POLICY REPORT

BRENNAN CENTER FOR JUSTICE

Protecting Against Police Brutality and Official Misconduct

A New Federal Criminal Civil Rights Framework

By Taryn A. Merkl PUBLISHED APRIL 29, 2021
With a foreword by Eric H. Holder Jr.

Brennan Center for Justice at New York University School of Law

Table of Contents

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that works to reform, revitalize — and when necessary defend — our country's systems of democracy and justice. The Brennan Center is dedicated to protecting the rule of law and the values of constitutional democracy. We focus on voting rights, campaign finance reform, ending mass incarceration, and preserving our liberties while also maintaining our national security. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, in the courts, and in the court of public opinion.

STAY CONNECTED TO THE BRENNAN CENTER

Visit our website at
www.brennancenter.org

Foreword

The protest movement sparked by George Floyd's killing last year has forced a nationwide reckoning with a wide range of deep-rooted racial inequities — in our economy, in health care, in education, and even in our democracy — that undermine the American promise of freedom and justice for all. That tragic incident provoked widespread demonstrations and stirred strong emotions from people across our nation.

While our state and local governments wrestle with how to reimagine relationships between police and the communities they serve, the Justice Department has long been hamstrung in its ability to mete out justice when people's civil rights are violated.

The Civil Rights Acts passed during Reconstruction made it a federal crime to deprive someone of their constitutional rights while acting in an official capacity, a provision now known as Section 242. Today, when state or local law enforcement are accused of misconduct, the federal government is often seen as the best avenue for justice — to conduct a neutral investigation and to serve as a backstop when state or local investigations falter. I'm proud that the Justice Department pursued more Section 242 cases under my leadership than under any other attorney general before or since.

But due to Section 242's vague wording and a series of Supreme Court decisions that raised the standard of proof needed for a civil rights violation, it's often difficult for federal prosecutors to hold law enforcement accountable using this statute.

This timely report outlines changes to Section 242 that would clarify its scope, making it easier to bring cases and win convictions for civil rights violations of these kinds. Changing the law would allow for charges in cases where prosecutors might currently conclude that the standard of proof cannot be met. Perhaps more important, it attempts to deter potential future misconduct by acting as a nationwide reminder to law enforcement and other public officials of the constitutional limits on their authority.

The statutory changes recommended in this proposal are carefully designed to better protect civil rights that are already recognized. And because Black, Latino, and Native Americans are disproportionately victimized by the kinds of official misconduct the proposal addresses, these changes would advance racial justice.

This proposal would also help ensure that law enforcement officers in every part of the United States live up to the same high standards of professionalism. I have immense regard for the vital role that police play in all of America's communities and for the sacrifices that they and their families are too often called to make on behalf of their country. It is in great part for their sake — and for their safety — that we must seek to build trust in all communities.

We need to send a clear message that the Constitution and laws of the United States prohibit public officials from engaging in excessive force, sexual misconduct, and deprivation of needed medical care. This proposal will better allow the Justice Department to pursue justice in every appropriate case, across the country.

Eric H. Holder Jr.
Eighty-Second Attorney General of the United States

Introduction

Excessive use of force by law enforcement, sexual abuse by public officials and others in positions of authority, and the denial of needed medical care to people in police or correctional custody undermine the rule of law, our government, and our systems of justice.

When public officials engage in misconduct, people expect justice, often in the form of a federal investigation and criminal prosecution. In 2020 alone, instances of police violence, including the killings of George Floyd, Rayshard Brooks, and Breonna Taylor and the shooting of Jacob Blake, led to demands for increased police accountability and federal civil rights investigations.[1]

For almost all incidents involving violence by law enforcement, there is one federal criminal law that applies: 18 U.S.C. § 242. Unlike nearly all other criminal laws, the statute does not clearly define what conduct is a criminal act. It describes the *circumstances* under which a person, acting with the authority of government, can be held criminally responsible for violating someone's constitutional rights, but it does not make clear to officials what particular *actions* they cannot take.[2]

It need not be this way. The federal government must renew our national commitment to civil rights by enacting a criminal statutory framework that protects the fundamental constitutional rights of people who come into contact with public officials, including those who are being arrested or are in custody.[3]

Recent instances of racialized police violence have made this matter all the more urgent. In 2020 alone, police killed more than 1,100 people.[4] Black Americans are three times more likely to be killed by a police officer than white Americans and nearly twice as likely to be killed as Latino Americans.[5] Police killing is a leading cause of death for Black men in the United States — one in every 1,000 Black men will die at the hands of police.[6] In 2019, Black people represented 24 percent of those killed, despite making up only 13 percent of the population, and although Black people are 3 times more likely to be killed by the police than white people, they are 1.3 times more likely than whites to be unarmed in such incidents.[7] These disparities have led unprecedented numbers of Americans to demand justice for victims of police violence and changes to our criminal justice system.[8]

In addition to law enforcement brutality, other types of official misconduct shock the conscience. These include sexual misconduct by public officials; officials' failure to provide medical treatment to people who are under arrest or in jail or prison; and pervasive violence by correctional officers in jails and prisons, where excessive force against incarcerated people is often shielded from public view.[9] Yet cases are rarely prosecuted under § 242.[10]

Congress should make structural changes to our laws to help protect the civil rights of all people. If passed, the legislation recommended in this report would impact how law enforcement, corrections, and other public officials operate nationwide. By more specifically defining what actions violate civil rights, the law would put officials on clearer notice of what is forbidden. In addition, the proposed statute would specifically codify the authority to prosecute fellow officers or supervisors who know a civil rights violation is occurring but fail to intervene — something the law already allows.[11] These changes to § 242 should result in modifications to police and law enforcement training across the country and also deter civil rights violations.[12] For those public officials and law enforcement officers who do deprive someone of his or her civil rights, these changes would lower some of the barriers to federal prosecutions and civil lawsuits.[13]

I. The Current Federal Criminal Civil Rights Laws

The text of § 242 is different from most criminal laws, which prohibit specific *conduct* or *actions*.[14] For example, a state murder statute typically provides that a person is guilty of murder when "[w]ith intent to cause the death of another person, he causes the death of such person or of a third person."[15] The prohibited conduct is clear: causing a person's death. In contrast, § 242 describes the circumstances under which a person, acting with the authority of government, could be held criminally responsible for violating a person's constitutional rights. But it does not make clear to public officials, including law enforcement officers, what *actions* they cannot take.

The text of § 242 demonstrates that Congress originally intended for the scope of actions that might violate the law to be broad, recognizing a violation when a willful deprivation of "*any* rights, privileges, or immunities secured or protected by the Constitution or laws of the United States" occurs by someone acting "under color of any law" (that is, acting in one's official capacity or using authority derived from federal, state, or local law).[16] This expansive framing, which is used in both § 242 and its civil corollary, 42 U.S.C. § 1983, was designed to establish the federal government "as a guarantor of basic federal rights against state power" following the passage of the Fourteenth Amendment, which requires states to provide due process and equal protection under law.[17] But the statute presents obstacles to federal prosecutors who seek to charge government officials, including police and correctional officers, with a crime due to the law's vague and expansive framing and resulting lack of clarity about what *conduct* is illegal.[18]

To better protect Americans' rights and lives, Congress should more clearly specify what actions are criminal. Because § 242 and § 1983 cover a wide swath of potential violations — well beyond what the proposed amendments would cover — this report and the model legislation included in the appendix do not suggest a repeal of § 242's current language. Rather, the proposed amendments would add to the federal criminal civil rights laws by specifying three of the most egregious types of official misconduct: excessive use of force; abuse of one's position, power, or authority to engage in sexual activity; and deliberate failure to provide medical treatment to people in custody. In addition, the proposed amendments would incorporate failure to intervene as a form of aiding and abetting liability, making clear that it is a crime to look the other way knowing that a fellow law enforcement officer or public official is violating a person's rights. Changes in law are likely not enough to eliminate the problems of police violence and abuse of authority; there may always be some who choose to violate the law. But enhanced federal authority to prosecute official misconduct would help to deter such misconduct while also promoting accountability in law enforcement and among other public officials.

Title 18, United States Code, Section 242

"**Whoever, under color of any law,** statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death."

A. The Origins of 18 U.S.C. § 242

Section 242, whose language dates as far back as the Civil Rights Act of 1866, is the successor to Reconstruction-era civil rights statutes that were passed with the goal of helping the federal government enforce protections for newly freed Black people who faced widespread violence and little legal protection from state actors.[19] Congress's power to enact these civil rights laws derives from the Reconstruction Amendments (the Thirteenth, Fourteenth,

and Fifteenth). The Enforcement Clause of the Fourteenth Amendment (Section 5) provides Congress with the authority to pass laws "to secure the guarantees of the Fourteenth Amendment" and to regulate conduct that was previously the purview of the states.[20]

The enactment of the Fourteenth Amendment fundamentally altered the federal government's power to protect people and to define their rights.[21] Congress, relying on this new power, passed civil rights laws with the goals of protecting Black Americans from the scourge of racist violence they experienced at the hands of private and governmental actors and providing redress in federal court for civil rights violations.[22] However, 150 years later, these laws do not provide meaningful civil rights protections from police brutality and other official misconduct — violations of rights that are disproportionately borne by Black people and other marginalized groups.[23]

Section 242 is often the only criminal statute available under federal law to prosecute state and local public employees, including law enforcement and correctional officers, for on-the-job misconduct. Most other offenses that could be charged against state and local officers (such as assault or reckless endangerment, which do not require proof of an intent to violate a person's civil rights) fall under state and municipal jurisdiction, outside the scope of federal prosecutors' authority, but are rarely prosecuted.[24] One other federal criminal civil rights statute, 18 U.S.C. § 241 (the companion conspiracy provision to § 242), applies only if a public official is acting with others in a criminal agreement to violate someone's rights.[25]

B. Obstacles to Criminal Civil Rights Prosecutions

To establish a criminal violation of § 242, a federal prosecutor must prove three essential elements beyond a reasonable doubt: that the defendant acted "(1) 'willfully' and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States."[26] Generally speaking, if a public official acts in an official capacity or by using governmental authority (even if acting beyond the scope of what has been authorized), the "under color of law" element can be established.[27] But the other two elements, which require federal prosecutors to prove that an official acted willfully to deprive a person of one or more rights, often impede efforts to hold law enforcement and correctional officers criminally liable under § 242.

The first element of § 242 — that the defendant acted willfully — has been stringently interpreted.[28] In a now-infamous Supreme Court case, *Screws v. United States* (1945), a sheriff, special deputy sheriff, and policeman were charged with violating the rights of Robert Hall, a Black man, by beating him to death while he was in handcuffs following his arrest.[29] Despite characterizing the case as a "shocking and revolting episode in law enforcement," the Supreme Court ultimately reversed the defendants' convictions.[30] The Court held that to obtain a conviction under § 242, the prosecution must establish that the defendant's actions were willful, meaning that the official acted "in open defiance or in reckless disregard of a constitutional requirement that has been made specific and definite."[31] This does not mean that federal prosecutors must prove that the public official was "thinking in constitutional terms" and decided to violate a specific federal right or law, but the evidence must establish beyond a reasonable doubt that the official intended to engage in conduct that violated the Constitution or laws and did so knowing that such conduct was wrongful.[32]

This high standard can cause criminal civil rights cases to end before they start. The 2012 killing of Ramarley Graham is but one high-profile example in which the willfulness requirement played a significant role in federal prosecutors' determination not to charge.[33] In this case, a New York City Police Department officer followed Graham into his home, breaking down a door to gain entry. Although the officer was ultimately found to be wrong in his stated belief that Graham had a gun, the investigation did not uncover what prosecutors believed would have been sufficient evidence to refute the officer's claim of self-defense. In reviewing the officer's actions based on the information available to him in the moment when he shot Graham, federal prosecutors decided that it was unlikely that they could establish beyond a reasonable doubt that the officer "*willfully* deprived Mr. Graham of his right to be free from excessive force."[34] In a press statement explaining the decision, U.S. Attorney for the Southern District of New York Preet Bharara characterized the "willfully" standard as "the highest standard of intent imposed by law . . . different from and higher than the intent standard under the relevant state statutes. Neither accident, mistake, fear, negligence nor bad judgment is sufficient to establish a federal criminal civil rights violation."[35]

In addition, the third element of § 242, which requires proof of a deprivation of rights, is undeniably vague.[36] Because it is broad and inclusive — permitting a prosecution for the deprivation of "any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States" — the statute has been narrowly interpreted to ensure that potential defendants have adequate notice of the type of actions that may constitute a crime.[37] The Supreme Court in *Screws* first raised the vagueness issue and attempted to add notice to the law by limiting its application to types of conduct that have previously been held to amount to civil rights violations.[38] Specifically, the *Screws* Court sought to save § 242 from "unconstitutionality on the grounds of vagueness" by holding

that to deliver a guilty verdict, the jury must find that a criminal defendant had the "specific intent to deprive a person of a federal right made definite by decision or other rule."[39] The rationale for this approach is that if the conduct at issue was previously found to be a civil rights violation, then future potential defendants will have been put on notice regarding what conduct is unlawful.

But this approach is problematic. It essentially means that federal prosecutors bear the burden of proving beyond a reasonable doubt that a public official acted with the specific bad intent to deprive a person of "a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them."[40] This extraordinarily high burden often requires an investigation into an officer's training and specific knowledge of the law in order to prove that the officer acted willfully or in reckless disregard of what the law prohibits.[41] Given that the contours of constitutional rights are developed through cases in judicial opinions, officers do not necessarily have clear notice of which actions violate the law, making it difficult for federal prosecutors to bring criminal charges and for injured parties to seek civil remedies.[42]

Moreover, because constitutional protections may be analyzed differently depending on the federal circuit, this reading of § 242 leaves people with uneven protection across the country.[43] Federal circuit and district courts have, in fact, brought different interpretations to the willfulness standard — and the scope of people's constitutional rights.[44] In addition, in conducting an investigation, federal prosecutors may conclude that the likelihood of success of a federal charge depends on whether an officer received clear training on a specific constitutional right and acted contrary to that training, which can serve as powerful evidence of intent. Altogether, these complexities risk confusion and uncertainty for law enforcement officials, federal prosecutors, and judges in evaluating whether a specific act of misconduct rises to the level of a federal crime.

C. The Interplay of Criminal Prosecutions and Civil Rights Lawsuits

Even when a federal prosecution fails or is not attempted at all, an injured party may bring a civil lawsuit in federal court to seek monetary damages for a constitutional violation under 42 U.S.C. § 1983, the civil counterpart to § 242. These civil cases carry a lower burden of proof: a preponderance of the evidence, rather than proof beyond a reasonable doubt as is required under the criminal law.

The case law discussing the scope of constitutional rights protected under § 242 and § 1983 identifies various protected rights, as well as specific actions by state officials that may constitute a violation of those rights. Once a right has "been defined and made specific by court decisions, that right is encompassed by § 242."[45] But because these rights are constitutional in origin and are explained through judicial opinions, they are not specifically written into the United States Code, making criminal enforcement difficult.

Criminal defendants have a fundamental due process right to notice that their actions are illegal.[46] In the case of § 242, that essentially means notice that their actions violate the Constitution. A person seeking civil redress for a constitutional violation can use § 242's companion statute, § 1983, but will typically also be required to prove that the public official's actions violated a right established with sufficiently "definite" clarity to overcome the defense of "qualified immunity."[47] Qualified immunity, a defense that releases an official from having to participate (or pay damages) in a civil lawsuit, is often invoked by civil defendants who argue that the constitutional right claimed by the injured party was not "clearly established" at the time of the alleged constitutional violation.[48] This requirement is similar to § 242's notice requirement, with an analogous effect: an official may be able to evade civil liability by claiming the contours of the right were not clear, while also claiming that there is no criminal responsibility because the official was not on notice that the actions violated a constitutional right.

Because § 242 and § 1983 essentially cross-reference the entire body of rights protected or guaranteed by the Constitution and laws of the United States, the protection is so broad that it is difficult to enforce in a manner consistent with due process, making courts hesitant to interpret those rights broadly. Greater specificity for the most egregious acts will make the federal civil rights laws stronger across the board. The inclusion of specific prohibited *actions* in the United States Code itself will make it easier to bring criminal cases and, in civil suits, to demonstrate that certain rights are clearly established.[49] In turn, this will make civil claims less readily subject to dismissal on qualified immunity grounds.

II. Amending 18 U.S.C. § 242

In discussing Congress's Section 5 power to enact legislation to deter constitutional harm, the Supreme Court recently observed that "hard problems often require forceful responses."[50] Given the current crisis in American policing and the need to regularize police accountability, § 242 should be amended to better equip federal prosecutors to hold law enforcement officers accountable for wrongful acts.[51]

Amending § 242 is complicated.[52] First, the legislative power to change the statute is limited by Congress's constitutional authority. Although Congress may pass legislation to enforce the provisions of the Fourteenth Amendment, "Congress cannot use its 'power to enforce' the Fourteenth Amendment to *alter* what that Amendment bars."[53] Because Congress's power to protect against constitutional harms under the Fourteenth Amendment is not unlimited, the mechanisms that Congress uses in any laws passed under Section 5 to protect people's rights must fit closely with the harm (injury) that Congress is working to prevent or remedy.[54]

Practically speaking, this means that Congress does not generally have the power to enact laws to define constitutional rights that the Supreme Court has not already recognized. Congress does have sufficient authority to pass legislation to *prevent* constitutional harm, but it should first engage in careful, robust fact-finding about the harm to craft appropriate legislation in response.[55] The statutory language included in the appendix to this report is supported factually and legally and, if adopted, would offer a strong framework to protect key civil rights that the federal courts have already identified and defined.[56]

Because Congress cannot *define* new rights, the proposed law closely tracks certain rights that have been explained in case law — rights that are already protected by § 242, violations of which are difficult to prosecute under the current statute. By adopting new statutory language, Congress can give clearer guidance to officials as to what conduct the law prohibits while also providing a powerful tool to protect established rights by changing what federal prosecutors must prove to a jury to find an official guilty of committing a federal civil rights crime. As with § 242, the new proposed text would reach both public officials and private individuals acting with the authority of the state — that is, "under color of law."[57]

A. Overview of Proposed Changes

The rights and dignity of people who come into contact with law enforcement and other public officials (such as police, federal agents, judges, probation officers, and correctional officers) deserve greater protection. To afford them this, Congress should amend § 242 in two ways.

First, Congress should change the intent standard needed to secure a criminal conviction. Currently, § 242 requires federal prosecutors to prove beyond a reasonable doubt that a law enforcement officer *willfully* violated a person's constitutional rights. That standard should be lowered to cover actions taken "knowingly" or "recklessly."[58]

Second, § 242 should be amended to provide more specific language defining what *actions* are criminal, which will help insulate the lower intent standard from constitutional challenge on the grounds of vagueness. Focusing on actions, the proposed amendments would reach three specific categories of official misconduct — excessive force, improper sexual contact, and deliberate indifference to medical needs. Each of these areas involves constitutional rights that have been identified by the Supreme Court and clarified by case law, which defines the scope of the protected rights.[59] By clarifying what conduct is prosecutable, Congress can give public officials improved guidance as to the minimum standards of conduct they must maintain, while underscoring its commitment to protecting the constitutional rights of people who come into contact with public officials. And if an official engages in conduct prosecutable under the amended § 242, the new language would remove significant obstacles to federal prosecution.

B. Amending the "Willful" Intent Standard

The intent element of § 242 is confusing and onerous. As discussed above, the Supreme Court in *Screws* concluded that to sustain a conviction, the jury must find beyond a reasonable doubt that the evidence shows that a defendant acted (1) with a bad purpose and (2) with the "specific intent to deprive a person of a federal right made definite by decision or other rule."[60] This intent standard requires a jury to evaluate the defendant's subjective specific intent, although a defendant's state of mind can rarely be proved by direct evidence.

Changing the intent (mens rea) requirement to "knowingly" or "recklessly" — and focusing on the defendant's level of intent to *act* — would promote law enforcement accountability by eliminating the requirement to prove that the defendant was aware of, and sought to violate, a person's rights.

Standards of Intent: Willfully Versus Knowingly Versus Recklessly

In a criminal trial, juries are instructed on the elements of each crime that is charged, including the intent, or mens rea, standard that the jurors are required to unanimously find beyond a reasonable doubt in order to return a verdict of guilty. In brief, these are the requirements for the three mens rea standards discussed in this report:

>> **Willfully –** To conclude that a defendant acted "willfully," the jury must find that the defendant acted "with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say with the bad purpose to disobey or to disregard the law."[61]

>> **Knowingly –** To conclude that a defendant acted "knowingly," the jury must find that the defendant acted "intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness."[62]

>> **Recklessly –** To conclude that a defendant acted "recklessly," the jury must find that the defendant acted while consciously disregarding "a substantial and unjustifiable risk that the material element exists or will result from his conduct."[63]

With the inclusion of specific prohibited *conduct* in the proposed statute, together with the intent standards of "knowingly" or "recklessly," juries would be required to find that a defendant had that level of intent while engaging in prohibited conduct that is specified in the statute itself. Under this approach, federal prosecutors would be required to prove that a defendant (1) knowingly or recklessly (2) engaged in one of the forms of prohibited conduct (3) under color of law — without the need to find that the defendant acted with a bad purpose to disregard or disobey the law by violating someone's rights.

As a result, under the new law, juries would not be required to find that a defendant acted "with the intent not only to act with a bad or evil purpose, but specifically to act with the intent to deprive a person of a federal right made definite by decisions or other rule of law — that is, either by the express terms of the Constitution or federal law or by decisions interpreting them."[64] Accordingly, the proposed statute would remove one of the most challenging barriers to prosecution under the current version of § 242.

The George Floyd Justice in Policing Act (JPA), which was introduced in the U.S. House of Representatives during the summer of 2020 and passed by the House in early March 2021, seeks to lower the intent standard of § 242 to "knowingly or recklessly," along with other changes to the law. The framework presented here does more than modify the intent standard; it provides a new statutory structure that changes the essential elements of the offense. In addition, by specifying prohibited conduct, the proposed law would help guide officer discretion and improve training, while providing clear notice to government officials about what the law prohibits as to use of excessive force, sexual contact involving public officials, and acting with deliberate indifference to a person's medical needs.[65]

C. Defining Criminal Acts

The proposed statutory text specifies three of the most egregious types of official misconduct: use of excessive force; abuse of one's position, power, or authority to engage in sexual activity; and deliberate failure to provide medical treatment to people in custody. The definitions of the prohibited conduct in the proposed law are based on federal cases that identify and define these fundamental constitutional rights, as noted in the appendix and discussed below. By adding these provisions to § 242 or including them in a new section of law, the proposed amendments would complement, not replace, the current version of § 242 — leaving intact the broad, inclusive approach taken by Congress since 1870.

1. Excessive Force by Law Enforcement

Since the brutal killing of George Floyd in May 2020, there has been renewed and sustained national outcry against unjustified police use of deadly or excessive force in encounters with members of the community, particularly encounters with Black people and other people of color. At the same time, the United States' outsize incarcerated population is at risk of violence in prisons and jails across the country, where correctional officers, shielded from public view, have the power to use excessive force — often to retaliate or to punish — and sometimes inappropriately use weapons such as pepper spray.[66]

These incidents undermine faith in law enforcement and the criminal justice system more generally. They have brought renewed focus on existing rules regulating the levels and types of force that police are permitted to use and whether there are ways to better rein in police use of aggressive and violent tactics.[67]

a. The Constitutional Right to Be Free from Excessive Force

The Fourth, Eighth, and Fourteenth Amendments all provide protection against excessive force during interactions with law enforcement, including correctional officials, depending on the circumstances leading to the interaction. As interpreted by the Supreme Court, the scope of the right to be free from excessive force at the hands of law enforcement varies according to whether a person has been arrested (seized), is in the process of being arrested, is already in custody, or has been sentenced to a term of imprisonment.

The right to be free from excessive force by law enforcement during arrest is secured by the Fourth Amendment to the Constitution.[68] However, the origin of any right to be free from excessive force either before or after arrest is less clearly established. Some courts of appeals have held that claims of excessive force by a person who has not been arrested by law enforcement are governed by a different doctrine, substantive due process.[69] When it comes to excessive force after arrest, federal courts of appeals are split, leaving individuals in custody with uneven protections depending on how far along they are in the arrest process (e.g., immediately following arrest, pre-arraignment, or post-arraignment). Several circuits have held that people who are in pretrial custody are protected by the Fourth Amendment at least until arraignment, while other circuits have relied on the substantive due process protections of the Fourteenth Amendment. (In this context, the Fourteenth Amendment protects the right to bodily integrity, whereas the Fourth guarantees the right to be free from objectively unreasonable search or seizure).[70] Individuals in prison are generally protected from unnecessary force and infliction of pain by correctional officers under the Eighth Amendment.[71]

This patchwork of constitutional protections renders the job of federal prosecutors difficult given the requirement to prove beyond a reasonable doubt that a defendant knew about the rights at issue but chose to violate them anyway.

b. Recommendations

Amendments to § 242 could help to better protect individuals' fundamental right to be free from excessive force at the hands of law enforcement, and to reduce the number of incidents that lead to police killings of unarmed community members and correctional officer assaults of incarcerated people.[72] As set forth in more detail in the appendix, the amendments proposed to § 242 in this report include:

- Adding new language to the United States Code that would include the intent, or mens rea, standards of "knowingly" or "recklessly" for a number of specific actions that would constitute illegal acts.
- Making explicit that certain types of deadly force — including choke holds and other neck holds, firing a weapon, or multiple discharges of an electronic control weapon such as a taser — are not permitted against
  - > any individual whose actions are a threat only to him or herself or to property, or
  - > a person who is fleeing from law enforcement (including in a moving vehicle) unless there is probable cause to conclude that there is an imminent risk of serious bodily injury or death to the officer or another if the subject is not immediately apprehended.[73]
- Defining key terms, including "deadly use of force" and "excessive use of force," to put law enforcement officers on clearer notice of what the law prohibits and under what circumstances.
- Placing limits on certain defenses, including
  - > ignorance of the law, or argument that the officer was acting in "good faith," and
  - > that the force was justified if the defendant's own actions, leading up to and at the time of the use of force, created the necessity to use such force.[74]

2. Sexual Contact Under Color of Law

Sexual misconduct by public officials in the course of their official duties undermines faith in government and, when perpetrated by law enforcement, confidence in our criminal justice system.[75] It is an abuse of authority that may also violate the Constitution.[76]

Even amid the #MeToo movement, the scope of this problem remains unknown.[77] But the data that exists indicates it is significant. An Associated Press investigation found that about 1,000 officers had lost their badges between 2009 and 2014 for sex-related offenses, noting that the estimate was "unquestionably" an undercount.[78] Another study found 548 sex-related crimes committed by police officers from 2005 to 2007, but since it was based on news reports, this study also surely did not capture the full scope of the problem.[79] One police chief who studied the issue for the International Association of Chiefs of Police (IACP) commented that sexual misconduct was "happening probably in every law enforcement agency across the country."[80] And troublingly, the information that is available indicates that, as with many other aspects of the criminal justice system, sexual misconduct by law enforcement disproportionately targets people of color, and Black women in particular.[81]

Sexual misconduct by law enforcement should be viewed broadly; prohibited conduct should not be limited to rape and other serious sexual assault. Recognizing how significant an abuse of power it is for law enforcement officers, in their official capacity, to engage in sexual contact with others, the IACP has observed that "sexual misconduct by law enforcement is defined as any behavior by an officer that takes advantage of the officer's position in law enforcement to misuse authority and power (including force) in order to commit a sexual act, initiate sexual contact with another person, or respond to a perceived sexually motivated cue (from a subtle suggestion to an overt action) from another person."[82]

Given the power dynamics, all sexual contact between public officials and those who are under their custody, control, or authority should be prohibited — much as federal law already prohibits any sex acts involving people who are in federal detention and "under the custodial, supervisory, or disciplinary authority" of the person who engages in a sex act.[83]

a. The Constitutional Right to Be Free from Sexual Contact by an Official Acting Under Color of Law

There are various constitutional bases for prosecuting an official acting under color of law for sexual misconduct, depending on the circumstances.[84] Case law has recognized that public officials who engage in nonconsensual sexual contact with an individual in their care or custody or under their authority may deprive that person of the right to bodily integrity or liberty without due process of law, in violation of the Fourteenth Amendment.[85] Sexual misconduct can also implicate the Fourth Amendment right to be free from unlawful search, seizure, and unreasonable intrusions on bodily integrity; the Fifth Amendment right to due process (as applied to federal officials); the Eighth Amendment right to be free from cruel and unusual punishment; and the rights to due process (as applied to state officials), bodily integrity, and privacy protected by the Fourteenth Amendment.[86]

The right to be free from sexual abuse is ingrained in § 242, which explicitly provides for heightened punishment for official acts that constitute aggravated sexual abuse or an attempt to commit such abuse. Under current law, however, consent is generally considered to be a complete defense to prosecution under § 242.[87]

In sharp contrast, the 50 states, Guam, Puerto Rico, and the federal system all recognize that the power dynamics between corrections staff and people in prison are such that there can be no meaningful consent — sexual contact between corrections staff and people in prison is already illegal in these jurisdictions.[88] In cases involving other law enforcement officers, however, consent can be invoked as a defense, in both federal civil rights prosecutions and in a majority of states, even though similar power dynamics pertain.[89]

Congress has the power to change this nationwide by amending § 242. With proper fact-finding, including on the need for improved community–police relations, the incredibly damaging impact of law enforcement sexual misconduct, and the disproportionate rates of sexual misconduct targeting Black women in particular, a zero-tolerance policy for sexual misconduct by law enforcement and other public officials is appropriate and necessary.[90] Enacting such a policy would be a powerful remedy to the current law, which permits consent as a defense in § 242 cases alleging a civil rights offense against an officer or other public official who is accused of engaging in sexual conduct under color of law.[91] Given the power and authority law enforcement officers wield and contemporary understandings of the power dynamics involved in sexual misconduct and consent, this remedy would be permissible to protect people's civil rights if enacted with appropriate congressional findings.[92]

b. Recommendations

To guard against sexual predation and abuse by law enforcement and other public officials, Congress can make clear what conduct is prohibited, uniformly criminalizing sexual contact between officials and members of the public during the course of their official duties. As set forth in more detail in the appendix, the amendments proposed to § 242 in this report include:

- Adopting a new provision that would criminalize knowing or reckless "sexual misconduct" under color of law with a person under the custodial, supervisory, disciplinary, or other authority of the putative defendant.
- Adding a definitional provision for the term "sexual misconduct" that includes the preexisting federal definitions for "sexual act" and "sexual contact."[93]
- Prohibiting consent as a defense to allegations of sexual misconduct, which would make clear to law enforcement officials nationwide that all sexual contact with people under their custody and care is prohibited and that they have a duty of care to prevent such contact from occurring.

3. Deliberate Indifference to Medical Needs of People in Custody

George Floyd's treatment by police raises issues beyond those of excessive force. Because Floyd said "I can't breathe" while being subjected to a neck hold for more than nine minutes, many have asked why medical treatment was not summoned more quickly.[94] Law enforcement, including police and correctional officials, should

be held to account for deliberately indifferent failures to provide treatment for serious medical needs.

With more than 2 million people in prison or jail each day in the United States, it is critical that we hold correctional officials and other law enforcement accountable for providing appropriate medical treatment to people in their custody or behind bars.[95]

a. The Constitutional Right to Medical Treatment in Custody

It is well established that a correctional official's "deliberate indifference to serious medical needs" of a person in custody violates the Eighth Amendment and that such violations are prosecutable under § 242.[96] Specifically, the Supreme Court has recognized that an official's "deliberate indifference to serious medical needs of prisoners constitutes an 'unnecessary and wanton infliction of pain.' "[97] (For those in state custody following arrest or in pretrial detention, the right flows from the Due Process Clause of the Fourteenth Amendment.)[98]

To prove "deliberate indifference" under § 242, the government currently must show "[1] that the victim faced a substantial risk of serious harm; [2] that the officer had actual knowledge of the risk of harm; and [3] that the officer failed to take reasonable measures to abate it."[99] Given the myriad factual scenarios that may necessitate medical treatment for people under the custody and care of law enforcement, it would be impossible to assemble a comprehensive list of conditions or symptoms that require a response by prison officials. Each case must be evaluated on its facts.

Serious medical needs include not only conditions or symptoms that licensed physicians identify as requiring treatment but also those that laypeople can readily infer need medical attention.[100] Although courts have analyzed varying fact patterns that give rise to Eighth Amendment violations, each case turns on its specific facts, rendering "deliberate indifference" a difficult theory of prosecution under § 242 due to the need to prove that the defendant was acting willfully.[101]

In an example of a successful deliberate indifference prosecution under § 242, a correctional officer at New York City's notorious Rikers Island jail was convicted and sentenced to five years in prison after refusing to provide medical treatment for Jason Ecchevaria, an incarcerated man who had swallowed a powerful cleaning agent and later died as a result.[102] A jury found the correctional officer guilty of violating Ecchevaria's rights by deliberately ignoring his serious medical condition.

Given the case law establishing that deprivations of medical treatment are cognizable under the Constitution, a revised § 242 should make explicit that deliberate indifference to medical needs is a basis for criminal liability.

b. Recommendations

To underscore law enforcement's obligation to provide medical treatment to people in their care and custody, Congress should expressly include that duty in a revised version of § 242. As set forth in more detail in the appendix, the proposed amendments include:

- A provision that clearly criminalizes the deliberately indifferent failure to provide medical treatment for people in custody, which would include those who are under arrest, in pretrial detention, or serving a sentence of imprisonment.

- A definitional provision for the term "deliberate indifference" to codify the term's meaning: the knowing disregard of an excessive risk of harm to another person.[103]

Conclusion: A New Civil Rights Framework

Americans spoke clearly and convincingly in the aftermath of the police killings and violence of 2020, demanding improved police accountability and broader changes to policing and our criminal justice systems. A majority of Americans believe that stricter use-of-force policies are needed and that police officers who injure or kill people are treated too leniently.[104]

Our laws are outdated. The 150-year-old framework established by § 242 fails to protect people from being injured or killed at the hands of law enforcement. On its own, an amended civil rights statute is unlikely to eradicate official misconduct, but it will leave federal prosecutors better situated to address these breaches of the public trust more forcefully and regularly, normalizing accountability.

At present, law enforcement agencies often provide vague direction for when or how police can use lethal or nonlethal force, and many do not provide specific or rigorous guidance on how to minimize its likelihood or severity.[105] Were Congress to amend § 242 as recommended by this report, police departments, correctional agencies, and other law enforcement agencies nationwide would need to adapt their use-of-force policies and strategies to ensure that their officers were trained in accordance with the specifics of the new federal law.[106] The new law would help center the core principle that law enforcement officers must value and preserve human life, and it would underscore that deadly force should be used only as a method of last resort to prevent imminent death or serious bodily injury.[107] The goal is not to unduly punish public officials. The goal is to stop the brutality.

It is time for a "forceful response" to the "hard problem" of official misconduct, including excessive police violence, sexual misconduct by public officials, and failure to provide care to people in custody.[108] In this moment of national reckoning over policing, state violence, and racial injustice, Congress should renew our national commitment to civil rights by passing a more robust framework for protection from police brutality and official misconduct.

Appendix

Proposed Amendments to 18 U.S.C. § 242

Upon making appropriate congressional findings,[109] Congress should amend 18 U.S.C. § 242 to add the following language as a new statutory subsection, or as a new section to Title 18 of the United States Code:[110]

(a) Whoever, under color of any law, statute, ordinance, regulation, or custom, knowingly or recklessly[111] —

(1) uses excessive force;

(2) engages in sexual misconduct with any person; or

(3) and with deliberate indifference fails to provide medical treatment for another person who is in custody or under an official's custodial, supervisory, or disciplinary authority,

shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this subsection or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, or a sexual act as defined by 18 U.S.C. § 2246(2), or an attempt to commit a sexual act,[112] shall be [sentenced]; and if death results from the acts committed in violation of this subsection or if such acts include kidnapping or an attempt to kidnap, or aggravated sexual abuse as defined by 18 U.S.C. § 2241, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be [sentenced].[113] For purposes of this subsection, an act shall be considered to have resulted in death if the act was a substantial factor contributing to the death of the person.[114]

(b) Any person who, under color of any law, statute, ordinance, regulation, or custom —

(1) knowingly attempts or conspires to commit any offense defined in this subsection shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy;[115] or

(2) knowingly aids, abets, counsels, commands, induces, or procures any offense defined in this subsection shall be subject to the same penalties as those prescribed for the offense.[116]

(c) As used in this subsection —

(1) the term "excessive force" means[117] —

(A) use of force greater than that which is objectively reasonable to effect a lawful arrest or bring a person or incident under control;[118]

(B) force used to cause harm, or with a knowing willingness that harm will occur;[119]

(C) force used against an individual who is in restraints or under law enforcement control, except use of the minimal amount of force that is reasonably necessary to transport the individual, or to prevent the individual from fleeing the scene or causing imminent bodily injury to the officer or another person, including the individual;[120]

(D) deadly or lethal force unless the use of such force is objectively reasonable under the totality of the circumstances and necessary to protect the officer or another from an imminent threat of death or serious bodily injury;

(E) deadly or lethal force against a fleeing individual,[121] including an individual in a moving vehicle, unless the officer has probable cause to conclude that there is an imminent risk of serious bodily injury or death to the officer or another if the subject is not immediately apprehended;[122] or

(F) deadly or lethal force against any individual whose actions are a threat only to himself or herself or to property;[123]

(2) the term "deadly or lethal force"[124] means physical force that a reasonable person would conclude creates a substantial risk of death or serious bodily injury,[125] including but not limited to —

(A) the discharge of a firearm;

(B) a maneuver that restricts blood or oxygen flow to the brain, including choke holds, strangleholds, neck restraints, neck holds, and carotid artery restraints; and

(C) multiple discharges of an electronic control weapon;

(3) the term "sexual misconduct" means knowingly engaging or attempting to engage in any sexual act, as defined by 18 U.S.C. § 2246(2), or sexual contact, as defined by 18 U.S.C. § 2246(3), with another person under the custodial, supervisory, disciplinary, or other authority of the person engaging in such contact, which conduct —

(A) is not incidental to legitimate official duties, such as a pat-down, frisk, or strip search; or

(B) is undertaken with the intent to gratify the person's sexual desire or humiliate another person under his or her custodial, supervisory, disciplinary, or other authority;[126]

(4) the term "deliberate indifference" means knowing and disregarding an excessive risk of harm to another person;[127]

(5) the phrase "aids, abets, counsels, commands, induces, or procures" includes, but is not limited to —

(A) participating in the commission of the underlying offense;[128] or

(B) knowingly failing to intervene to stop, prevent, or attempt to stop or prevent the commission of the underlying offense by another.[129]

(d) Limitation on defenses.

(1) It shall not be a defense to prosecution under this subsection that —

(A) the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time that the conduct was committed; or

(B) the defendant believed that his or her actions were authorized by state law, local law or ordinance, or law enforcement practice.

(2) In a prosecution under paragraph (a)(1), it is not a defense that the use of force was justified if the defendant's actions, leading up to and at the time of the use of force, created the necessity for the use of such force.[130]

(3) In a prosecution under paragraph (a)(2), it is not a defense that the other individual consented to the sexual act or contact.[131]

Endnotes

1 See Rashawn Ray, "How Can We Enhance Police Accountability in the United States?," in *Policy 2020*, Brookings Institution, 2020, https://www.brookings.edu/policy2020/votervital/how-can-we-enhance-police-accountability-in-the-united-states/ [https://perma.cc/8Z9S-GRCU]; and Elliot C. McLaughlin, "Breonna Taylor Investigations Are Far from Over as Demands for Transparency Mount," CNN, September 24, 2020, https://www.cnn.com/2020/09/24/us/breonna-taylor-investigations-remaining/index.html [https://perma.cc/4SR6-FG85]. See also, e.g., U.S. Attorney's Office for the Eastern District of California, "Federal, State and Local Law Enforcement Statement on the Death of George Floyd and Riots," press release, May 31, 2020, https://www.justice.gov/usao-edca/pr/federal-state-and-local-law-enforcement-statement-death-george-floyd-and-riots [https://perma.cc/V69J-49JR]; and U.S. Attorney's Office for the Eastern District of Wisconsin, "Statement Regarding Federal Civil Rights Investigation into Shooting of Mr. Jacob Blake," press release, January 5, 2021, https://www.justice.gov/usao-edwi/pr/statement-regarding-federal-civil-rights-investigation-shooting-mr-jacob-blake [https://perma.cc/5GCM-WJ7H].

2 Throughout this report, people who could be charged under § 242 are most often referred to as "public officials" or "law enforcement." The Supreme Court has held, however, that § 242 may also be used to prosecute private actors whose authority to act in a given situation is derived from the state, such as a guard at a privately run prison. United States v. Price, 383 U.S. 787, 794 (1966), https://caselaw.findlaw.com/us-supreme-court/383/787.html [https://perma.cc/V6FU-ZQR6] ("To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.").

3 This report proposes changes to federal criminal civil rights laws that would apply to any public official who is acting with governmental authority, including police, prosecutors, judges, correctional officials, and more. Even though the law would apply to any public official who violated it, this report frequently uses the term "law enforcement" or "police" instead of "public officials" in discussions of violence and use of force since law enforcement officers — including police, correctional officials, sheriffs and their deputies, and federal agents — are the public officials most frequently involved in these incidents.

4 Mapping Police Violence, last accessed February 5, 2021, https://mappingpoliceviolence.org/.

5 Mapping Police Violence. See also Timothy Williams, "Study Supports Suspicion That Police Are More Likely to Use Force on Blacks," *New York Times*, July 7, 2016, https://www.nytimes.com/2016/07/08/us/study-supports-suspicion-that-police-use-of-force-is-more-likely-for-blacks.html ("African-Americans are far more likely than whites and other groups to be the victims of use of force by the police, even when racial disparities in crime are taken into account.").

6 Frank Edwards, Hedwig Lee, and Michael Esposito, "Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex," *Proceedings of the National Academy of Sciences of the United States of America* 116, no. 34 (2019): 16793, 16794, https://www.pnas.org/content/pnas/116/34/16793.full.pdf [https://perma.cc/8W88-XWR9].

7 Mapping Police Violence.

8 Associated Press–NORC Center for Public Affairs Research, "Widespread Desire for Policing and Criminal Justice Reform," June 15, 2020, https://apnorc.org/projects/widespread-desire-for-policing-and-criminal-justice-reform/ [https://perma.cc/HYU2-8J9R].

9 Lauren Brooke-Eisen, "The Violence Against People Behind Bars That We Don't See," *Time*, September 1, 2020, https://time.com/5884104/prison-violence-dont-see/ [https://perma.cc/GLP4-Y9XP]. The "shocks the conscience" standard is the long-established test for a Fourteenth Amendment violation under *Rochin v. California*, 342 U.S. 165 (1952), https://www.law.cornell.edu/supremecourt/text/342/165 [https://perma.cc/ZJ6S-UEDZ].

10 TRAC Reports, "Police Officers Rarely Charged for Excessive Use of Force in Federal Court," June 17, 2020, https://trac.syr.edu/tracreports/crim/615/ [https://perma.cc/9LTD-VN9N] (reporting that "between 1990 and 2019, federal prosecutors filed § 242 charges about 41 times per year on average, with as few as 19 times (2005) and as many as 67 times in one year"). See also U.S. Department of Justice, *Civil Rights Division Highlights: 2009–2017*, January 2017, 32–34, https://www.justice.gov/crt/page/file/923096/download [https://perma.cc/Q3Y3-FQCB] (reporting that the Civil Rights Division prosecuted 580 law enforcement officials for committing willful violations of civil rights and related crimes between 2009 and 2016); Brian R. Johnson and Phillip B. Bridgmon, "Depriving Civil Rights: An Exploration of 18 U.S.C. 242 Criminal Prosecutions 2001–2006," *Criminal Justice Law Review* 34, no. 2 (2009), 196, 204 (observing that prosecutions under § 242 are a relatively rare event, and identifying a very small number of sexual misconduct cases); and Paul J. Watford, "*Screws v. United States* and the Birth of Federal Civil Rights Enforcement," *Marquette Law Review* 98, no. 1 (2014), 465, 483, https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=5229&context=mulr [https://perma.cc/737F-XGW4].

11 See U.S. Department of Justice, "Law Enforcement Misconduct," updated July 6, 2020, https://www.justice.gov/crt/law-enforcement-misconduct [https://perma.cc/LW5V-HZ8G] ("An officer who purposefully allows a fellow officer to violate a victim's Constitutional rights may be prosecuted for failure to intervene to stop the Constitutional violation. To prosecute such an officer, the government must show that the defendant officer was aware of the Constitutional violation, had an opportunity to intervene, and chose not to do so. This charge is often appropriate for supervisory officers who observe uses of excessive force without stopping them, or who actively encourage uses of excessive force but do not directly participate in them.").

12 Local law enforcement policies often provide vague, imprecise direction on use of force. These policies may focus on the extent of what is legally permitted rather than on best practices. Police Executive Research Forum, *Guiding Principles on Use of Force*, 2016, 15–16, https://www.policeforum.org/assets/30%20guiding%20principles.pdf [https://perma.cc/AQ5S-3Q5F].

13 The amendments proposed herein could also be made to 42 U.S.C. § 1983, although the specifics of § 1983 are beyond the scope of this report. In either event, a clarification of the civil rights protected by the Constitution and laws of the United States would make more plain which rights are "clearly established" in the context of civil lawsuits. See discussion of qualified immunity below at notes 47–49 and in accompanying text.

14 One court described § 242 as "perhaps the most abstractly worded statute among the more than 700 crimes in the federal criminal code." United States v. Lanier, 73 F.3d 1380, 1382 (6th Cir. 1996) (vacated and remanded, United States v. Lanier, 520 U.S. 259 (1997)), https://supreme.justia.com/cases/federal/us/520/259/case.pdf [https://perma.cc/9FRS-NWHY].

15 N.Y. Penal Law § 125.25, Murder in the Second Degree, https://codes.findlaw.com/ny/penal-law/pen-sect-125-25.html [https://perma.cc/67E2-AKHN]. See also Model Penal Code § 210.1 (1962) ("A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being."), https://archive.org/details/ModelPenalCode_ALI/mode/2up [https://perma.cc/B5SB-6VHL].

16 18 U.S.C. § 242 (emphasis added); see also Screws v. United States, 325 U.S. 91, 111 (1945), https://supreme.justia.com/cases/federal/us/325/91/ [https://perma.cc/L2N8-2HEH].

17 Mitchum v. Foster, 407 U.S. 225, 238 (1972). See U.S. Const., amend. XIV, § 1, https://www.law.cornell.edu/constitution/amendmentxiv [https://perma.cc/6S29-5S3W]; and Adickes v. S.H. Kress & Co., 398 U.S. 144, 166, nn. 26 & 36 (1970) (discussing the origins and complementary nature of Sections 242 and 1983).

18 Joanna R. Lampe, *Congress and Police Reform: Current Law and Recent Proposals*, Congressional Research Service, updated June 24, 2020, https://fas.org/sgp/crs/misc/LSB10486.pdf [https://perma.cc/4XK7-EJ5H].

19 Ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–1986 (1982)). For historical context, see Rev. Stat. of the United States, 39th Congress, 1st Sess. ch. 31 (1866), https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=014/llsl014.db&recNum=058 [https://perma.cc/X7RV-FXWX]; and Rev. Stat. of the United States, 42d Congress, 1st Sess. ch. 22 (1871), https://www.loc.gov/law/help/statutes-at-large/42nd-congress/session-1/c42s1ch22.pdf [https://perma.cc/RD4J-LL9W]. See also Rev. Stat. of the United States, 43d Congress, 1st Sess. ch. 7 § 5510, at 1068 (1873–74), http://memory.loc.gov/ll/llsl/018/1100/11411068.tif [https://perma.cc/7KA2-XVHH] ("Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both."). See also Adam Harris Kurland, "The Enduring Virtues of Deferential Federalism: The Federal Government's Proper Role in Prosecuting Law Enforcement Officers for Civil Rights Offenses," *Hastings Law Journal* 70, no. 3 (2019), 771, 783, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3851&context=hastings_law_journal [https://perma.cc/FRG9-7FPM]. See also Joanna R. Lampe, *Federal Police Oversight: Criminal Civil Rights Violations Under 18 U.S.C. § 242*, Congressional Research Service, 2020, https://crsreports.congress.gov/product/pdf/LSB/LSB10495 [https://perma.cc/KLP4-CKXU].

20 U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). The phrase "provisions of this article" includes other sections of the Fourteenth Amendment, including the Due Process Clause, which prohibits states from depriving "any person of life, liberty, or property, without due process of law." See also U.S. Const. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). See also Frederick M. Lawrence, "Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes," *Tulane Law Review* 67 (1993), 2113, 2133–37. See also Katzenbach v. Morgan, 384 U.S. 641, 651 (1966); and Fitzpatrick v. Bitzer, 427 U.S. 445, 455–56 (1976) (discussing Congress's power under the Civil War Amendments and the "corresponding diminution" of state sovereignty found to be intended by the framers and made part of the Constitution upon the states' ratification of those amendments).

21 U.S. Const. amend. XVI, § 1. See also Eric Foner, *The Second Founding* (New York: WW Norton, 2019), 56 (observing that the Fourteenth Amendment was meant to "establish general principles about the rights of the freed people and of all Americans") and xix–xx ("Together with far-reaching congressional legislation meant to provide former slaves with access to the courts, ballot box, and public accommodations, and to protect them against violence, the Reconstruction amendments greatly enhanced the power of the federal government, transferring much of the authority to define citizens' rights from the states to the nation."). See also *Mitchum*, 407 U.S. at 242 (discussing § 1983, the civil law companion to § 242, and observing that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial'" (citation omitted)).

22 S. Rep. No. 1, 42d Congress, 1st Sess. (1871); and Wilson v. Garcia, 471 U.S. 261, 276 (1985) ("The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights. . . . The debates on the Act chronicle the alarming insecurity of life, liberty, and property in the Southern States, and the refuge that local authorities extended to the authors of these outrageous incidents." (internal citation omitted)). See Watford, "Birth of Federal Civil Rights Enforcement," 471, 474.

23 Leadership Conference on Civil and Human Rights, "Letter to Speaker Pelosi, Leader McCarthy, Majority Leader McConnell, and Minority Leader Schumer," June 1, 2020, http://civilrightsdocs.info/pdf/policy/letters/2020/Coalition_Letter_to_House_and_Senate_Leadership_on_Federal_Policing_Priorites_Final_6.1.20.pdf [https://perma.cc/5ZXQ-L8ZF]. See also Edwards, Lee, and Esposito, "Risk of Being Killed."

24 Asit S. Panwala, "The Failure of Local and Federal Prosecutors to Curb Police Brutality," *Fordham Urban Law Journal* 30, no. 2 (2003), 639, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2079&context=ulj [https://perma.cc/DQL4-HHGH].

25 18 U.S.C. § 241 ("If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same. . . . They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.").

26 *Lanier*, 520 U.S. at 264.

27 U.S. Department of Justice, "Deprivation of Rights Under Color of Law," https://www.justice.gov/crt/deprivation-rights-under-color-law [https://perma.cc/UYP6-FUNE], accessed January 20, 2021.

28 *Screws*, 325 U.S. 91, 103. The willfulness requirement was added to § 242 in 1909. See Act of March 4, 1909, ch. 321, § 20, 35 Stat. 1088, 1092, https://www.loc.gov/law/help/statutes-at-large/60th-congress/session-2/c60s2ch321.pdf [https://perma.cc/ZQ8Z-3KVX].

29 *Screws*, 325 U.S. at 92–93.

30 *Screws*, 325 U.S. at 92.

31 *Screws*, 325 U.S. at 105. As the Fifth Circuit has observed, "Once a due process right has been *defined and made specific by court decisions*, that right is encompassed by § 242." United States v. Stokes, 506 F.2d 771, 774–75 (5th Cir. 1975) (emphasis added).

32 *Screws*, 325 U.S. at 106–07 ("The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected.").

33 U.S. Attorney's Office for the Southern District of New York, "U.S. Attorney's Office Closes Investigation into the Death of Ramarley Graham," press release no. 16-047, March 8, 2016, https://www.justice.gov/usao-sdny/pr/us-attorney-s-office-closes-investigation-death-ramarley-graham [https://perma.cc/3EBH-XBH3].

34 U.S. Attorney's Office for the Southern District of New York, "Investigation into the Death of Ramarley Graham" (emphasis added).

35 U.S. Attorney's Office for the Southern District of New York, "Investigation into the Death of Ramarley Graham."

36 See *Lanier*, 520 U.S. at 265 (observing that neither 18 U.S.C. § 242 nor its companion conspiracy statute, § 241, "nor a good many of their constitutional referents delineate the range of forbidden conduct with particularity"). See also Lawrence, "Civil Rights and Criminal Wrongs," 2179–83.

37 "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012), https://supreme.justia.com/cases/federal/us/567/10-1293/case.pdf [https://perma.cc/EGN9-A7SF] (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."). See also Edward F. Malone, "Legacy of the Reconstruction: The Vagueness of the Criminal Civil Rights Statutes," *UCLA Law Review* 38 (1990), 163.

38 *Screws*, 325 U.S. at 104–05; and Lawrence, "Civil Rights and Criminal Wrongs," 2180 (arguing that the opinion in *Screws* "attempted, unsuccessfully, to solve the vagueness problem").

39 *Screws*, 325 U.S. at 103. In *Screws*, the Supreme Court also observed that "Congress did not define what it desired to punish but referred the citizen to a comprehensive law library in order to ascertain what acts were prohibited. To enforce such a statute would be like sanctioning the practice of Caligula who published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it." *Screws*, 325 U.S. at 96 (internal quotation marks and citation omitted).

40 *Screws*, 325 U.S. at 104. See also Watford, "Birth of Federal Civil Rights Enforcement," 482 ("The one thing everyone agrees on, though, is that the specific intent requirement imposed by *Screws* has made it harder for the government to win convictions, even in cases where the defendants obviously acted in bad faith.").

41 This subjective inquiry, which is often necessary to prove specific intent beyond a reasonable doubt, creates confusion and is in some tension with the "objective reasonableness" test of the Fourth Amendment, which generally prohibits officers from engaging in objectively unreasonable uses of force during the commission of a stop or arrest. In *Graham v. Connor*, 490 U.S. 386, 388 (1989), the Court made clear that officers are to be afforded reasonable leeway to make mistakes, observing:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . With respect to a claim of excessive force, the same standard of reasonableness *at the moment* applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," Johnson v. Glick, 481 F.2d [1028 (2d Cir. 1973)], at 1033, violates the Fourth Amendment. 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.

Graham, 490 U.S. at 396 (emphasis added). In a criminal case, even if a jury found that a defendant-officer's actions were "objectively unreasonable" under the Fourth Amendment, meaning a reasonable officer on the scene would not have taken the same actions, the jury would also need to conclude that the prosecution proved the defendant's specific intent beyond a reasonable doubt — that the defendant was aware of the contours of the rights alleged to have been violated and *willfully* intended to violate those rights. That is, it is possible for a jury to find that an officer, acting under color of law, violated someone's civil rights and deliberately engaged in the action that violated those rights, but still be unable to find them guilty under § 242 if the jury cannot find that the officer was acting with a wrongful purpose, meaning that the officer subjectively intended to engage in a rights violation.

42 Due to the defense of qualified immunity, which is discussed more below, a civil lawsuit may not be viable unless the underlying conduct has been "clearly established" as a violation of a constitutional right. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), https://supreme.justia.com/cases/federal/us/457/800/ [https://perma.cc/F3RS-GTUB] (holding that officers are entitled to qualified immunity so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

43 See Fara Gold, "Investigating and Prosecuting Law Enforcement Sexual Misconduct Cases," *United States Attorneys' Bulletin*, January 2018, 77, 80–81 & nn. 17–20, https://evawintl.org/wp-content/uploads/242SexualMisconduct-USABulletin.pdf [https://perma.cc/Q67A-9F8X] (discussing varying approaches for protection from sexual assault under the Fourth and Fourteenth Amendments). For example, contrast Fontana v. Haskin, 262 F.3d 871, 881 (9th Cir. 2001) (finding that plaintiff's claims regarding an officer's propositioning and touching her could constitute a Fourth Amendment violation if proved, and observing that there is "no situation that would justify any amount of purposeful sexual verbal and physical predation against a handcuffed arrestee") with Rogers v. City of Little Rock, Ark., 152 F.3d 790, 793–96 (8th Cir. 1998) (analyzing rape by a police officer as a due process rather than a Fourth Amendment violation, as a "nonconsensual violation of intimate bodily integrity which is protected by substantive due process"). There is also regional variability in whether a civil case may be brought due to differing approaches to the qualified immunity inquiry. During the summer of 2020, Reuters identified 529 qualified immunity cases brought since 2005 and found that, depending on the circuit and state, some federal appeals courts are more likely than others to grant police officers qualified immunity, often requiring nearly identical facts between two cases to conclude that the law is as "clearly established" as necessary to deny the application of qualified immunity. See Andrew Chung et al., "Shot by Cops, Thwarted by Judges and Geography," Reuters, August 25, 2020, https://www.reuters.com/investigates/special-report/usa-police-immunity-variations/ [https://perma.cc/G8WR-VDVY].

44 Compare, for example, the Fifth Circuit's model jury charges on § 242, which require the jury to find beyond a reasonable doubt "[t]hat the defendant acted willfully, that is, that the defendant committed such act or acts with a bad purpose to disobey or disregard the law, specifically intending to deprive the person of [a right secured by the Constitution or laws of the United States]" with those published by the Seventh Circuit, which instruct: "The defendant intended to deprive [name of victim] of this right. The government is not required to prove that the defendant knew this right was secured by the [[Constitution] [and] [laws]] of the United States." Committee on Pattern Jury Instructions District Judges Association Fifth Circuit, *Pattern Jury Instructions (Criminal Cases)*, Thomson Reuters, 2019, https://www.lb5.uscourts.gov/juryinstructions/Fifth/crim2019.pdf [https://perma.cc/2BNT-UMA2]; and Committee on Federal Criminal Jury Instructions of the Seventh Circuit, *The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit, 2020 Ed.*, Thomson Reuters, 2020, http://www.ca7.uscourts.gov/pattern-jury-instructions/pattern_criminal_jury_instructions_2020edition.pdf [https://perma.cc/MFE7-R5TQ]. Meanwhile, the Modern Federal Jury Instructions recommend the following charge, in part, on willfulness:

> "Willfully" means that the defendant acted voluntarily and intentionally, with the intent not only to act with a bad or evil purpose, but specifically to act with the intent to deprive a person of a federal right made definite by decisions or other rule of law — that is, either by the express terms of the Constitution or federal law or by decisions interpreting them.
>
> To find that the defendant acted willfully, and to convict, therefore, you must find that the defendant not only had a generally bad or evil purpose, but also that the defendant had the specific intent to deprive [name of victim] of the federal

right to [description of right alleged to have been deprived]. This does not mean, however, that the government must show that the defendant acted with knowledge of particular provisions of the Constitution or federal law, or that the defendant was even thinking in these terms. It is enough that the federal right is clearly defined and that the defendant intended to invade interests protected by the Constitution or federal law.

1 Modern Federal Jury Instructions — Criminal, § 17.06 (2020).

45 *Stokes*, 506 F.2d at 774–75.

46 See note 37, above; and *Lanier*, 520 U.S. at 265–66 (discussing the right to notice and the rule of lenity; collecting cases).

47 See, e.g., Plumhoff v. Rickard, 572 U.S. 765, 778–79 (2014) ("[A] defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.").

48 See Parratt v. Taylor, 451 U.S. 527, 534 (1981) (observing that "Section 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found by this Court to contain a state-of-mind requirement"), overruled by Daniels v. Williams, 474 U.S. 327, 330–31 (1986) (overruling *Parratt* to the extent that it held that "mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment"). On qualified immunity, see Ziglar v. Abbasi, 582 U.S. ___, 137 S. Ct. 1843, 1867 (2017) (observing that there need not be a specific preexisting case recognizing a constitutional right, but that " 'in the light of pre-existing law,' the unlawfulness of the officer's conduct 'must be apparent' " (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)); and Saucier v. Katz, 533 U.S. 194 (2001).

49 Because "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," delineating certain constitutional rights by statute will put officers on clearer notice of what the law forbids, which will in turn impact qualified immunity determinations. *Anderson*, 483 U.S. at 640. See also *Lanier*, 520 U.S. at 270–71 (discussing the overlap between the "clearly established" standard in the qualified immunity context and the "fair warning" necessary for a valid application of § 242).

50 Allen v. Cooper, 589 U.S. ___, 140 S. Ct. 994, 1004 (2020) ("Hard problems often require forceful responses and, as noted above, Section 5 allows Congress to enact reasonably prophylactic legislation to deter constitutional harm." (internal quotation marks and citations omitted)).

51 On the crisis of policing and the impacts of police violence on public trust, see Major Cities Chiefs Association, "Major Cities Chiefs Association (MCCA) Statement Regarding the Death of George Floyd," May 27, 2020, https://majorcitieschiefs.com/wp-content/uploads/2021/01/NEWS-RELEASE-Statement-regarding-Death-of-George-Floyd.pdf [https://perma.cc/QK68-UYRC]; and Ronal W. Serpas, "Written Testimony to the President's Commission on Law Enforcement and the Administration of Justice," June 23, 2020, http://lawenforcementleaders.org/wp-content/uploads/2020/06/2020.6.23_LEL-Ronal-Serpas-Public-Testimony-for-Law-Enforcement-Commission_FINAL.pdf [https://perma.cc/7NTH-XVLP].

52 Kurland, "Deferential Federalism," 2019.

53 *Allen,* 140 S. Ct. at 1004 (emphasis added).

54 City of Boerne v. Flores, 521 U.S. 507, 520, 524–29 (1997) (holding that laws must have a "congruence and proportionality" between the means Congress uses and the harm Congress is seeking to prevent or remedy) (superseded by statute on other grounds).

55 *City of Boerne*, 521 U.S. at 520, 524–29.

56 In *Allen*, the Supreme Court discussed the *City of Boerne* congruence and proportionality test as follows:

> For Congress's action to fall within its Section 5 authority, we have said, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520. On the one hand, courts are to consider the constitutional problem Congress faced — both the nature and the extent of state conduct violating the Fourteenth Amendment. That assessment usually (though not inevitably) focuses on the legislative record, which shows the evidence Congress had before it of a constitutional wrong. See *Florida Prepaid [Postsecondary Ed. Expense Bd. v. College Savings Bank]*, 527 U.S. [627,] at 646 [(1999)]. On the other hand, courts are to examine the scope of the response Congress chose to address that injury. Here, a critical question is how far, and for what reasons, Congress has gone beyond redressing actual constitutional violations.

Allen, 140 S. Ct. at 1004.

57 Morrison v. Washington County, 700 F.2d 678, 686 (11th Cir. 1983); see also *Civil Rights Cases*, 109 U.S. 3 (1883) (holding the 1875 Civil Rights Act unconstitutional because it sought to regulate private conduct that could not be reached under the Fourteenth Amendment). See note 2 for a discussion of § 242's applicability to private parties who are acting under state authority.

58 The George Floyd Justice in Policing Act (JPA) recommends lowering the intent standard of § 242 to "knowingly" or "recklessly," along with other changes, including eliminating the death penalty as a possible punishment and adding language that provides: "[f]or purposes of this section, an act shall be considered to have resulted in death if the act was a substantial factor contributing to the death of the person." George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Congress (2021) § 101, https://www.congress.gov/bill/117th-congress/house-bill/1280/text; and George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Congress (2020) § 101, https://www.congress.gov/bill/116th-congress/house-bill/7120/text. In revising § 242, "Congress may need to examine whether any revision of [the statute's] mental state requirement provides potential defendants with clear notice of what conduct violates the statute." Lampe, *Federal Police Oversight*, 5. See also notes 61–65 and accompanying discussion, and notes 37 and 111.

59 The proposed amendments to § 242 are grounded in cases that identify and define these fundamental constitutional rights, as noted in the appendix. But because an official could violate individuals' rights in other ways as well, the proposed amendments to § 242 would add to that statute, not replace it, leaving intact the broad, inclusive approach taken by Congress since Reconstruction.

60 *Screws*, 325 U.S. at 103.

61 1 Modern Federal Jury Instructions — Criminal, § 3A.03. The model federal jury instructions for this element of § 242 provide, in pertinent part: " 'Willfully' means that the defendant acted voluntarily and intentionally, with the intent not only to act with a bad or evil purpose, but specifically to act with the intent to deprive a person of a federal right made definite by decisions or other rule of law — that is, either by the express terms of the Constitution or federal law or by decisions interpreting them. To find that the defendant acted willfully, and to convict, therefore, you must find that the defendant not only had a generally bad or evil purpose, but also that the defendant had the specific intent to deprive [name of victim] of the federal right to [description of right alleged to have been deprived]." 1 Modern Federal Jury Instructions — Criminal, § 17.06.

62 Modern Federal Jury Instructions — Criminal, § 3A.01. "A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result." Model Penal Code § 2.02(2)(b).

63 Model Penal Code § 2.02(2)(c). In further defining "recklessly," the Model Penal Code explains that "[t]he risk must be of such a

nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." Model Penal Code § 2.02(2)(c).

64 1 Modern Federal Jury Instructions — Criminal § 17.06.

65 *Screws*, 325 U.S. at 103, 105. Although amending the mens rea element alone is sufficient to put defendants on notice for rights that are specific and definite — including the well-established right to be free from excessive force under *Graham v. Connor*, 490 U.S. at 388 — a lower mens rea standard may present challenges for prosecutors in cases involving alleged violations of rights that are less well defined due to the concerns about vagueness discussed in the *Screws* case.

66 See U.S. Department of Justice Civil Rights Division, United States Attorney's Offices for the Northern, Middle, and Southern Districts of Alabama, *Investigation of Alabama's State Prisons for Men*, 2020, 10–15, https://www.justice.gov/crt/case-document/file/1297031/download?utm_medium=email&utm_source=govdelivery [https://perma.cc/65QE-84VZ]. The scope of state violence against incarcerated people has been given little academic attention and is difficult to catalog and study given that the data would need to come from the prisons and jails themselves. See David A. Rembert and Howard Henderson, "Correctional Officer Excessive Use of Force: Civil Liability Under Section 1983," *Prison Journal* 94, no. 2 (2014), 198–219, 199 ("To date, scholarly analyses of correctional officer excessive use of force do not exist. Several researchers (Hall, Ventura, Lee, & Lambert, 2003; Phillips, Hagan, & Rodriguez, 2006) have hypothesized that this lack of research may be a result of the difficulty in obtaining access to data, directly limiting the ability of empirical examinations and legislative review. Sever and Reisner (2008) noted that the reluctance of prison administrators to provide accurate data for reliable analysis of excessive use of force may be due to their desire to protect the image of the agency."). One study, which looked at a random sample of 6,964 males in prison in 2005, found that approximately 20% of them reported having been assaulted by prison staff over a six-month period, and that the incidence of violence disproportionately affected Black men and other people of color. See Nancy Wolff and Jing Shi, "Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath," *Journal of Correctional Health Care* 15, no. 1 (2009), 58, 65, https://www.liebertpub.com/doi/pdf/10.1177/1078345808326622 [https://perma.cc/M9EL-CPCB].

67 Ram Subramanian, Lauren-Brooke Eisen, Taryn Merkl, et al., *A Federal Agenda for Criminal Justice Reform*, Brennan Center for Justice, 2020, 11, https://www.brennancenter.org/sites/default/files/2020-12/FederalAgendaCriminalJustice.pdf [https://perma.cc/VR2R-AAVR]. See also Rembert and Henderson, "Correctional Officer Excessive Use of Force," 214.

68 *Graham*, 490 U.S. at 388. *Graham* is the foundational case that established the modern working definition of excessive force, in which the Supreme Court held that the proper constitutional standard for analyzing whether law enforcement used excessive force "in the course of making an arrest, investigatory stop, or other 'seizure'" is the "Fourth Amendment's 'objective reasonableness' standard." In *Graham*, however, the Court rejected adopting a definitive, uniform standard that could be applied broadly to excessive force claims filed under § 1983, instead opting for a contextualized case-by-case approach based on which right was allegedly violated. The Court explained the general foundation of the right to be free from excessive force as follows:

> In addressing an excessive force claim . . . , analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct. The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized "excessive force" standard.

Graham, 490 U.S. at 394 (internal quotation marks and citations omitted).

69 See Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 796 (1st Cir. 1990); Pleasant v. Zamieski, 895 F.2d 272, 276 n. 2 (6th Cir. 1990); and Hemphill v. Schott, 141 F.3d 412, 418 (2d Cir. 1998) ("[O]utside the context of an arrest, a plaintiff may make claims of excessive force under § 1983 under the Due Process Clause of the Fourteenth Amendment.").

70 As observed by the Sixth Circuit, "[t]he Supreme Court has deliberately left undecided the question of 'whether the Fourth Amendment continues to provide protection against deliberate use of excessive force beyond the point at which arrest ends and pretrial detention begins.' *Graham*, 490 U.S. at 395 n. 10. A circuit split has emerged from this legal 'twilight zone,' Wilson v. Spain, 209 F.3d 713, 715 (8th Cir. 2000), with courts choosing between the Fourth Amendment and the Fourteenth Amendment to protect those arrested without a warrant between the time of arrest and arraignment." Aldini v. Johnson, 609 F.3d 858, 864 (6th Cir. 2010) (footnotes and internal citation omitted); see *Aldini*, 609 F.3d at n. 6 (observing that a "majority of circuits" has held that the Fourth Amendment applies "until an individual arrested without a warrant appears before a neutral magistrate for arraignment or for a probable cause hearing or until the arrestee leaves the joint or sole custody of the arresting officer or officers" (citing Wilson v. Spain, 209 F.3d 713, 715–16 (8th Cir. 2000); Barrie v. Grand County, 119 F.3d 862, 866 (10th Cir. 1997); Pierce v. Multnomah County, 76 F.3d 1032, 1042–43 (9th Cir. 1996); Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989); and McDowell v. Rogers, 863 F.2d 1302, 1306–07 (6th Cir. 1988)). Meanwhile, although the Fifth Circuit has held, generally speaking, that substantive due process protects people following arrest, it has recognized some overlap. See Valencia v. Wiggins, 981 F.2d 1440, 1443–45 (5th Cir. 1993); and Petta v. Rivera, 143 F.3d 895, 910–14 (5th Cir. 1998). The Fourth, Eleventh, and Seventh Circuits have held that excessive force claims following arrest flow from substantive due process rights. See Riley v. Dorton, 115 F.3d 1159, 1161–64 (4th Cir. 1997) (en banc); Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996); and Wilkins v. May, 872 F.2d 190, 192–95 (7th Cir. 1989). See also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (concluding that unconstitutional conduct in violation of the Fourth Amendment by a federal agent acting "under color of his authority gives rise to a cause of action for damages"). See also *Ziglar,* 582 U.S. ___, 137 S. Ct. 1843.

71 Hudson v. McMillian, 503 U.S. 1, 8–9 (1992). See also *Graham*, 490 U.S. at 388.

72 As set forth in a recent Brennan Center report, many other policy changes by law enforcement would also help to improve policing and promote law enforcement accountability, in addition to the amendments to § 242 proposed here. Subramanian et al., *A Federal Agenda for Criminal Justice Reform* (recommending, among other things, placing strict limits on permissible police use of deadly and non-deadly force, requiring all law enforcement agencies to enforce a "duty to intervene" policy, mandating use-of-force reporting to the federal government, creating a national database of police misconduct records, promoting a national standard for police officer decertification, and reinvigorating U.S. Department of Justice "pattern or practice" investigations).

73 Despite it being established in *Tennessee v. Garner* that officers cannot use deadly force against an unarmed fleeing suspect absent probable cause "to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," recent examples such as the shooting of Jacob Blake in Kenosha, Wisconsin, in 2020 and the shooting of Walter Scott in 2015 underscore the need for a bright-line criminal law. Tennessee v. Garner, 471 U.S. 1, 11 (1985). See Azi Paybarah and Marie Fazio, "Kenosha Police Shooting of Black Man Is

Investigated by Wisconsin Authorities," *New York Times*, August 23, 2020, https://www.nytimes.com/2020/08/23/us/kenosha-police-shooting.html; and U.S. Department of Justice, "Former North Charleston, South Carolina, Police Officer Michael Slager Sentencedto 20 Years in Prison for Federal Civil Rights Offense," press release 17-1382, December 7, 2017, https://www.justice.gov/opa/pr/former-north-charleston-south-carolina-police-officer-michael-slager-sentenced-20-years [https://perma.cc/K9T3-EXTS].

74 If passed, the JPA would limit the justification defense for federal officers. See George Floyd Justice in Policing Act of 2021, § 1123; and George Floyd Justice in Policing Act of 2020, § 1123. By way of example, such a limitation (particularly when coupled with a lower mens rea standard) theoretically could have changed the analysis of the Ramarley Graham case, in which an officer's own actions — following an unarmed individual into his home, breaking down the door to gain entry, and shooting him, on the belief that Graham was armed with a gun, but without evidence that Graham posed a danger to himself or others — led to the circumstances under which the officer fired his weapon. Matthew Haag and Ashley Southall, "Officer Who Killed Ramarley Graham Leaves New York Police Department," *New York Times*, March 27, 2017, https://www.nytimes.com/2017/03/27/nyregion/ramarley-graham-nypd-richard-haste.html. Although the officer was mistaken in his belief that Graham had a gun, the U.S. Attorney's Office declined to charge the officer because "[t]he weight of the evidence indicates that, at the time the shooting took place, Officer Haste believed Mr. Graham to be in possession of a firearm that was tucked into the waistband of his pants, for which Officer Haste believed Mr. Graham was reaching." As a result, the determination was made that the officer's claim of fear would likely render the government unable to prove beyond a reasonable doubt that the officer acted willfully to deprive Graham of his right to be free from excessive force. U.S. Attorney's Office for the Southern District of New York, "U.S. Attorney's Office Closes Investigation," 2016.

75 International Association of Chiefs of Police (hereinafter IACP), *Addressing Sexual Offenses and Misconduct by Law Enforcement: Executive Guide*, 2011, 1, https://www.theiacp.org/sites/default/files/all/a/AddressingSexualOffensesandMisconductbyLawEnforcementExecutiveGuide.pdf [https://perma.cc/H83G-8THD]. See also generally Jonathan Blanks, "The Police Who Prey on Victims," Cato Institute, November 1, 2017, https://www.cato.org/commentary/police-who-prey-victims [https://perma.cc/669G-N4W8].

76 See *Lanier*, 520 U.S. at 262 (overturning a court of appeals decision reversing a conviction under § 242 based on the Fourteenth Amendment right to "personal bodily integrity and the right to be free of unauthorized and unlawful physical abuse by state intrusion" against a judicial officer who had sexually assaulted judicial employees and litigants).

77 Anastasia Cassisi, "Sexual Misconduct by Law Enforcement: A New Meaning to Stop and Frisk?," *Journal of Civil Rights & Economic Development* 33, no. 2 (2019), 141, 142 & nn. 7–8, https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1889&context=jcred [https://perma.cc/NV6A-HDLX].

78 Matt Sedensky and Nomaan Merchant, "Hundreds of Officers Lose Licenses over Sex Misconduct," Associated Press, November 1, 2015, https://apnews.com/fd1d4d05e561462a85abe50e7eaed4ec/ap-hundres-officers-lose-licenses-over-sex-misconduct.

79 Philip M. Stinson et al., "Police Sexual Misconduct: A National Scale Study of Arrested Officers," *Bowling Green State University Criminal Justice Faculty Publications* (2014), https://www.bwjp.org/assets/documents/pdfs/webinars/dhhs-police-sexual-misconduct-a-national-scale-study.pdf [https://perma.cc/EV4A-2TCF].

80 Sedensky and Merchant, "Hundreds of Officers Lose Licenses," 2015 (quoting Chief Bernadette DiPino of the Sarasota Police Department in Florida. Chief DiPino also observed: "It's so underreported and people are scared that if they call and complain about a police officer, they think every other police officer is going to be then out to get them.").

81 Jasmine Sankofa, "Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform," *Howard Law Journal* 59, no. 3 (2016), 651, 665 & n. 89; and Andrea J. Ritchie, *Invisible No More: Police Violence Against Black Women and Women of Color* (Boston: Beacon Press, 2017), 139 ("Yet women and girls, and particularly women of color, are sexually assaulted, raped, brutally strip-searched, beaten, shot, and killed by law enforcement agents with alarming frequency, experiencing many of the same forms of law enforcement violence as men of color, as well as gender- and race-specific forms of police misconduct and abuse.") (excerpt available at https://www.npr.org/books/ [https://perma.cc/FD2S-KB3L]).

82 IACP, *Addressing Sexual Offenses and Misconduct*, 3–4 (also listing multiple forms of sexual misconduct that can be committed by law enforcement).

83 18 U.S.C. § 2243(b)(2), https://www.law.cornell.edu/uscode/text/18/2243 [https://perma.cc/5ZQU-HALL]. See also United States v. Langer, 958 F.2d 522, 523–24 (2d Cir. 1992) (affirming § 242 conviction of officer who detained various women late at night on a deserted stretch of highway as an abuse of his power that resulted in Fourth Amendment violations and writing that the court's opinion was intended as a "sharp warning that the Courts of the United States are not powerless to punish egregious conduct of lawless police officers who violate the civil rights of citizens under the color of state law").

84 Gold, "Investigating and Prosecuting Law Enforcement Sexual Misconduct Cases," 77, 80–81.

85 Gold, "Investigating and Prosecuting Law Enforcement Sexual Misconduct Cases," 80–81. See Rogers v. City of Little Rock, 152 F.3d 790, 795–96 (8th Cir. 1998) (discussing sexual abuse by law enforcement as an intrusion of the Fourteenth Amendment right to bodily integrity; collecting cases).

86 For Fourth Amendment analysis, see, e.g., *Fontana*, 262 F.3d at 881; and *Langer*, 958 F.2d at 523–24. For Eighth Amendment analysis, see, e.g., Crawford v. Cuomo, 796 F.3d 252, 257 & 260 (2d Cir. 2015) (discussing the evolution of our understanding of sexual abuse in prison, and recognizing that societal mores make "clear that the sexual abuse of prisoners, once overlooked as a distasteful blight on the prison system, offends our most basic principles of just punishment"). For Fourteenth Amendment analysis, see *Lanier*, 520 U.S. 259.

87 Gold, "Investigating and Prosecuting Law Enforcement Sexual Misconduct Cases," 81. Unlike some laws, such as statutory rape provisions that impose liability regardless of whether the accused knew the actual age of an underage person, § 242 is not a strict liability statute.

88 IACP, *Addressing Sexual Offenses and Misconduct*, 6.

89 "Given law enforcement's authority to detain and arrest citizens, a profession-wide position prohibiting on-duty sexual activity seems fundamental." IACP, *Addressing Sexual Offenses and Misconduct*, 6. See "H.R. 6568 (115th): Closing the Law Enforcement Consent Loophole Act of 2018: Summary," Govtrack, last updated August 30, 2018, https://www.govtrack.us/congress/bills/115/hr6568/summary [https://perma.cc/9CZ2-YWV4]. More than half of the states lack laws that explicitly invalidate the consent defense for law enforcement officers who engage in sexual acts with individuals in their custody. Since 2018, at least eight states — Colorado, Illinois, Kansas, Louisiana, Maryland, New Hampshire, New York, and Texas — have closed the consent defense "loophole," making any sexual conduct between law enforcement officers and those in their custody illegal. Devon Link, "Fact Check: Sex Between Police Officers and Their Detainees Isn't Illegal in Many States," *USA Today*, July 9, 2020, https://www.usatoday.com/story/news/factcheck/2020/07/09/fact-check-police-detainee-sex-not-illegal-many-states/5383769002/ [https://perma.cc/5A9S-77PE]. See also Just Detention International, *Custodial Sexual Misconduct Laws: A State-by-State Legislative Review*, 2004, https://static.prisonpolicy.org/scans/sprcsmstatelaw.pdf [https://perma.cc/T6M4-LME7].

90 IACP, *Addressing Sexual Offenses and Misconduct*, 1.

91 As noted above in note 89, a majority of states lack laws that preclude officers from relying on consent as a defense for engaging in sexual conduct with people in their custody.

92 Kimel v. Florida Board of Regents, 528 U.S. 62, 88 (2000) (recognizing Congress's authority to enact "reasonably prophylactic legislation").

93 18 U.S.C. § 2246(2) and (3).

94 Haley Willis et al., "New Footage Shows Delayed Medical Response to George Floyd," *New York Times*, August 11, 2020 (updated January 6, 2021), https://www.nytimes.com/2020/08/11/us/george-floyd-body-cam-full-video.html.

95 See Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Policy Initiative, 2020, https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/L5DN-XVJQ].

96 Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (observing that deliberate indifference may violate the Eighth Amendment "whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed") (footnotes omitted).

97 *Estelle*, 429 U.S. at 104. See also U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

98 City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983) ("The Due Process Clause, however, does require the responsible government or governmental agency to provide medical care to persons, such as [the person arrested in this case], who have been injured while being apprehended by the police. In fact, the due process rights of a person in [an arrest] situation are at least as great as the Eighth Amendment protections available to a convicted prisoner.").

99 U.S. Department of Justice, "Law Enforcement Misconduct." See also Farmer v. Brennan, 511 U.S. 825, 847 (1994).

100 Brown v. Johnson, 387 F.3d 1344, 1350–52 (11th Cir. 2004); and *Farmer*, 511 U.S. at 842.

101 The deliberate indifference standard does not require that medical treatment be withheld or obstructed with the intention of causing harm. Rather, it is meant to distinguish situations where correctional officials exhibit deliberate indifference to a person's need from circumstances where a correctional official attempted to facilitate or provide proper treatment, but where such efforts failed to result in proper treatment. The courts have long held that negligence is not sufficient for an Eighth Amendment claim regarding inadequate medical treatment. *Estelle*, 429 U.S. at 106. Additionally, instances in which treatment was provided but was incorrectly administered may fall under the negligence standard of medical malpractice rather than deliberate indifference. See, e.g., Snipes v. DeTella, 95 F.3d 586 (7th Cir. 1996) (noting that "[a] prisoner's dissatisfaction with a doctor's prescribed course of treatment does not give rise to a constitutional claim unless the medical treatment is 'so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition'" (citations omitted)).

102 U.S. Attorney's Office for the Southern District of New York, "Former Rikers Island Correction Officer Sentenced to Five Years in Prison for Deliberately Ignoring Urgent Medical Needs of Inmate Who Died," press release 15-148, June 18, 2015, https://www.justice.gov/usao-sdny/pr/former-rikers-island-correction-officer-sentenced-five-years-prison-deliberately [https://perma.cc/E44P-H2YV].

103 In *Farmer*, the Supreme Court adopted "'subjective recklessness' as used in the criminal law" as the test for deliberate indifference under the Eighth Amendment, finding that it "is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases." *Farmer*, 511 U.S. at 839–40. See also Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994).

104 Associated Press–NORC Center for Public Affairs Research, "Widespread Desire for Policing and Criminal Justice Reform," 2020.

105 See, e.g., William Terrill et al., *Final Technical Report Draft: Assessing Police Use of Force Policy and Outcomes*, U.S. Department of Justice, 2011 (unpublished), 180–91, https://www.ojp.gov/pdffiles1/nij/grants/237794.pdf [https://perma.cc/3GFH-F7G9]; Brandon Garrett and Seth Stoughton, "A Tactical Fourth Amendment," *Virginia Law Review* 103, no. 2 (2017), 211–307, https://www.virginialawreview.org/wp-content/uploads/2020/12/Garrett-Stoughton_Online.pdf [https://perma.cc/J2YK-EZK3]; and DeRay McKesson et al., *Police Use of Force Policy Analysis*, Campaign Zero, 2016, https://static1.squarespace.com/static/56996151cbced68b170389f4/t/57e1b5cc2994ca4ac1d97700/1474409936835/Police+Use+of+Force+Report.pdf [https://perma.cc/NCV6-A3RA].

106 This training is already necessary. The Police Executive Research Forum has found that current training on use of force is inadequate across police departments. Police Executive Research Forum, *Critical Issues in Policing: Re-Engineering Training on Police Use of Force*, 2015, 4, https://www.policeforum.org/assets/reengineeringtraining1.pdf [https://perma.cc/BY7N-HPG4]. See U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices*, 2018, 10, https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf [https://perma.cc/S3JY-VNRY]. See also Police Executive Research Forum, *Guiding Principles on Use of Force*, 16; and Subramanian et al., *A Federal Agenda for Criminal Justice Reform*, 12–16.

107 See Leadership Conference on Civil and Human Rights, *New Era of Public Safety: A Guide to Fair, Safe, and Effective Community Policing*, 2019, 119–49, https://civilrights.org/wp-content/uploads/Policing_Full_Report.pdf [https://perma.cc/B7V9-3MY9]. See also IACP, *National Consensus Policy and Discussion Paper on Use of Force*, 2017, 2, https://www.theiacp.org/sites/default/files/all/n-o/National_Consensus_Policy_On_Use_Of_Force.pdf [https://perma.cc/VGT4-F4VE].

108 *Allen*, 140 S. Ct. at 1004 (quoting *Kimel*, 528 U.S. at 62, 88) (internal modification omitted).

109 See City of Boerne v. Flores, 521 U.S. 507, 519–20, 536 (1997) (holding that laws must have a "congruence and proportionality" between the means Congress uses and the harm Congress is seeking to prevent or remedy) (superseded by statute on other grounds); Allen v. Cooper, 589 U.S. ___, 140 S. Ct. 994, 1004 (2020) (discussing *City of Boerne*); Kimel v. Florida Board of Regents, 528 U.S. 62, 88–89 (2000) ("Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation. . . . 'The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.'" (quoting *City of Boerne*, 521 U.S. at 530)).

110 This proposal does not advocate for the repeal of the existing language codified at 18 U.S.C. § 242. Rather, the proposed language should be included within § 242 or in a new section within Title 18 of the United States Code.

111 The mens rea standard proposed here ("knowingly" or "recklessly") lowers the standard of intent from the "willful" standard currently required under § 242. The new provisions proposed herein, which proscribe specific actions and conduct, are sufficiently specific to avoid vagueness challenges. See generally Screws v. United States, 325 U.S. 91, 96 (1945); see also Joanna R. Lampe, *Federal Police Oversight: Criminal Civil Rights Violations Under 18 U.S.C. § 242* (Washington, DC: Congressional Research Service, 2020), 5, https://crsreports.congress.gov/product/pdf/LSB/LSB10495 [https://perma.cc/KLP4-CKXU] (observing that "Congress may need to examine whether any revision of Section 242's mental state requirement provides potential defendants with clear notice of what conduct violates the statute").

112 Section 242 does not currently include cross-references to the definitional provisions contained in Title 18, Chapter 109A, Sexual abuse. The amendments recommended herein would more clearly define what specific sexual acts constitute a civil rights violation and would better protect persons in state custody from sexual abuse and harassment by officials acting under color of law.

113 Currently, § 242 authorizes the death penalty for civil rights violations resulting in a person's death. This proposed language would eliminate the death penalty as a sentencing option in this subsection. The proposed language recommends including a misdemeanor option punishable up to one year for cases that do not result in bodily injury and anticipates graduated sentences for felony cases depending upon their severity. In setting statutory maximum penalties, empirical research has shown that all sentences, including those for violent crimes, may be significantly reduced without compromising public safety. See James Austin et al., *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, 2016, 7, https://www.brennancenter.org/sites/default/files/2019-08/Report_Unnecessarily_Incarcerated_0.pdf [https://perma.cc/BSL2-PS5F].

114 See George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Congress (2021) § 101.

115 See, e.g., 21 U.S.C. § 846.

116 See, e.g., 18 U.S.C. § 2(a).

117 The definitions and guidelines here are based in part on the use-of-force standards recommended in a national consensus policy on use of force prepared by 11 law enforcement leadership and labor organizations. International Association of Chiefs of Police (IACP), *National Consensus Policy and Discussion Paper on Use of Force*, 2017, https://www.theiacp.org/sites/default/files/all/n-o/National_Consensus_Policy_On_Use_Of_Force.pdf [https://perma.cc/VGT4-F4VE]. Law enforcement practices have been recognized as relevant by the Supreme Court, which observed in *Tennessee v. Garner*: "Actual departmental policies are important for an additional reason. We would hesitate to declare a police practice of long standing 'unreasonable' if doing so would severely hamper effective law enforcement." *Garner*, 471 U.S. 1, 19 (1985).

118 In the arrest context, "excessive force in the course of making [a] . . . 'seizure' of [the] person . . . [is] properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." Graham v. Connor, 490 U.S. 386, 388 (1989). See also *Graham* at 395 ("Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard."). Once in custody, use of force against a pretrial detainee is governed by a combination of the Fourth and Fourteenth Amendments (and the Fifth Amendment for those in federal pretrial custody), whereas use of force against those who have been sentenced is governed by the Eighth Amendment and therefore subject to the heightened standard articulated in *Farmer v. Brennan*. Such cases should be brought with reference to paragraph (c)(1)(B) of the proposed amendments.

119 For individuals who are serving a prison sentence, the Eighth Amendment standard for use of excessive force, not the Fourth or Fourteenth Amendment standard, controls. See Farmer v. Brennan, 511 U.S. 825, 835–36 (1994) ("The claimant must show that officials applied force 'maliciously and sadistically for the very purpose of causing harm,' [*Hudson v. McMillian*,] 503 U.S. [1], at 6 [(1992)], or, as the Court also put it, that officials used force with 'a knowing willingness that [harm] occur,' id., at 7." (internal citations omitted) (modification to include "harm" in brackets in *Farmer*). In *Hudson*, decided before *Farmer*, the Supreme Court held that the core inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson*, 503 U.S. at 7. In addition, force used maliciously or sadistically to cause harm to people who are not serving a prison sentence could also run afoul of the Fourth, Fifth, and Fourteenth Amendments.

120 See, e.g., Baker v. City of Hamilton, Ohio, 471 F.3d 601, 607 (6th Cir. 2006) ("We have held repeatedly that the use of force after a suspect has been incapacitated or neutralized is excessive as a matter of law."); Cox v. Treadway, 75 F.3d 230, 234 (6th Cir. 1996) ("[T]he jury should have been instructed that it is unreasonable and thus a violation of the Fourth Amendment for a police officer, acting under color of law, to use physical force on a citizen who has been arrested and restrained, who is securely under the control of the police, and who is not attempting to escape."); Smith v. Vavoulis, 373 F. App'x 965, 967 (11th Cir. 2010) (*per curiam*) (finding that "the amount of force applied necessarily appears inordinate compared to the need for force" where an incarcerated person had calmly submitted to being handcuffed); and Harris v. Chapman, 97 F.3d 499, 505–06 (11th Cir. 1996) (concluding excessive force was used when an incarcerated person who was restrained for a haircut was slapped and his head was snapped back with a towel). See also IACP, *National Consensus Policy*, 3.

121 Tennessee v. Garner, 471 U.S. 1 (1985) (holding that the killing of an unarmed burglar to prevent his escape was an unconstitutional seizure). See *Garner* at 11–12 ("The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."; and "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.").

122 See Scott v. Harris, 550 U.S. 372, 382 (2007) ("A police officer's attempt to terminate a dangerous high-speed car chase that *threatens the lives of innocent bystanders* does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.") (emphasis added); see also Plumhoff v. Rickard, 572 U.S. 765 (2014).

123 *Garner*, 471 U.S. 1; and *National Consensus Policy*, 4.

124 See George Floyd Justice in Policing Act of 2021 (JPA), H.R. 1280, 117th Congress (2021), § 2; George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Congress (2020), § 2. As noted in the IACP *National Consensus Policy*, however, "[t]he difference between deadly and less-lethal force is not determined simply by the nature of the force technique or instrument that is employed by an officer. Many force options have the potential to result in the death or serious bodily injury of a subject under certain circumstances." IACP, *National Consensus Policy*, 9–10. Therefore, the definition proposed here is non-exhaustive. Relatedly, during the summer of 2020, the Commission on Accreditation for Law Enforcement Agencies (CALEA) proposed modifying its recommended use-of-force standard to the following: "[D]eadly force may only be used when an officer reasonably believes that the action is in defense of any human life in imminent danger of death or serious bodily injury." CALEA also recommends regular training on use-of-force guidelines, and that training should "should stress deadly force shall only be used as a last resort." CALEA, "Proposed revision to Law Enforcement standard 4.1.2 relating to the use of deadly force," CALEA forum, July 6, 2020, https://www.calea.org/forum/topic/proposed-revision-law-enforcement-standard-412-relating-use-deadly-force [https://perma.cc/735Q-PV88].

125 See, e.g., Smith v. City of Hemet, 394 F.3d 689, 693, 705–06 (9th Cir. 2005) (defining "deadly force as force that creates a

substantial risk of causing death or serious bodily injury," similar to the definition of deadly force used in all 50 states and by other circuits) (collecting cases).

126 In *Crawford v. Cuomo*, the Second Circuit held that sexual contact with an incarcerated person that is undertaken with the intent to gratify an officer's sexual desire or humiliate the person (and serves no penological purpose, such as a valid pat-down or body cavity search) constitutes an Eighth Amendment violation. *Crawford*, 796 F.3d 252 (2d Cir. 2015). In addition, as the Supreme Court appeared to recognize in *Lanier*, the Fourteenth Amendment also offers protection against officers and other public officials who abuse their authority by engaging in unwanted sexual contact. United States v. Lanier, 520 U.S. 259 (1997). See also Fontana v. Haskin, 262 F.3d 871 (9th Cir. 2001) (observing that a woman seized during a trip to the police station has a Fourth Amendment right to be free from intrusions of her bodily integrity); Fara Gold, "Investigating and Prosecuting Law Enforcement Sexual Misconduct Cases," *United States Attorneys' Bulletin*, January 2018, 80, https://evawintl.org/wp-content/uploads/242SexualMisconduct-USABulletin.pdf [https://perma.cc/Q67A-9F8X] ("The Constitutional right at issue depends on the status of the victim at the time of the crime. As a general matter, those under arrest or those stopped by the police during an investigation are subject to the Fourth Amendment's protections against unreasonable seizure. Pretrial detainees are protected by the Due Process Clause of the Fourteenth Amendment. Convicted persons are protected by the Eighth Amendment's prohibition against cruel and unusual punishment.").

127 In *Farmer*, the Supreme Court adopted " 'subjective recklessness' as used in the criminal law" as the test for deliberate indifference under the Eighth Amendment, finding that it "is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases." Farmer v. Brennan, 511 U.S. 825, 839–40 (1994). See also Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994).

128 See Rosemond v. United States, 572 U.S. 65, 77 (2014) (observing that, as a general rule, for "purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission").

129 See U.S. Department of Justice, "Law Enforcement Misconduct" (updated July 6, 2020), https://www.justice.gov/crt/law-enforcement-misconduct [https://perma.cc/LW5V-HZ8G] ("An officer who purposefully allows a fellow officer to violate a victim's Constitutional rights may be prosecuted for failure to intervene to stop the Constitutional violation. To prosecute such an officer, the government must show that the defendant officer was aware of the Constitutional violation, had an opportunity to intervene, and chose not to do so. This charge is often appropriate for supervisory officers who observe uses of excessive force without stopping them, or who actively encourage uses of excessive force but do not directly participate in them.").

130 See George Floyd Justice in Policing Act of 2021, § 1123.

131 See, e.g., Closing the Law Enforcement Consent Loophole Act of 2019, S. 855, 116th Congress, 1st Sess. (2019).

ABOUT THE AUTHOR

▶ **Taryn A. Merkl** is senior counsel in the Brennan Center's Justice Program and leads the program's Law Enforcement Leaders to Reduce Crime & Incarceration initiative. Previously she was an assistant U.S. attorney in the Eastern District of New York for more than 16 years, where she served as deputy chief of the Criminal Division and as chief of the Civil Rights and Organized Crime and Gangs sections. As chief of Civil Rights from 2013 to 2019, she supervised all criminal civil rights and human trafficking cases in the district. She has also served as a law clerk to Chief Judge John M. Walker Jr. of the U.S. Court of Appeals for the Second Circuit and to Judge Jan E. DuBois of the U.S. District Court for the Eastern District of Pennsylvania, as a lecturer at Columbia Law School for more than 10 years, and as an adjunct professor of white-collar crime at Cardozo School of Law. She holds a JD from Columbia Law School and a BA from the University of Michigan.

ABOUT THE BRENNAN CENTER'S JUSTICE PROGRAM

The Brennan Center's Justice Program seeks to secure our nation's promise of equal justice for all by creating a rational, effective, and fair justice system. Its priority focus is to reduce mass incarceration. The program melds law, policy, and economics to produce new empirical analyses and innovative policy solutions to advance this critical goal.

ACKNOWLEDGMENTS

The Brennan Center gratefully acknowledges Arnold Ventures' founders, Laura and John Arnold, Solidarity Giving, and The Tow Foundation for their generous support of our work. This is an independent Brennan Center publication; the views expressed are those of the authors and do not necessarily represent those of our supporters.

The author is grateful to Ed Chung, Ram Subramanian, Lauren-Brooke Eisen, and Maris Mapolski for their detailed, substantive feedback on this report; to Leily Arzy for research assistance; and to Ames Grawert, Hernandez Stroud, Taylor King, and Zachary Laub for their thoughtful review of the report, communications assistance, and work to ensure the report's successful launch. Sincere thanks are also due to interns Daniel Lumer and Amarpreet Kaur for additional research support.

BRENNAN CENTER FOR JUSTICE

Brennan Center for Justice at New York University School of Law
120 Broadway // 17th Floor // New York, NY 10271
www.brennancenter.org