *Official Corruption*

In *Kelly v. United States*, the Supreme Court vacated the defendants' program theft and wire fraud convictions in a unanimous decision.[25] Viewed narrowly, the Court's decision came down to the property-deprivation element in each statute.[26] In the Court's view, neither the defendants' alleged attempt "to commandeer[] part of the Bridge itself" (that is, "to take control of its physical lanes") nor their defrauding of the Port Authority of "the costs of compensating . . . traffic engineers and back-up toll collectors" satisfied the requirement.[27] The first charging theory simply didn't allege a property interest in the hands of the government.[28] The second theory did, but the prosecutors didn't show the requisite mens rea in this case—that the defendants' scheme was "directed at" effecting this property deprivation.[29] The deprivation was instead just an "implementation cost[]" of their scheme aimed at political payback.[30]

But to fully understand *Kelly*, you have to place it within the larger context of the Supreme Court's approach to official corruption.[31] Over the last three decades and across several different statutes, the Court has narrowed the reach of federal official corruption law (sometimes dramatically

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25. 140 S. Ct. at 1569; see also 18 U.S.C. § 666 (2018) (program theft); id. § 1343 (wire fraud).

26. 18 U.S.C. § 666(a)(1)(A) ("obtains by fraud . . . property"); id. § 1343 ("scheme . . . for obtaining . . . property"). Interestingly, the defendants were charged under the misapplication prong of § 666. See Indictment at 1–28, United States v. Kelly, No. 15-193 (D.N.J. Mar. 30, 2017), 2015 WL 2127949. And their convictions were approved of by a jury, the district court, and the Third Circuit under this theory (at least in the alternate). See *Baroni*, 909 F.3d at 570–79; Judgment in a Criminal Case at 1, United States v. Kelly, No. 2:15-CR-00193-SDW-2 (D.N.J. Mar. 30, 2017), 2017 WL 1233891; United States v. Baroni, No. 2:15-cr-00193-SDW, 2017 WL 787122, at *5–6 (D.N.J. Mar. 1, 2017), vacated and remanded, 809 F. App'x 120 (3d Cir. 2020) (mem.). The Supreme Court, however, was silent on what conduct (if any) this prong reaches and instead required the government to make a substantially similar showing under § 666 as that required under the wire fraud statute. See *Kelly*, 140 S. Ct. at 1568–69.

27. *Kelly*, 140 S. Ct. at 1572 (alteration in original) (quoting Transcript of Oral Argument at 58–59, Kelly, 140 S. Ct. 1565 (No. 18-1059), 2020 WL 209136) (cleaned up).

28. Id. at 1572–73.

29. Id. at 1572 (internal quotation marks omitted) (quoting Brief for the United States at 44, *Kelly*, 140 S. Ct. 1565 (No. 18-1059), 2019 WL 6324152).

30. Id. at 1573–74. This ratcheting up of a mens rea requirement through statutory interpretation to draw an intuitive line between culpable and nonculpable conduct (often with constitutional values lurking in the background) is common in the Supreme Court's federal criminal law decisions. See Daniel C. Richman, Kate Stith & William J. Stuntz, Defining Federal Crimes 120–80 (2d ed. 2018) (online edition).

31. For an overview of federal official corruption law that this Comment relies heavily on, see generally Richman et al., supra note 30, at 335–427.

so).[32] Taken within this broader context, *Kelly* was more than a cut-and-dry statutory interpretation case. It was about whether federal prosecutors could, through clever pleading, sidestep judicially imposed limits in the official corruption area[33] that are the product of vagueness concerns,[34] First Amendment values,[35] and federalism principles.[36] As the above shows, the answer was an emphatic *no*. The upshot of the Court's official corruption precedent—with *Kelly* being the most recent instance—is that unless an official uses their office for naked economic gain (i.e., quid pro quo corruption or a scheme "directed at" effectuating a property deprivation), federal criminal law will likely have little to say on the matter.

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32. See id. There are, however, a couple notable exceptions worth flagging. See Ocasio v. United States, 136 S. Ct. 1423, 1432–37 (2016); Sabri v. United States, 541 U.S. 600, 604–07 (2004).

33. See Transcript of Oral Argument at 3–4, *Kelly*, 140 S. Ct. 1565 (No. 18-1059), 2020 WL 230205 ("[The Government's theory] end-runs *McNally* and *Skilling* by subsuming honest services fraud within property fraud and by criminalizing ulterior motives even without bribes or kickbacks."); Brief for Petitioner at 29–34, *Kelly*, 140 S. Ct. 1565 (No. 18-1059), 2019 WL 4568203 ("In short, the decision below conflicts with this Court's precedents on a fundamental level: If the opinion below is correct, then a host of seminal cases constraining application of federal criminal statutes to political behavior were both wrongly decided and utterly pointless.").

34. See McDonnell v. United States, 136 S. Ct. 2355, 2365, 2371–73 (2016) (citing vagueness concerns, among other reasons, to adopt a narrow definition of "official act"—a term that comes from the federal bribery statute but, as the parties assumed in *McDonnell*, most likely applies in honest services fraud and Hobbs Act under-color prosecutions as well); Skilling v. United States, 561 U.S. 358, 368 (2010) ("Construing the honest-services statute to extend beyond [bribes and kickbacks] . . . would encounter a vagueness shoal.").

35. See *McDonnell*, 136 S. Ct. at 2372 (explaining that a broad definition of "official act" in official corruption prosecutions might cause officials to "wonder whether they could respond to even the most commonplace requests for assistance" and cause citizens to "shrink from participating in democratic discourse"); McCormick v. United States, 500 U.S. 257, 271–73 (1991) (requiring, in the campaign contribution context, "an explicit *quid pro quo*" arrangement to support a Hobbs Act under-color prosecution because holding otherwise would extend criminal liability to "conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures").

36. See *McDonnell*, 136 S. Ct. at 2373 ("[States have] the prerogative to regulate the permissible scope of interactions between state officials and their constituents."); Cleveland v. United States, 531 U.S. 12, 20, 24 (2000) (invoking a federalism clear-statement rule to reject an interpretation of the mail and wire fraud statutes that would work "a sweeping expansion of federal criminal jurisdiction" to include fraud against a state government entity acting in a "*regulatory*" capacity); McNally v. United States, 483 U.S. 350, 360 (1987) (rejecting, in a decision before Congress enacted 18 U.S.C. § 1346, an honest services theory of mail and wire fraud, and requiring a clear statement before interpreting a statute to "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials"). Note that one year after *McNally*, Congress enacted a statute permitting honest services fraud prosecutions. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (codified as amended at 18 U.S.C. § 1346 (2018)); Richman et al., supra note 30, at 190–98, 220–41 (overviewing honest services fraud). And though *McNally*'s treatment of honest services fraud is no longer governing law, the *McNally* Court's approach to official corruption law continues to animate Supreme Court decisions in this area. See, e.g., supra note 4 and accompanying text.

B. *Intentional Civil Rights Deprivations*

A similar story played out at the court of appeals level. Before the Bridgegate case made its way up to the Supreme Court, the Third Circuit vacated the defendants' convictions under two statutes that make it a federal crime to willfully deprive someone of rights guaranteed by federal law.[37] Like the official corruption statutes discussed in the previous section, the rights-deprivation statutes look broad on their face but are more limited in practice.[38]

Federal prosecutors charged the Bridgegate perpetrators with conspiring to deprive Fort Lee residents of their substantive due process "right to localized travel on public roadways free from restrictions unrelated to legitimate government objectives."[39] One key limitation on these statutes drove the Third Circuit's rejection of the government's theory: A right must be defined with a high degree of clarity before it can be the basis for a civil rights prosecution.[40] This "made specific" requirement largely tracks qualified immunity's "clearly established" requirement in § 1983 and *Bivens* litigation. "[T]he contours" of a right must be "sufficiently clear that every reasonable official would have understood that what he is doing violates" federal law.[41] Whatever the ultimate scope of the right to intrastate travel under the Federal Constitution, the Third Circuit concluded that a single circuit court decision setting out the right at a high level wasn't enough to put the defendants on notice that their conduct was unlawful.[42]

Two other limitations on these statutes' reach are also worth noting, though they did not come into play in the Third Circuit's analysis. The first is intent: The government must show that the defendant "willfully" deprived an individual of a right—that is, the defendant "act[ed] in open defiance or in reckless disregard of a constitutional [or statutory] requirement."[43] The second is that Main Justice exercises a significant degree of control over 18 U.S.C. §§ 241 and 242 prosecutions, and it has been cautious in deploying these statutes—perhaps out of concern with bringing their common law–like quality into too stark of relief before the Supreme

37. See 18 U.S.C. §§ 241–242; United States v. Baroni, 909 F.3d 550, 588 (3d Cir. 2018), rev'd and remanded sub nom. Kelly v. United States, 140 S. Ct. 1565 (2020).

38. For an overview of criminal violations of civil rights law that this Comment relies heavily on, see Richman et al., supra note 30, at 429–502.

39. *Baroni*, 909 F.3d at 585.

40. Id. at 586 (citing United States v. Lanier, 520 U.S. 259, 265 (1997)).

41. Id. (quoting L.R. v. Sch. Dist. of Phila., 836 F.3d 235, 247 (3d Cir. 2016)) (cleaned up); see also Richard H. Fallon, Jr., John F. Manning, Daniel J. Melzer & David L. Shapiro, Hart and Wechsler's the Federal Courts and the Federal System 986–1056 (7th ed. 2015) (overviewing constitutional tort litigation, including qualified immunity).

42. *Baroni*, 909 F.3d at 586–88.

43. Screws v. United States, 325 U.S. 91, 105 (1945); see also Richman et al., supra note 30, at 441–51.

Court.[44] The result is that, though these statutes appear broad, they are used relatively rarely and are reserved mostly for law enforcement officials who have engaged in egregious uses of force.[45]

II. DEFINING OFFICIAL MISCONDUCT

Thus, federal criminal law plays an important, but ultimately limited, role in ensuring integrity in state and local government—and one that the conduct at the heart of Bridgegate falls outside of. But as *Kelly* highlighted, states have their own tools, including official misconduct statutes.[46] Putting aside concerns about whether you could expect state charges to be brought at all in this instance,[47] the Court was likely right as a matter of substantive criminal law that the defendants were guilty of official misconduct under New Jersey law. Recognizing that the statutes vary from state to state, this Part overviews what official misconduct generally entails, discussing its elements and sentencing consequences.

A. *Elements*

1. *Public Official.* — Recall the elements of an official misconduct statute.[48] The first element, that the defendant be a "public official" or "public servant," is straightforward in most applications, reaching anyone who is an employee of a "governmental instrumentality within the state."[49] Official misconduct statutes therefore apply to elected political officials at both the state and local level,[50] police officers and sheriffs,[51] government

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44. See Richman et al., supra note 30, at 444; Daniel Richman, Defining Crime, Delegating Authority—How Different Are Administrative Crimes?, 39 Yale J. on Regul. (forthcoming Jan. 2022) (manuscript at 18–21), https://ssrn.com/abstract= 3803618 [https://perma.cc/GY2Y-4LX2] [hereinafter Richman, Administrative Crimes].

45. See Richman, Administrative Crimes, supra note 44, at 20.

46. See supra note 4 and accompanying text.

47. See Donald F. Burke, Bridgegate: Time for an Attorney General Elected and Accountable to the People, N.J. L.J. (May 29, 2020), https://www.law.com/njlawjournal/2020/05/29/bridgegate-time-for-an-attorney-general-elected-and-accountable-to-the-people/ (on file with the *Columbia Law Review*) (discussing potential hold-up problems given gubernatorial control of the New Jersey Attorney General and county prosecutors).

48. See supra text accompanying note 10.

49. E.g., N.Y. Penal Law § 10.00(15) (McKinney 2021).

50. See, e.g., State v. Oldner, 206 S.W.3d 818, 819–20 (Ark. 2005) (permitting the removal of a mayor who was convicted of official misconduct after using city funds to improve property his family owned); State v. Andersen, 370 N.W.2d 653, 656–59 (Minn. Ct. App. 1985) (upholding the conviction of a mayor who pressured a police chief into closing an investigation concerning her); State v. Jensen, 743 N.W.2d 468, 471–72 (Wis. Ct. App. 2007) (vacating and remanding, on the basis of an erroneous jury instruction, the conviction of a state legislator who solicited employees to engage in partisan political activities while being compensated by the state, allegedly knowing that doing so would violate state campaign laws).

51. See, e.g., Sewell v. State, 197 A.3d 607, 611–12 (Md. Ct. Spec. App. 2018) (holding that the conviction of a police chief who instructed subordinate officers not to arrest or cite

attorneys,[52] and corrections officials[53] (to name a few of the recurring categories of defendants). But given the breadth of state and local regulatory authority and service delivery, the list of official misconduct defendants runs the gamut of government employment.[54] Moreover, official misconduct—depending on the jurisdiction—may extend beyond these core applications to individuals who are employees of quasipublic entities,[55] individuals who wield state authority on a temporary basis,[56] or individuals who are set to assume, but have not yet taken, office.[57]

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an acquaintance for drunk driving was legally sufficient, but remanding for a new trial due to an erroneous evidentiary ruling); State ex rel. Danforth v. Orton, 465 S.W.2d 618, 620–22 (Mo. 1971) (removing from office on the basis of official misconduct a sheriff who threatened to jail state officials unless they stopped their investigation); State v. Jones, 365 P.3d 1212, 1213–15 (Utah 2016) (binding over for trial a defendant-police officer who failed to adhere to department protocol when a domestic violence allegation was made against his brother).

52. See, e.g., People v. Brown, 840 P.2d 348, 349–50 (Colo. 1992) (en banc) (describing a public defender who pleaded guilty to official misconduct after misappropriating funds from the family members of clients by falsely stating the funds were needed for medical evaluations); People v. Abelove, 113 N.Y.S.3d 378, 379–81 (App. Div. 2019) (reinstating the indictment of a prosecutor who allegedly sandbagged a grand jury presentation arising out of a police officer's shooting of a civilian); Matter of Weissmann, 105 N.Y.S.3d 124, 125–26 (App. Div. 2019) (describing a special prosecutor who pleaded guilty to official misconduct after giving preferential treatment to friends and the politically connected).

53. See, e.g., People v. Ware, No. 4-16-0415, 2018 WL 3933904, at *1–2 (Ill. App. Ct. Aug. 13, 2018) (affirming one count of official misconduct for a corrections official who coerced an individual on parole into a relationship); People v. Groskin, 505 N.Y.S.2d 475, 476 (App. Div. 1986) (dismissing the indictment of a corrections official who denied family visits to an individual in custody in attempt to coerce the individual into sexual relations).

54. See, e.g., People v. Perry, No. 1-18-0201, 2019 WL 7177020, at *1–2 (Ill. App. Ct. Dec. 23, 2019) (affirming the sentence of a city tow truck driver who forced drivers to pay hundreds of dollars to not have their legally parked vehicles towed); Megason v. State, 19 S.W.3d 883, 884–85 (Tex. App. 2000) (affirming the conviction of a county clerk who misappropriated government funds); State v. Rindfleisch, 857 N.W.2d 456, 458 (Wis. Ct. App. 2014) (describing charges brought against a chief of staff to a county executive who allegedly knowingly violated restrictions on municipal employees engaging in partisan campaign activities during work hours).

55. See, e.g., Tenn. Code Ann. § 41-24-108 (2021) (extending, among other provisions, official misconduct to employees of privately run prisons); Cromwell v. N.Y.C. Health & Hosps. Corp., 983 F. Supp. 2d 269, 273 (S.D.N.Y. 2013) (holding that an employee of a state-created public-benefit corporation was a public official). But see, e.g., State v. Smith, 357 So. 2d 505, 507–08 (La. 1978) (holding that employees of a nonprofit established by a city charter were not public officials).

56. See, e.g., Alaska Stat. § 11.81.900(56)(B) (2021) (classifying as public officials advisors, consultants, and assistants working "under contract with the state" and members of boards or commissions created by statute); Del. Code tit. 11, § 1209(4) (2021) (including, among others, advisors and consultants as public officials); People v. Bruce, 939 N.W.2d 188, 199 (Mich. 2019) (holding that federal agents assigned to a federal–state taskforce were public officials).

57. See, e.g., Ark. Code Ann. § 5-52-107(a) (2021) (extending the scope of the official misconduct statute to persons "designated to become a public servant although not yet occupying that position").

2. *Intent to Obtain a Benefit.* — Second, defendants must act with the intent to obtain a benefit for themselves or a third party. In most jurisdictions, cognizable motivations go beyond pecuniary ones[58] and permit the prosecution of individuals who abuse their office for political reasons,[59] to provide favors to friends,[60] or to engage in sexual harassment or assault.[61] In some states, the statutes reach the varied motivations that fall within the rubric of *personal* benefit.[62] So, this element usually is not a point of major contention in official misconduct prosecutions. It does, however, provide defendants with a valid defense if they acted in good faith for the public benefit but did so mistakenly.[63]

3. *Act Related to Office.* — Third, the charged conduct must relate to the defendant's office. This element looks quite similar to federal courts' analyses of the under-color requirement in § 242 prosecutions.[64] In the lion's share of cases, the analysis is straightforward: Was the individual's ability to commit the charged conduct a product of their office?[65] But sometimes—particularly where an official is charged for off-duty conduct—the analysis gets trickier. There, the analysis becomes highly fact-intensive and depends on, for example, whether the official displayed symbols of state authority or threatened state sanctions.[66]

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58. See, e.g., People v. Camacho, 103 F.3d 863, 867 (9th Cir. 1996) ("Official misconduct can be criminal when advantages other than money accrue to the public servant in the wrongful exercise of office."). But see Ark. Code Ann. § 5-52-107 (limiting cognizable interests to pecuniary ones).

59. People v. Feerick, 714 N.E.2d 851, 856 (N.Y. 1999) ("'Benefit' includes more than financial gain and can encompass political or other types of advantage.").

60. See, e.g., Conde v. Kelly, 990 N.Y.S.2d 166, 167–68 (App. Div. 2014) (holding that a benefit accrued to a third party when a police officer accessed internal affairs information in violation of confidentiality regulations to tip off his fellow police officer regarding the status of an internal investigation against him).

61. *Camacho*, 103 F.3d at 867 ("That sexual gratification should be prominent among these other advantages [cognizable in official misconduct statutes] . . . reflects a long tradition in the misuse of authority.").

62. See, e.g., Del. Code tit. 11, § 1209(3) (2021) (defining "personal benefit" as "anything regarded by the recipient as such gain or advantage"); People v. Selby, 698 N.E.2d 1102, 1110 (Ill. Ct. App. 1998) ("The fact most reported decisions involve a pecuniary or tangible benefit to the defendant does not preclude the State from proving . . . [the] alleged misconduct here was done with the intent to obtain a personal advantage.").

63. See, e.g., People v. Dilger, 585 P.2d 918, 920 (Colo. 1978) (vacating an official misconduct conviction because "[d]oubt exists as to whether the defendant, who was new to the job, acted to enrich himself or merely identified incorrectly the taxpayers and misconceived the means of collection"); *Feerick*, 714 N.E.2d at 856 ("[T]he [l]egislature sought to ensure that good faith miscalculations . . . did not run the risk of a criminal prosecution.").

64. Compare Richman et al., supra note 30, at 463–74 (overviewing federal under-color precedent), with, e.g., People v. Berry, 457 P.3d 597, 602 (Colo. 2020) (overviewing Colorado and sister states' act-relating-to-office precedent).

65. See, e.g., *Berry*, 457 P.3d at 602–03; State v. Kueny, 986 A.2d 703, 712–13 (N.J. Super. Ct. App. 2010); People v. Flanagan, 71 N.E.3d 541, 550–51 (N.Y. 2017).

66. See, e.g., People v. Ware, 2018 IL App (4th) 160415-U, ¶ 39 (affirming one count of official misconduct for a corrections official who took advantage of the "power dynamic" between him and an individual on parole to force her into a relationship); People v. Arcila,

4. *Knowing the Act is Unlawful.* — This element, in application, is really two subelements: unlawfulness and knowledge of that unlawfulness. On the first subelement, the main question is which sources of law are sufficient to establish unlawfulness. And here, there's significant variation among jurisdictions. Some states impose a low bar, permitting employee handbooks[67] or even judicial determinations of what responsibilities are "inherent in [an] office" to suffice.[68] Others, however, require that the source of law be enacted pursuant to formal procedures or have some other indicia of seriousness that put officials on notice that violation would carry criminal penalties.[69] Moreover, in one state, statutory law is the only acceptable predicate.[70] And going even further, another state requires that the law come from a criminal statute, meaning official misconduct effectively functions as a sentencing enhancement in that jurisdiction.[71]

The second subelement, knowledge, does a lot of work separating criminally culpable conduct from simple negligence (and figures heavily in courts' rejection of vagueness challenges to official misconduct statutes[72]). It's not enough that conduct was unlawful; the defendant must have *known* it was. Knowledge is proven in the mine run of cases through circumstantial evidence: Did the individual participate in department trainings, sign paperwork acknowledging their duties and responsibilities, or violate a well-established and well-publicized regulation?[73] And in some instances—in a move once again similar to federal civil rights

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59 N.Y.S.3d 141, 142–43 (App. Div. 2017) (reinstating the indictment of a police officer who allegedly sexually harassed an individual while displaying his badge and threatening to write her a ticket).

67. See, e.g., State v. Petitto, 59 So. 3d 1245, 1253–54 (La. 2011); People v. Middleton, 147 N.E.3d 583, 584 (N.Y. 2020).

68. See, e.g., N.Y. Penal Law § 195.00 (McKinney 2021); Or. Rev. Stat. § 162.415 (2021); Utah Code § 76-8-201 (2021).

69. See, e.g., State v. Green, 376 A.2d 424, 428 (Del. Super. Ct. 1977) (rejecting prosecutions based on judicial determinations of which duties are inherent in an office); State v. Serstock, 402 N.W.2d 514, 516 (Minn. 1987) (invoking the rule of lenity to find ethics rules to be an insufficient source); infra notes 129–130 (describing formality and nontriviality requirements that some state courts apply).

70. See *Serstock*, 402 N.W.2d at 517.

71. See State v. Hardy, 7 N.E.3d 396, 400–02 (Ind. Ct. App. 2014) (interpreting State v. Dugan, 793 N.E.2d 1034 (Ind. 2003), to require this result under the former version of Indiana's official misconduct statute); see also Ind. Code § 35-44.1-1-1 (2021) (effectively codifying the *Hardy*/*Dugan* requirement by prohibiting the commission of "an offense in the performance of the public servant's official duties").

72. See infra section III.B.1.

73. See, e.g., People v. Yaguchi, 91 N.Y.S.3d 862, 865 (Sup. Ct. 2019) ("The People introduced evidence of the standard police regulations, policies and rules through testimony of supervising and fellow officers as well as the NYPD Patrol Guide, a governing policy manual that delineates the respective authority of officers faced with the situation presented.").

prosecutions—the egregiousness of the conduct itself will provide strong evidence the official *must* have known their actions were unlawful.[74]

B. *Sentencing Consequences*

In most states, official misconduct is a misdemeanor, meaning there's a serious decrease in sentencing exposure from the federal felonies that Part I discusses.[75] The maximum authorized punishment is a year. And in many instances, unless charged alongside other offenses, an official misconduct conviction will lead to little or no jail time, resulting instead in probation- and fine-based sentences.[76] Additionally, forfeiture of office is either required upon conviction or in the court's discretion in many jurisdictions, ensuring that those who have shown themselves unfit for a government office don't have another opportunity to misuse it.[77]

III. EVALUATING STATE OFFICIAL MISCONDUCT STATUTES

Now that the basic contours of official misconduct statutes have been laid out, this Part turns to the normative implications of the statutes. Section III.A discusses the enforcement benefits of the statutes, while section III.B considers two concerns.

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74. Cf. Poole v. State, 425 S.E.2d 655, 656 (Ga. 1993) (stating in an analogous oath-violation prosecution that the defendant's conduct was "so far outside the realm of acceptable police behavior that, despite arguably vague language in the oath, [he] had adequate notice that he could be prosecuted for that conduct" (footnote omitted)). See generally Richman et al., supra note 30, at 444–51 (exploring applications of the willfulness requirement in federal civil rights prosecutions).

75. Official misconduct is a felony in Illinois, Indiana, Louisiana, South Carolina, Texas (depending on the nature of the offense), and Wisconsin. See infra Appendix. There's a concern that official misconduct's misdemeanor status in the majority of states could bring with it some of the negative aspects of the misdemeanor system, including: limited prosecutorial screening, hands-off judicial review, and less-than-full compliance with the Sixth Amendment's rights to counsel and trial by jury. See Alexandra Natapoff, Misdemeanors, 85 S. Cal. L. Rev. 1313, 1328–50 (2012). That said, the right to counsel issues Professor Natapoff describes *may* be less prevalent in the official misconduct context, since some jurisdictions either provide state employees with counsel or—subject to certain requirements—indemnify them for the costs incurred in defending against a criminal charge related to their employment. See, e.g., N.Y. Pub. Off. Law § 19 (McKinney 2021) (authorizing the indemnification of state employees for costs incurred in a criminal prosecution if an employee notifies the attorney general and is either acquitted or has their charges dismissed); Zimmer v. Town of Brookhaven, 678 N.Y.S.2d 377, 379–81 (App. Div. 1998) (overviewing New York's indemnification framework and noting that there is no statutory provision providing for the indemnification of municipal, as opposed to state, employees for costs incurred in criminal prosecutions).

76. See, e.g., In re Weissmann, 105 N.Y.S.3d 124, 125 (App. Div. 2019) (noting the defendant's sentence of probation and fines); Rademacher v. Schneiderman, 66 N.Y.S.3d 541, 543 (App. Div. 2017) (noting a correction officer's plea agreement under which he was sentenced to "a one-year conditional discharge" and required to resign).

77. See infra Appendix.

A. *Enforcement Utility*

1. *Supplementing Federal Criminal Law.* — One of the upsides of official misconduct statutes is that they allow states (if they are so inclined) to supplement federal criminal law in the area of government misconduct. Federal criminal law in this area reaches two main buckets of conduct: (1) quid pro quo corruption or other schemes "directed at" naked pecuniary gain, and (2) intentional civil rights deprivations.[78] What form government misconduct enforcement takes beyond these categories is—as *Kelly* emphasized—largely a matter left to the states to decide.[79] And there are reasons why states could look at these categories of federal criminal law and conclude that they are underinclusive.

Taking the first category of federal law, there are schemes that don't fit its bribery-or-embezzlement rubric but are nonetheless culpable attempts to use an office for financial gain. One example is an official with a conflict of interest refusing to step back from a government decision, knowing that state or local law requires recusal.[80] This was once potentially within the province of federal criminal law, but after *Skilling v. United States* and other decisions striking a similar tenor, it is now exclusively a matter for the states themselves to enforce.[81] Moreover, a state might reasonably conclude that financial gain is not the only motivation warranting sanction—that officials who abuse their office for political gain[82] or simply out of personal loyalties[83] are deserving of sanction as well.

Turning to the second category of federal law, rights-based enforcement mechanisms provide important floors, but subconstitutional rules are often needed to ensure good governance.[84] This is particularly true where the enforcement mechanism is the strong medicine of a federal felony. The DOJ has been cautious bringing federal civil rights prosecutions, and courts have rightfully imposed robust notice requirements.[85] Official misconduct statutes allow states to prohibit and deter rights-*implicating* but not necessarily rights-*depriving* conduct. For example, the ultimate reach of *Brady v. Maryland* to police officers (instead of prosecutors) is

78. See supra Part I.

79. See supra note 4 and accompanying text.

80. See supra note 13 and accompanying text; see also Richman et al., supra note 30, at 220–36 (discussing honest services fraud).

81. 561 U.S. 358 (2010); see also, e.g., Jack D. Arseneault & Joshua C. Gillette, Federal Honest Services Mail Fraud: The Defining Role of the States, N.J. Law., Oct. 2008, at 37, 37–41 (discussing pre-*Skilling* case law in which courts permitted honest services fraud prosecutions that incorporated state law duties imposed by conflict of interest statutes).

82. See, e.g., People v. DiMattina, 690 N.Y.S.2d 73, 74 (App. Div. 1999).

83. See, e.g., People v. Flanagan, 71 N.E.3d 541, 550–51 (N.Y. 2017).

84. See Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 378–80 (1974).

85. See supra section I.B.

uncertain.[86] But departmental policy on disclosure is often clear: There is, for example, no question whatsoever that an NYPD officer who intentionally withholds exculpatory evidence acts unlawfully.[87] Or, while it's a heavy burden to show a particular use of force violated the Fourth Amendment in a way every reasonable officer would recognize,[88] showing an individual knowingly attempted to evade scrutiny by omitting use-of-force paperwork is not.[89]

2. *Difficulty of Ex Ante Delineation.* — Another potential benefit of state official misconduct statutes is that they relieve state legislatures of the difficult, if not impossible, task of specifying every instance of conduct by government employees at every state and local government entity that is worthy of criminal sanction.[90] The state legislature sets forth the general policy that public officials' knowing violation of certain provisions for personal benefit is a misdemeanor, and entities closer to the ground and with subject-matter expertise fill in the details of which provisions count.

3. *Noncriminal Enforcement.* — Additionally, even where prosecutors decline to charge an individual, official misconduct statutes can still advance criminal law's goal of specific deterrence. At the risk of oversimplifying, there are in many jurisdictions certain employees—due to tenure protections or grievance procedures that are the product of statute or collective bargaining agreement—who can be disciplined or removed only for certain enumerated categories of conduct. Often, one category is the commission of a criminal offense.[91] So, even where official misconduct is not charged, it can provide the predicate for a government employer to suspend or remove officials who have shown themselves undeserving of a public trust.[92]

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86. 373 U.S. 83 (1963); see also 7 Lawrence K. Marks, Robert S. Dean, Mark Dwyer, Anthony J. Girese, James A. Yates & Paul McDonnell, West's New York Practice Series: New York Pretrial Criminal Procedure § 7:14 (2d ed. 2021).

87. People v. Lemma, 22 N.Y.S.3d 280, 281–82 (App. Div. 2015) (denying the defendant-police officer's motion to dismiss an official misconduct charge based on his withholding of information about a robbery suspect's alibi, resulting in the individual's incarceration).

88. See supra note 43 and accompanying text.

89. See supra note 14 and accompanying text.

90. Cf. People v. Feerick, 714 N.E.2d 851, 855–56 (N.Y. 1999) ("The [l]egislature intended to encompass flagrant and intentional abuse of authority by those empowered to enforce the law. The current official misconduct statute replaced more than 30 prior crimes, all of which dealt with specific malfeasance or nonfeasance in the accomplishment of official duties." (citations omitted)).

91. See, e.g., N.Y. Pub. Off. Law § 30(1)(e) (McKinney 2021).

92. See, e.g., Snowden v. Vill. of Monticello, 89 N.Y.S.3d 366, 368 (App. Div. 2018) (upholding the defendant's removal from his position as a building inspector after an administrative proceeding determined he knowingly failed to contain asbestos in a building); Wise v. N.Y.C. Hum. Res. Admin., 27 N.Y.S.3d 145, 146 (App. Div. 2016) (upholding removal based on an administrative proceeding that found the respondent "knowingly and actively participated . . . in a scheme to transfer job placement cases from other agency centers . . . so as to satisfy the agency's job-placement goals . . . and to reduce agency pressure on the center arising from years of under-performance").

Moreover, in a handful of jurisdictions, private-citizen enforcement may be an option. After Bridgegate, a handful of car services negatively affected by the hours-long traffic jam brought suit against the *Kelly* defendants under New Jersey's state RICO statute, listing official misconduct as one of several predicate offenses.[93] But litigants will often find themselves—as the Bridgegate private litigants did[94]—stumbling over either standing requirements or the substantive requirements of establishing a RICO claim.[95]

B. *Vagueness and Delegation Concerns*

1. *Vagueness.* — State official misconduct statutes are, of course, not without their drawbacks. Some might object (and many defendants do) that the first two qualities framed as pluses in the previous section are, in fact, downsides—and major ones at that. It's certainly reasonable to worry that, given the flexibility of state official misconduct statutes, they might not provide regulated parties with enough notice of what they prohibit and might lend themselves to arbitrary application by prosecutors. Doctrinally this concern sounds in vagueness. Rooted in due process, the void for vagueness doctrine requires that a criminal prohibition be clear to a "person of common intelligence."[96]

a. *Minority View.* — A small number of courts have invalidated their states' official misconduct statutes under their state constitution, the federal constitution, or both.[97] Looking at the Kansas official misconduct statute on its face and without regard to any imported statutes or regulations, the Kansas Supreme Court concluded that the statute failed the notice prong of the void for vagueness inquiry:

> Due to the great divergence of opinion held in our society as to what is acceptable or proper behavior, misconduct is in the eye of the beholder. For that reason, "misconduct" as a standard of conduct is "so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application."[98]

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93. Galicki v. New Jersey, No. CV 14-169 (JLL), 2016 WL 4950995, at *1–2, *22–26 (D.N.J. Sept. 15, 2016). Note that official misconduct is not a predicate for a *federal* RICO claim. See United States v. Genova, 333 F.3d 750, 758 (7th Cir. 2003).

94. See *Galicki*, 2016 WL 4950995, at *26.

95. See generally Richman et al., supra note 30, at 567–608 (overviewing RICO elements and case law).

96. See United States v. Davis, 139 S. Ct. 2319, 2325 (2019); Johnson v. United States, 576 U.S. 591, 597 (2015); City of Chicago v. Morales, 527 U.S. 41, 90 (1999); see also Sessions v. Dimaya, 138 S. Ct. 1204, 1228 (2018).

97. See State v. DeLeo, 356 So. 2d 306, 307 (Fla. 1978); State v. Adams, 866 P.2d 1017, 1023 (Kan. 1994); cf. State v. Conrad, 643 P.2d 239, 240–43 (Mont. 1982) (holding an open meeting–related subsection of Montana's official misconduct statute to be unconstitutionally vague); State v. Jensen, 694 N.W.2d 56, 56 (Wis. 2005) (dividing equally over whether the state's official misconduct statute was unconstitutionally vague, and affirming the decision below upholding the statute).

98. *Adams*, 866 P.2d at 1023.

Taking the opposite path, the Florida Supreme Court viewed the incorporation of other statutes and regulations to be the root of the Florida statute's vagueness.[99] The court was concerned both that the violation of an agency rule "no matter how minor or trivial" could result in criminal liability and that the statute's "catch-all nature" would lead to "misuse [of] the judicial process for political purposes."[100] Rejecting the state's arguments that a "corrupt intent" requirement saved the statute and that prosecutorial discretion is inherent under any criminal prohibition, the Florida Supreme Court held that the official misconduct statute was "simply too open-ended" to satisfy the arbitrary-application prong of the void for vagueness doctrine. [101]

Moreover, even though *Kelly* cited New Jersey's official misconduct statute with seeming approval, couldn't you read *Kelly*—and the Supreme Court cases that preceded it—to support the minority view that official misconduct statutes raise vagueness concerns? After all, *Kelly* read § 666's misapplication prong out of the U.S. Code,[102] and that prong of the program-theft statute looks functionally similar to state official misconduct statutes.[103] And more generally, the Court's official corruption precedent seems driven by a real unease with too sweeping of official criminal liability and a concern with punishing officials for wielding power for the "wrong" reasons.[104] True, the Supreme Court has developed these concerns only in statutory interpretation decisions, but the decisions are the product of a muscular constitutional avoidance. Shouldn't the Court's constitutionally motivated concerns inform state practice? [105]

b. *Majority View.* — The vast majority of courts to consider the issue, however, have upheld official misconduct statutes against either as-applied or facial vagueness challenges.[106] Their analyses have tended to focus on

99. *DeLeo*, 356 So. 2d at 307–08.

100. Id. at 308 (cleaned up).

101. Id.

102. See supra note 26 and accompanying text.

103. See Richman et al., supra note 30, at 410–18.

104. See supra notes 31–36.

105. See generally William K. Kelley, Avoiding Constitutional Questions as a Three-Branch Problem, 86 Cornell L. Rev. 831, 862–64 (2001) (describing the ambiguous authority of constitutional discussions in avoidance decisions).

106. See State v. Green, 376 A.2d 424, 426–27 (Del. Super. Ct. 1977); People v. Kleffman, 412 N.E.2d 1057, 1059–61 (Ill. App. Ct. 1980); State v. Petitto, 59 So. 3d 1245, 1249–54 (La. 2011); State v. Andersen, 370 N.W.2d 653 (Minn. Ct. App. 1985); State v. Kilmer, 231 N.W.2d 708, 710 (Neb. 1975); State v. Saavedra, 117 A.3d 1169, 1185–89 (N.J. 2015); People v. Goldswer, 368 N.Y.S.2d 323, 323 (App. Div. 1975); State v. Wood, 678 P.2d 1238, 1241–42 (Or. 1984); State v. Szczepanowski, No. E2000-03124-CCA-R3-CD, 2002 WL 1358681, at *38–40 (Tenn. Crim. App. June 24, 2002); Campbell v. State, 139 S.W.3d 676, 686–87 (Tex. App. 2003); State v. Birge, 478 P.3d 1144, 1157–58 (Wash. Ct. App. 2021); State v. Jensen, 681 N.W.2d 230, 236–41 (Wis. 2004); cf. People v. Beruman, 638 P.2d 789, 792–93 (Colo. 1982) (holding the state's official misconduct statute to be constitutional as a general matter but deeming inherent-in-office prosecutions to be unconstitutionally vague); Poole v. State, 425 S.E.2d 655, 656–57 (Ga. 1993) (rejecting an as-applied vagueness challenge to a similar oath-violation criminal statute); Commonwealth v. Checca, 491 A.2d

the double mens rea requirement the statutes impose: Defendants must act (1) *intending* to receive a benefit and (2) *knowing* their conduct violates the law. In their view, that double requirement helps to shield good faith mistakes and simple negligence from criminal liability.

Additionally, the impact of the Supreme Court's official corruption cases on state court decisions has been limited.[107] This makes sense, given that the Court's official corruption cases seem to be motivated in large part by federalism concerns that aren't present when a state is the prosecuting authority.[108] The driving force of many of the Court's official corruption decisions can be tough to parse, but this federalism-forward reading finds support when you compare a case like *Kelly* to the Supreme Court's flat rejection of challenges to criminal statutes that protect purely federal interests (e.g., conspiracy to defraud the United States or making a material false statement to a federal officer).[109]

2. *Administrative Crimes.* — Relatedly, some might object to the authority delegated to state and local administrative agencies by official misconduct statutes. Indeed, in nonmajority opinions, five members of the Supreme Court have expressed a desire to revisit the federal nondelegation doctrine and give it more teeth.[110] And following *Gundy v. United*

1358, 1367 (Pa. Super. Ct. 1985) (rejecting an as-applied vagueness challenge to a similar official-oppression criminal statute).

107. Compare Tanoos v. State, 137 N.E.3d 1008, 1017–18 (Ind. 2019) (rejecting an argument that *McDonnell* governed a case under a state bribery statute), and Commonwealth v. Berry, 167 A.3d 100, 109 (Pa. Super. Ct. 2017) (rejecting an argument that *Skilling* rendered a state statute unconstitutional), with Commonwealth v. Veon, 150 A.3d 435, 447 (Pa. 2016) (relying on *McDonnell* to interpret a state statute). See generally Vincent L. Briccetti, Amie Ely, Alexandra Shapiro & Dan Stein, How Has *McDonnell* Affected Prosecutors' Ability to Police Public Corruption? What Are Politicians and Lobbyists Allowed to Do, and What Are Prosecutors Able to Prosecute?, 38 Pace L. Rev. 707, 719–23 (2018) (describing the potential effect of *McDonnell* on state prosecutions, and noting that the lack of federalism issues may limit *McDonnell*'s reach in state courts).

108. See supra notes 4, 36 and accompanying text.

109. See Richman, Administrative Crimes, supra note 44, at 44 (discussing the breadth of 18 U.S.C. §§ 371 and 1001).

110. Id. at 1–2 (noting recent opinions written or joined by Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh). See generally Peter L. Strauss, Todd D. Rakoff, Gillian E. Metzger, David J. Barron & Anne Joseph O'Connell, Gellhorn and Byse's Administrative Law: Cases and Comments 790–825 (12th ed. 2018) (describing the historical development of the nondelegation doctrine and the prevailing intelligible-principle approach).

In response to these opinions, there's been an outpouring of scholarship assessing the historical bona fides of the nondelegation doctrine. For two contributions to the debate, compare Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 121 Colum. L. Rev. 277, 289–366 (2021) (drawing on colonial and early congressional practice to argue that the Constitution, as originally understood, does not contain a nondelegation doctrine), with Ilan Wurman, Nondelegation at the Founding, 130 Yale L.J. 1490, 1495–97 (2021) (arguing that the evidence, particularly statements from some Founders, supports the presence of a nondelegation doctrine in the Founding period "whereby Congress could not delegate to the Executive decisions over 'important subjects'").

States,[111] there's been renewed academic attention to the topic of *criminal* delegations at the federal level.[112] Of course, structural principles applicable to the federal government aren't incorporated against the states. Moreover, state separation of powers arrangements and administrative systems are incredibly diverse,[113] and important differences between state/local and federal administrative lawmaking should caution against reflexively importing a concept from one system into the other.[114] As a result, any doctrinal movement at the federal level will not necessarily impact state practice.

That said, the reasoning behind the academic critique of administrative crimes (and their defenses) is not strictly limited to the federal level. Not without counterarguments, the critique argues that administrative crimes suffer from a democratic legitimacy gap that is incompatible with expressive and liberal theories of punishment;[115] that the relative ease of administrative lawmaking impairs liberty interests; and that there is a mismatch between the conventional, pragmatic justifications for delegation and the unique task of criminal lawmaking.[116] And some state courts—though not yet in the official misconduct context—have looked to nonmajority, delegation-skeptic Supreme Court opinions as persuasive

111. 139 S. Ct. 2116 (2019).

112. See Brenner M. Fissell, When Agencies Make Law, 10 U.C. Irvine L. Rev. 855, 880–906 (2020); F. Andrew Hessick & Carissa Byrne Hessick, Nondelegation and Criminal Law, 107 Va. L. Rev. 281, 299–329 (2021); Richman, Administrative Crimes, supra note 44, at 10–47.

113. See, e.g., Jim Rossi, Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States, 52 Vand. L. Rev. 1167, 1187–216 (1999) (surveying separation of powers provisions in state constitutions and exploring their application in various doctrines, including nondelegation); Aaron Saiger, *Chevron* and Deference in State Administrative Law, 83 Fordham L. Rev. 555, 558–60 (2014) (collecting recent surveys of and briefly categorizing Chevron-like deference regimes in the states); Gary J. Greco, Note, Standards or Safeguards: A Survey of the Delegation Doctrine in the States, 8 Admin. L.J. Am. U. 567, 580–601 (1994) (surveying state approaches to nondelegation).

114. See Nestor M. Davidson, Localist Administrative Law, 126 Yale L.J. 564, 588–92 (2017).

115. See Fissell, supra note 112, at 887–906. But see Richman, Administrative Crimes, supra note 44, at 10–42 (complicating the assertion that criminal delegations to agencies are unique by describing federal delegations of criminal lawmaking authority to courts, prosecutors, states, and international organizations); Miriam Seifter, Countermajoritarian Legislatures, 121 Colum. L. Rev. 1733, 1755–76, 1780–91 (2021) (pointing to pervasive gerrymandering in some states to challenge the assumption that state legislatures are always the most representative branch, and exploring the consequences of this for state nondelegation doctrines).

116. See Hessick & Hessick, supra note 112, at 299–329. But see Richman, Administrative Crimes, supra note 44, at 39–51 (comparing Title 18 securities fraud and Rule 10b-5 securities fraud as an illustration that counters the arguments that agency rulemaking is necessarily worse for liberty interests and that agencies lack expertise in the criminal lawmaking context).

authority, incorporating the principles laid out in those opinions into their state constitutional and administrative law.[117]

When it comes to official misconduct statutes specifically, so far only the Florida Supreme Court has expressed serious concern under this rubric—incorporating nondelegation concerns into its void for vagueness analysis when it struck down Florida's official misconduct statute in the 1970s.[118] But other states have addressed concerns with official misconduct statutes at the margins by adopting approaches that constrain the scope of acceptable delegations without invalidating the statutes wholesale.[119]

IV. BUILDING INSTITUTIONAL SAFEGUARDS FOR OFFICIAL MISCONDUCT STATUTES

When considering the constitutionality of official misconduct statutes, this Comment comes down on the side of the majority of state courts: The statutes don't violate any requirements imposed by the Fourteenth Amendment's Due Process Clause. As sketched above, the void for vagueness doctrine has a know-it-when-you-see-it flavor, but a recurring consideration is how robust a statute's mens rea element is.[120] In the official misconduct context, the answer is *quite so*. As noted, defendants must have both known their conduct was unlawful and acted with the intent to benefit themselves—not the public. These requirements decrease the risk that innocent, or even distasteful but not criminal, conduct is swept into the statutes' reach.

State courts are, of course, fully within their authority to develop parallel state due process or structural provisions in a more robust manner,[121] and particular defendants may have as-applied challenges available under other state and federal constitutional provisions.[122] This Comment is necessarily a multistate survey and doesn't attempt to argue what results are appropriate under a given state's constitutional tradition.

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117. See Midwest Inst. Of Health v. Governor of Mich. (In re Certified Questions from U.S. Dist. Ct.), No. 161492, 958 N.W.2d 1, 26–27 (Mich. 2020) (relying on Justice Gorsuch's *Gundy* dissent to invalidate the state legislature's delegation of emergency powers to the governor).

118. See supra note 100 and accompanying text.

119. See infra notes 124–129 and accompanying text; cf. Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315 (2000) (arguing that the nondelegation doctrine is alive at the federal level but in a modified version where courts specify certain actions—such as those that infringe on state and tribal sovereignty—that administrative agencies may not engage in until they have clear congressional authorization).

120. See supra notes 106–108 and accompanying text.

121. See William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 (1977).

122. See, e.g., Wright v. DeArmond, 977 F.2d 339, 347 (7th Cir. 1992) (rejecting a First Amendment Petition Clause defense); People v. Selby, 698 N.E.2d 1102, 1107 (Ill. Ct. App. 1998) (rejecting a First Amendment association defense); Ex parte Perry, 483 S.W.3d 884, 894–95 (Tex. Crim. App. 2016) (vacating a conviction under a state separation of powers clause); State v. Birge, 478 P.3d 1144, 1158–59 (Wash. Ct. App. 2021) (rejecting a First

Moreover, this Comment's conclusion that official misconduct statutes are constitutional is not meant to suggest that the concerns Part III sketches drop out of the picture entirely. The statutes *do* vest a significant amount of discretion, especially when combined with conspiracy and accomplice liability. And it's not difficult to envision situations where personal animus or other wholly arbitrary considerations seep into prosecutorial decisionmaking under these open-textured provisions.[123] Nor is it out of the question that a particular government official finds himself or herself to have committed a criminal offense without serious notice.[124] These concerns are real.

Nor does the conclusion that the statutes are constitutional mean there's no role for courts to play when it comes to official misconduct statutes; there are a number of more limited interventions that courts should take to ensure official misconduct statutes are applied in an appropriate manner and that defendants receive adequate notice. First, courts should be receptive to as-applied void for vagueness challenges concerning the specific statute or regulation an official misconduct prosecution is predicated on.[125] Second, courts should similarly apply the rule of lenity and other state-specific rules of strict construction to predicate laws.[126] Third, courts should carefully police the procedural validity of predicate regulations; if a regulation does not meet the requirements that a state or local government has set for it to become law, it cannot be the basis for an official misconduct prosecution.[127] Fourth, courts can consider adopting heightened pleading requirements for official misconduct indictments, so that defendants are adequately appraised of the specific laws they allegedly

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Amendment free speech overbreadth defense); State v. Jensen, 681 N.W.2d 230, 241–53 (Wis. 2004) (rejecting First Amendment free speech overbreadth and state separation of powers defenses).

123. See, e.g., State v. Thompson, 233 So. 3d 529, 564 (La. 2017) (Johnson, C.J., concurring in part and dissenting in part) ("The charges in this case arise from political strife in the town of Jonesboro, and the case has been fraught with racial undertones from inception.").

124. See, e.g., People v. Simmons, 49 N.Y.S.3d 615, 616–17 (Cnty. Ct. 2017) (rejecting a motion to dismiss the indictment of a corrections officer who allegedly used her personal cellphone at work in violation of the employee handbook).

125. See *Selby*, 698 N.E.2d at 1107–09 (considering but rejecting a vagueness challenge to a statute prohibiting probation officers from "knowingly socializ[ing]" with probationers); cf. People v. Brown, 1 N.E.3d 888, 895 (Ill. 2013) (noting that the prosecution abandoned a count based on a "rule prohibiting conduct that brings disrepute upon the department").

126. See People v. Grever, 856 N.E.2d 378, 381–85 (Ill. 2006) (carefully interpreting the underlying law and finding that the defendant did not, in fact, violate it); State v. Perez, 464 So. 2d 737, 740–43 (La. 1985) (parsing several predicate provisions identified by the prosecution and finding that none met the affirmative-duty requirement Louisiana courts have imposed in official misconduct prosecutions); State v. Passman, 391 So. 2d 1140, 1144 (La. 1980) (same).

127. See, e.g., People v. Williams, 940 N.E.2d 50, 56 (Ill. 2010) (vacating an official misconduct conviction because the police department regulations at issue were not, as required by law, ratified by the village president and board of trustees).

violated and have the ability to build a defense accordingly.[128] Fifth, and finally, courts can consider—either as a matter of construction[129] or pursuant to a clear textual command[130]—precluding prosecutions based on regulations that are far too minor or haphazardly promulgated to carry the risk of incarceration.

But it's important not to think of courts as the *sole* institution capable of effectuating constitutional values in this context.[131] Where and how the responsibility for prosecuting official misconduct is placed within a state's *executive* branch can go a long way toward ensuring prosecutorial regularity. This Comment argues that states should increase the role state attorneys general play in official misconduct enforcement decisions specifically and the prosecution of government misconduct more generally.

A. *Concerns With Local Enforcement*

A heavy dose of localism is—in most instances—desirable, and going back as far as Alexis de Tocqueville, it's been a prominent part of our country's political life.[132] But there are situations where the incentives of local actors are fundamentally misaligned.[133] The detection and prosecution of government misconduct is one such instance. As Professor Norman Abrams has put it, there's a "distance imperative" when it comes to rooting

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128. See, e.g., People v. Beruman, 638 P.2d 789, 793–94 (Colo. 1982); People v. Davis, 668 N.E.2d 119, 121–23 (Ill. Ct. App. 1996) (en banc); State v. Spina, 259 So. 2d 891, 893 (La. 1972), overruled by State v. Gainey, 376 So. 2d 1240 (La. 1979); State v. Serstock, 402 N.W.2d 514, 518–20 (Minn. 1987).

129. See *Williams*, 940 N.E.2d at 57–59 (laying out a two-part disjunctive test that asks, first, whether the regulation is of the type that the legislature intended to be a felony and require removal from office and, second, whether the regulation was adopted pursuant to formal procedures that involved more than one official); People v. Dorrough, 944 N.E.2d 354, 356–58 (Ill. App. Ct. 2011) (reversing an official misconduct conviction under *Williams*'s formality prong); State v. Schmidt, No. 04-701, 2005 WL 3540983, at *5 (Mont. Dec. 28, 2005) (adopting the Illinois approach).

130. See State v. Brewer, 945 S.W.2d 803, 807 (Tenn. Crim. App. 1997) (applying Tenn. Code Ann. § 39-16-402(d), which makes it a defense to official misconduct that the benefit the defendant received is "trivial" and "involved no substantial risk of undermining official impartiality").

131. Cf. Christopher J. Walker, Administrative Law Without Courts, 65 UCLA L. Rev. 1620, 1638 (2018) ("It is a mistake for administrative law to fixate on judicial review as the core safeguard for our constitutional republic.").

132. See generally Richard Briffault, Our Localism: Part I—The Structure of Local Government Law, 90 Colum. L. Rev. 1 (1990) [hereinafter Briffault, Our Localism Part I] (discussing the significance of localism in American legal history); Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 Colum. L. Rev. 346 (1990) (overviewing the evolution of localism throughout American history).

133. Briffault, Our Localism Part I, supra note 132, at 57 (citing the provision of low-income housing as one example).

out government misconduct.[134] Yet enforcing state criminal law remains primarily a *local* endeavor[135] (though this picture has begun to change with state-level authorities taking on slightly more active roles in some jurisdictions[136]). Local enforcement compounds the prosecutorial discretion concerns Part III discusses and creates problems that run in two different directions.

The first concern is *under*-enforcement. Local prosecutors rely on the police to investigate, build, and refer cases.[137] And local prosecutors, working under elected district attorneys in most jurisdictions, aren't above the fray of local politics.[138] Therefore, they may be reluctant to charge police officers or local political actors out of fear of disrupting the relationships they rely on.[139] The second, and opposite, concern is *over*- or *mis*-enforcement. Official misconduct statutes could be used against a political opponent; out of animus; or again as the product of agent–principal dynamics (e.g., a prosecutor bringing a charge solely at the behest of another agency). Given the open-textured quality of official misconduct statutes—when compared to, for example, bribery statutes that reach only quid pro quo corruption—this latter concern with pretextual charging is particularly pronounced.

B. *Three Models of State Involvement*

States, however, can mitigate these problems and increase enforcement "distance" by incorporating state attorneys general into official misconduct charging decisions.[140] What form this should (or can) take will depend on a variety of factors, including: the statutory and common law

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134. Norman Abrams, The Distance Imperative: A Different Way of Thinking About Public Official Corruption Investigations/Prosecutions and the Federal Role, 42 Loy. U. Chi. L.J. 207, 210 (2011).

135. See Daniel Richman & Sarah A. Seo, How Federalism Built the FBI, Sustained Local Police, and Left Out the States, 17 Stan. J. C.R. & C.L. (forthcoming 2021) (manuscript at 2), https://ssrn.com/abstract_id=3714325 [https://perma.cc/KN57-US4C].

136. See Rachel E. Barkow, Federalism and Criminal Law: What the Feds Can Learn From the States, 109 Mich. L. Rev. 519, 565–69 (2011) (highlighting Florida, Alabama, and Arizona as three jurisdictions that buck this norm by granting greater control to state-level prosecutors).

137. See Kate Levine, Who Shouldn't Prosecute the Police, 101 Iowa L. Rev. 1447, 1464–71 (2016); Daniel C. Richman, Prosecutors and Their Agents, Agents and Their Prosecutors, 103 Colum. L. Rev. 749, 767–78 (2003) [hereinafter Richman, Prosecutors and Their Agents].

138. See Michael J. Ellis, Note, The Origins of the Elected Prosecutor, 121 Yale L.J. 1528, 1538–39 (2012).

139. This dynamic can perhaps be seen in a recent prosecution by the New York Attorney General of a local assistant district attorney who sandbagged his grand jury presentation concerning a police homicide. See People v. Abelove, 113 N.Y.S.3d 378, 379–80 (App. Div. 2019).

140. This Comment joins a number of scholars who have proposed increased state-level involvement over prosecution. See, e.g., Richman & Seo, supra note 135, at 37–43.

jurisdiction of a given state attorney general;[141] state legislative appropriations and the availability of federal funding;[142] and the ability of an attorney general to place affirmative obligations or constraints on local prosecutors. Moreover, the reforms proposed here may require legislation in some states but be available through executive action in others. With these caveats in mind, three models of state involvement—and their relative benefits—can still be discussed.

First, a state could create a unit within the office of the attorney general that is vested with either exclusive or concurrent jurisdiction over official misconduct statutes. Of states with an official misconduct statute on the books, Kentucky,[143] Louisiana,[144] Michigan,[145] New York,[146] Tennessee,[147] and Wisconsin[148] follow this model to some extent.[149] This model introduces the largest amount of "distance," but it likely does so at the largest cost to the state and the largest shift in state–local relations.

Second, a state could draw on federal civil rights prosecutions and leave government corruption enforcement largely decentralized but require approval by the office of the attorney general before a local prosecutor can file an indictment.[150] For instance, a county prosecutor could be required to persuade the attorney general that internal disciplinary mechanisms are insufficient to vindicate the state's interest in government

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141. See Barkow, supra note 136, at 545–69.

142. Cf. Richman & Seo, supra note 135, at 33–37 (discussing different funding approaches taken by the federal government).

143. Office of Special Prosecutions, Att'y Gen.: Daniel Cameron, https://ag.ky.gov/about/Office-Divisions/OSP/Pages/default.aspx [https://perma.cc/375E-7FWL] (last visited Mar. 4, 2021).

144. Insurance Fraud Support Unit, Att'y Gen. Jeff Landry: La. Dep't of Just., https://www.ag.state.la.us/Page/33 [https://perma.cc/L56Z-UDTG] (last visited Mar. 4, 2021).

145. Schuette Creates Public Integrity Unit to Ramp Up Fight Against Public Corruption, Dep't of Att'y Gen. (Feb. 10, 2011), https://www.michigan.gov/ag/0,4534,7-359–251369–,00.html [https://perma.cc/2AYA-3TYU].

146. Office of Special Investigation, Letitia James: N.Y. Att'y Gen., https://ag.ny.gov/SIPU [https://perma.cc/MC92-KLTB] (last visited Sept. 2, 2021); Public Integrity Bureau, Letitia James: N.Y. Att'y Gen., https://ag.ny.gov/bureau/public-integrity-bureau [https://perma.cc/N6ZE-R22V] (last visited Mar. 4, 2021).

147. Divisions, Herbert H. Slatery III: Tenn. Att'y Gen. & Reporter, https://www.tn.gov/attorneygeneral/about-the-office/divisions.html [https://perma.cc/7X7S-CDS3] (last visited Mar. 4, 2021).

148. Criminal Litigation Unit, Wis. Dep't of Just., https://www.doj.state.wi.us/dls/criminal-litigation-unit [https://perma.cc/NA8S-97UF] (last visited Mar. 4, 2021).

149. This list is based on generally available information. Professor Rachel Barkow provides a larger list that is based on information collected from interviews and is not limited to states with official misconduct statutes. See Barkow, supra note 136, at 546 n.111.

150. See Richman et al., supra note 30, at 444 (describing the notice requirements for 18 U.S.C. §§ 241 and 242 prosecutions, and the informal control exercised by Main Justice under that regime); see also DOJ, Justice Manual § 8-3.130–.141 (2018), https://www.justice.gov/jm/jm-8-3000-enforcement-civil-rights-criminal-statutes#8-3.130 [https://perma.cc/TYQ2-XQQA] (last visited Sept 2, 2021).

integrity or that the prosecution is otherwise in the public interest.[151] This proposal requires less state investment and is likely less politically disruptive, but it addresses only one of the two problems identified above, overenforcement, and does nothing to solve the problem of underenforcment. No state with an official corruption statute currently has a system on the books like this. And the closest arrangement is probably that of Louisiana, where the office of the attorney general reviews certain criminal prosecutions and reserves the right to intervene and displace local authority.[152]

Third, and finally, states could place requirements on county prosecutors to report statistics on the number of prosecuted official misconduct cases and the number of declined referrals.[153] Each case is unique and requires individualized decisionmaking, but persistent trends can still be identified over time (though caution is needed).[154] Context can also be added by requiring local prosecutors to file internal declination statements.[155] This model exerts the least amount of state control over local prosecutors' decisionmaking but would still allow states to identify enforcement problems and use more informal methods to address them.

C. *Counterarguments to State Enforcement*

It's certainly true that "distance" concerns also arise at the state level if, for example, a state legislator or (as in Texas) the attorney general becomes the subject of an investigation.[156] Indeed, state attorneys general are increasingly political and partisan actors;[157] there's a risk they might play too heavy of a hand in directing anticorruption enforcement toward

151. Cf. 18 U.S.C. § 249(b)(1) (2018) (imposing a similar certification requirement on U.S. Attorney offices before they can file federal hate crime indictments).

152. See Charles J. Yeager & Lee Hargrave, The Power of the Attorney General to Supercede a District Attorney: Substance, Procedure & Ethics, 51 La. L. Rev. 733, 733–35 (1991) (describing Louisiana law); Tyler Q. Yeargain, Comment, Discretion Versus Suppression: Calibrating the Power Balance Between Local Prosecutors and State Officials, 68 Emory L. Rev. 95, 110–26 (2018) (surveying the authority of state attorneys general to intervene in prosecutions).

153. See DOJ, United States Attorneys' Annual Statistical Report Fiscal Year 2020, at tbls.14 & 15 (2020), https://www.justice.gov/usao/page/file/1390446/download [https://perma.cc/SS9M-T3H9] (reporting the number of declined federal cases and the provided reasons for declination).

154. Cf. Richman, Prosecutors and Their Agents, supra note 137, at 762–67 (discussing possible interpretations of high declination rates).

155. See Jessica A. Roth, Prosecutorial Declination Statements, 110 J. Crim. L. & Criminology 477, 501–02 (2020) (discussing the increase in internal accountability that declination statements can provide).

156. See supra note 8 and accompanying text.

157. See Seth Davis, The New Public Standing, 71 Stan. L. Rev. 1229, 1255–58 (2019) ("In almost all states, the attorney general is an elected official with a partisan constituency."); Margaret H. Lemos & Ernest A. Young, State Public-Law Litigation in an Age of Polarization, 97 Tex. L. Rev. 43, 50 (2018) ("[S]tate litigation is indeed becoming more 'political' in the sense that Democratic and Republican AGs increasingly are pursuing different causes or are lining up on opposite sides of the same case.").

partisan ends if authority is centralized. Moreover, attorneys general may too feel indebted to certain municipal employee organizations in a manner similar to local prosecutors.[158] Two quick responses: First, this concern is significant and likely calls for some degree of insulation. If, for instance, a state adopts the second model, ultimate certification authority could rest in a high-level career deputy instead of running all the way up the ladder to political appointees.[159] Second, none of the proposals here pretend whatsoever to be magic bullets. Institutional design is ultimately a risk-balancing exercise; if local abuse is a larger problem in terms of relative size, then centralization may be desirable even if it brings a risk of hold-up problems in a different context.

CONCLUSION

The Court's message in *Kelly* was clear: Beyond combatting corruption aimed at naked pecuniary gain, federal prosecutors won't have too large of a role to play in ensuring good government at the state and local level. As the federal government's involvement in this area decreases, the onus shifts more and more to the states to pick up the slack. As this Comment suggests, states have a dynamic tool on the books in the form of official misconduct statutes. But it's a tool that's not without its drawbacks. So, just as important as substantive law will be whether states have the necessary institutional structure and willpower to responsibly enforce their own prohibitions on government misconduct.

158. See Levine, supra note 137, at 1490–91.

159. Cf. Tonna Onyendu, Note, Department of Justice's Role in Electoral Politics: Maintaining Neutrality in the Enforcement of Voting Rights, 31 Geo. J. Legal Ethics 799, 802 (2018) ("[T]he career attorneys of the Department of Justice . . . have remained largely insulated from the inherently political nature of the Attorney General position . . . .").

APPENDIX

TABLE 1: STATE OFFICIAL MISCONDUCT STATUTES

Alaska		
Offense(s)	Official Misconduct (Class A Misdemeanor)	Alaska Stat. § 11.56.850 (2021)
Removal from Office	N/A	N/A
Arkansas		
Offense(s)	Abuse of Office (Varies)	Ark. Code Ann. § 5-52-107 (2021)
Removal from Office	Required	Id. § 16-90-112
Colorado		
Offense(s)	First Degree Official Misconduct (Class 2 Misdemeanor) Second Degree Official Misconduct (Class 1 Petty Offense)	Colo. Rev. Stat. § 18-8-404 (2021) Id. § 18-8-405
Removal from Office	N/A	N/A
Delaware		
Offense(s)	Official Misconduct (Class A Misdemeanor)	Del. Code tit. 11, § 1211 (2021)
Removal from Office	N/A	N/A
Guam		
Offense(s)	Official Misconduct (Misdemeanor)	9 G.C.A. § 49.90 (2020)
Removal from Office	N/A	N/A
Illinois		
Offense(s)	Official Misconduct (Class 3 Felony)	720 Ill. Comp. Stat. Ann. 5/33-3 (West 2021)
Removal from Office	Required	65 Ill. Comp. Stat. Ann. 5/3.1-55-15 (West 2021)
Indiana		
Offense(s)	Official Misconduct (Level 6 Felony)	Ind. Code § 35-44.1-1-1(1) (2021)
Removal from Office	In the court's discretion	Id. § 35-50-1-1

Iowa		
Offense(s)	Nonfelonious Misconduct in Office (Serious Misdemeanor)	Iowa Code § 721.2 (2021)
Removal from Office	N/A	N/A
Kentucky		
Offense(s)	Official Misconduct in the First Degree (Class A Misdemeanor) Official Misconduct in the Second Degree (Class B Misdemeanor) Malfeasance of Neglect of County Officers (Unspecified Offense Level)	Ky. Rev. Stat. Ann. § 522.020 (West 2021) Id. § 522.030 Id. § 61.170
Removal from Office	Required for conviction under third provision As grounds for removal action by governor under first and second provision	Id. § 63.090–63.180 Id. § 63.100
Louisiana		
Offense(s)	Malfeasance in Office (Five Years Prison/$100 Fine) (Felony)	La. Stat. Ann. § 14:134 (2020)
Removal from Office	N/A	N/A
Maryland		
Offense(s)	Common Law Misconduct in Office (Misdemeanor)	E.g., Sewell v. State, 197 A.3d 607, 624–25 (Md. 2018)
Removal from Office	Required for elected officials	Md. Const. art. XV, § 2
Michigan		
Offense(s)	Common Law Misconduct in Office (Misdemeanor) Willful Neglect of Duty	E.g., People v. Bruce, 939 N.W.2d 188, 190 (Mich. 2019) Mich. Comp. Laws Ann. § 750.478 (West 2021)
Removal from Office	N/A	N/A

Minnesota		
Offense(s)	Misconduct of Public Officer or Employee (Up to One Year of Confinement/Fine of $3,000/Both)	Minn. Stat. § 609.43 (2020)
Removal from Office	N/A	N/A
Montana		
Offense(s)	Official Misconduct (Class A Misdemeanor)	Mont. Code Ann. § 45-7-401 (West 2021).
Removal from Office	Required	Id. § 401(3)
Nebraska		
Offense(s)	Official Misconduct (Class II Misdemeanor)	Neb. Rev. Stat. § 28-924 (2016)
Removal from Office	Discretionary	Id. § 23-2001
New Hampshire		
Offense(s)	Official Oppression (Misdemeanor)	N.H. Rev. Stat. Ann. § 643:1 (2021); see also id. § 24:25
Removal from Office	N/A	N/A
New Jersey		
Offense(s)	Official Misconduct (Crime of the Third Degree)	N.J. Stat. Ann. § 2C:30-2 (West 2021)
Removal from Office	Required	Id. § 2C:51-2
New York		
Offense(s)	Official Misconduct (Class A Misdemeanor)	N.Y. Penal Law § 195.00 (McKinney 2021)
Removal from Office	Discretionary	Id. § 60.30
Oregon		
Offense(s)	Official Misconduct in the First Degree (Class A Misdemeanor) Official Misconduct in the Second Degree (Class C Misdemeanor)	Or. Rev. Stat. § 162.415 (2020) Id. § 162.405
Removal from Office	N/A	N/A

South Carolina		
Offense(s)	Common Law Misconduct in Office (Up to Ten Years in Prison) (Felony)	E.g. State v. Harrison, 854 S.E.2d 468, 489 n.10 (S.C. 2021)
Removal from Office	N/A	N/A
Tennessee		
Offense(s)	Official Misconduct (Class A Misdemeanor or Class E Misdemeanor)	Tenn. Code Ann. § 39-16-402 (2021)
Removal from Office	Required	Id. § 39-16-406
Texas		
Offense(s)	Abuse of Official Capacity (Varies)	Tex. Penal Code § 39.02 (2021)
Removal from Office	N/A	N/A
Utah		
Offense(s)	Official Misconduct—Unauthorized Acts or Failure of Duty (Class B Misdemeanor)	Utah Code § 76-8-201 (2021)
Removal from Office	N/A	N/A
Washington		
Offense(s)	Official Misconduct (Gross Misdemeanor) Failure of Duty by Public Officer (Misdemeanor)	Wash. Rev. Code § 9A.80.010 (2021) Id. § 42.20.100
Removal from Office	N/A	N/A
Wisconsin		
Offense(s)	Misconduct in Public Officer (Class I Felony)	Wis. Stat. § 946.12 (2021)
Removal from Office	Varies	Id. § 17.06-16
Wyoming		
Offense(s)	Official Misconduct (Misdemeanor)	Wyo. Stat. Ann. § 6-5-107 (2021)
Removal from Office	Required (subject to exceptions)	Id. § 6-5-113