Police Use of Force: Rules, Remedies, and Reforms

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Summary

Several high-profile police shootings and other law enforcement-related deaths in the United States have sparked intense protests throughout the country and a fierce debate in Congress concerning the appropriate level of force police officers should wield in a society that equally values public safety and the lives of each of its citizens under law. These incidents have been the subject of several congressional hearings, have prompted the introduction of various legislative measures, and have catalyzed a new civil rights movement in the United States aimed at reforming the criminal justice system. Reformers claim that police work too closely with local prosecutors resulting in insufficient oversight and have called for greater involvement by the federal government. The law enforcement community and its supporters have countered that these recent deaths are anomalous in otherwise exemplary police conduct, and that placing the federal government in direct regulation of state and local police would present an unwarranted intrusion into state and local affairs.

To provide legal context for this debate, this report will address three overarching questions: (1) what are the constitutional rules governing an officer's use of force; (2) what role has Congress played in providing a remedy for a violation of these rules; and (3) what are the potential reforms to these rules and remedies?

Rules. In a line of cases beginning in the mid-1980s, the Supreme Court ruled that all claims of excessive force occurring during an arrest or investigatory stop—deadly or otherwise—are governed by the Fourth Amendment's prohibition against unreasonable seizures. Under prevailing judicial precedent, all uses of force must be "objectively reasonable" based on the totality of the circumstances viewed through the lens of the officer in the field. This requires a fact-intensive inquiry that is not easily reduced to categorical rules, but some general trends can be discerned from the case law. For instance, the courts have been deferential to officers in the field who are required to make split-second decisions in dangerous situations. Also, officers need not use the least intrusive means to effectuate a seizure so long as their actions are reasonable.

Remedies. In an effort to provide teeth to federal constitutional restraints, Congress has enacted three federal statutes that accord various remedies for police use of excessive force. First is the federal criminal statute, 18 U.S.C. Section 242, which prohibits officers from willfully depriving another of a constitutional right while acting under color of law. Enacted shortly after the Civil War, many have argued that Section 242's specific intent *mens rea* requirement is too high a threshold to provide an adequate deterrence to excessive force. Moreover, the federal circuit courts are split on how to apply this test, with some requiring a strict form of intent and others permitting a reckless disregard jury instruction. Second is the federal civil rights statute, 42 U.S.C. Section 1983, which provides a civil cause of action for deprivations of one's constitutional rights. While generally viewed as successful in providing monetary damages to those injured by officers in the field, the doctrine of qualified immunity has frequently shielded officers from liability when the law was not "clearly established" at the time. Third is the more recently enacted "pattern or practice" statute, 42 U.S.C. Section 14141, which authorizes the Attorney General to sue local municipalities whose police forces have engaged in a pattern of excessive force under the Fourth Amendment.

Reforms. Various reform bills have been introduced in the 114th Congress to provide additional restraints on police use of force, including the Excessive Use of Force Prevention Act of 2015 (H.R. 2052), which would criminalize the use of chokeholds, and the Police Accountability Act of 2015 (H.R. 1102), which would create a new federal crime for certain homicides committed by law enforcement officers. Additionally, several bills would place requirements on states to report use of force statistics to the federal government.

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Introduction

By the very nature of their job, law enforcement officers are tasked with using physical force to restrain individuals and protect themselves and others from harm.[1] Police officers must stop and seize violent suspects, serve search warrants in hostile environments, and maintain the peace and safety of the communities in which they serve. As then-Justice Rehnquist observed, "[p]olicemen on the beat are exposed, in the service of society, to all the risks which the constant effort to prevent crime and apprehend criminals entails: Because these people are literally the foot soldiers of society's defense of ordered liberty, the State has an especial interest in their protection."[2] However, a number of recent high-profile police shootings and other law enforcement-related deaths have reignited the debate about how much force police should wield in a democratic society that values both law and order and the personal liberty of each of its citizens under law.[3]

The shooting of Michael Brown by a Ferguson, Missouri police officer in the summer 2014 served as a flashpoint for this debate,[4] but it is just one in a spate of recent law enforcement-related deaths.[5] These deaths, and others, have prompted a call for legal accountability against the officers involved in these killings, but also, more broadly, for systemic police reform on both the federal and state level. President Obama responded by establishing the *Task Force on 21st Century Policing* in December 2014 to develop best policing practices and recommendations.[6] The task force's final report issued in May 2015 offered a set of policy recommendations focused on training, investigations, prosecutions, data collection, and information sharing. Similarly, the House Judiciary Committee held a hearing on policing strategies on May 19, 2015,[7] and various measures have been introduced in the 114th Congress to address both use of force tactics and data

[1] Graham v. Connor, 490 U.S. 386, 396 (1989) ("Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.").

[2] Roberts v. Louisiana, 431 U.S. 633, 646-47 (1977) (Rehnquist, J., dissenting).

[3] Going hand-in-hand with this excessive force debate is the claim that state and local police forces have increasingly become "militarized" in their tactics and use of surplus military equipment from the Department of Defense, a practice recently ended by President Obama. *See generally* CRS Insight IN10138, *The "Militarization" of Law Enforcement and the Department of Defense's "1033 Program"*, by (name redacted) and (name redacted)

[4] *Angry Crowd Gathers after Missouri Police Shoot Teen*, CBS NEWS (August 10, 2014), *available at* http://www.cbsnews.com/news/angry-crowd-gathers-after-missouri-police-shoot-teen/; Ferguson Police Say Teen Shot by Cop Was Suspect in Robbery; Officer's Identity Revealed, CBS NEWS (August 15, 2014, 9:47 A.M.), *available at* http://www.cbsnews.com/news/darren-wilson-ferguson-police-officer-who-fatally-shot-michael-brown-identified/.

[5] *See, e.g.*, Elahe Izadi & Peter Holley, *Video Shows Cleveland Officer Shooting 12-Year Old Tamir Rice Within Seconds*, WASH. POST (November 26, 2014), *available at* http://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy/; Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES (July 18, 2014), *available at* http://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html?_r=1; Richard Pérez-Peña, *University of Cincinnati Officer Indicted in Shooting Death of Samuel Debose*, N.Y TIMES (July 29, 2015), *available at* http://www.nytimes.com/2015/07/30/us/university-of-cincinnati-officer-indicted-in-shooting-death-of-motorist.html; Scott Malone & Ian Simpson, *Six Baltimore Officers Charged in the Death of Freddie Gray, One With Murder*, REUTERS (May 1, 2015), *available at* http://www.reuters.com/article/2015/05/01/us-usa-police-baltimore-idUSKBN0NL1GO20150501; Mark Berman, *South Carolina Police Officer in Walter Scott Shooting Indicted on Murder Charge*, WASH. POST (June 8, 2015), *available at* http://www.washingtonpost.com/news/post-nation/wp/2015/06/08/police-officer-who-shot-walter-scott-indicted-for-murder/.

[6] FINAL REPORT, THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015), *available at* http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

[7] *Policing Strategies for the 21st Century, Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (2015), *available at* http://judiciary.house.gov/index.cfm/hearings?ID=9F5ABE57-E0F0-468E-9B79-F9DFDC448E11.

collection by state and local police departments. The public, too, has been thoroughly engaged on this issue. "Black Lives Matter," a movement that sprung up in response to the Treyvon Martin shooting and other police-related deaths, has recently released an initiative called "Campaign Zero," which contains a set of policy proposals to limit police use of excessive force, including a call for a national standard governing the use of deadly force and better reporting requirements on instances of excessive force by law enforcement officers.[8]

These reforms prompt the perennial debate concerning the role of Congress in addressing police reform, especially on the local level, where many of these deaths have occurred. Certain segments of the law enforcement community and its supporters have argued that regulating local police is best left to the province of state and local governments, and that a one-size-fits-all approach would hamper local experimentation.[9] Proponents of reform have countered that federal intervention is warranted as state and local governments and police departments have not adequately held their officers legally accountable for the improper use of force.

Insofar as *constitutional* violations are concerned, there is historical precedent for congressional intervention. Shortly after the Civil War, Congress enacted two federal statutes—one criminal and one civil—to provide legal remedies for newly freed African Americans who were being deprived of their civil rights. On the civil side is 42 U.S.C. Section 1983, which provides individuals with a civil cause of action to recover damages for the deprivation of such rights.[10] On the criminal side is 18 U.S.C. Section 242, which makes it a federal crime to willfully deprive someone of his constitutional rights.[11] Of more recent vintage (1994) is 42 U.S.C. Section 14141, which permits the Department of Justice (DOJ) to sue local police departments that engage in a "pattern or practice" of constitutional violations, including the use of excessive force.[12]

To provide legal context for this debate, this report will address three overarching questions: (1) what are the constitutional rules governing an officer's use of force; (2) what role has Congress played in providing a remedy for a violation of these rules; and (3) what are the potential reforms to these rules and remedies?

Rules Governing Use of Force

The first question that must be addressed is what rules govern police use of force.[13] Because the majority of recent law enforcement-related deaths have arisen in the context of street encounters with police (rather than pre- or post-trial detention), this report will focus almost exclusively on the Fourth Amendment right to be free from unreasonable seizures, which governs such encounters.[14]

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[8] *See* Campaign Zero, Limit Use of Force (last visited September 28, 2015), http://www.joincampaignzero.org/force.

[9] *See, e.g., id.* (statement of Sheriff David Clarke, Jr., Milwaukee County, Wisconsin); D.C. McAllister, *Activists Use Charges of Police Racism to Justify a Huge Power Grab*, THE FEDERALIST (June 12, 2015), *available at* http://thefederalist.com/2015/06/12/activists-use-charges-of-police-racism-to-justify-a-huge-power-grab/.

[10] Civil Rights Act of 1871, ch. 22, §1, 17 Stat. 13, (codified at 42 U.S.C. §1983).

[11] Civil Rights Act of 1866, 18 U.S.C. §242.

[12] 42 U.S.C. §14141.

[13] Note that an assessment of the legality of specific instances of force, such as in Ferguson or elsewhere, or an evaluation of use of force rules under state law, are beyond the scope of this report.

[14] Depending on the setting of the police-citizen encounter, different constitutional provisions might apply. For seizures occurring during an "arrest, investigatory stop, or other 'seizure' of a free citizen," the Fourth Amendment applies. *See* U.S. CONST. amend. IV; Graham v. Connor, 490 U.S. 386, 395 (1989). If the alleged excessive force was used after the person was arrested and while they were in detention, the Due Process Clause's "shock the conscience" standard will (continued...)

Fourth Amendment "Objective Reasonableness"

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, from unreasonable searches and seizures."[15] While this provision is best known for providing restraints on government searches and surveillance and the procedures under which they may be conducted, in a series of cases beginning in the 1980s the Supreme Court interpreted the Fourth Amendment as the primary federal legal restraint on excessive force. Prior to these cases, the lower circuit and district courts largely applied the substantive component of the Due Process Clause to all claims of excessive force, deadly or otherwise.[16] However, in *Tennessee v. Garner* and *Graham v. Connor*, the Court grounded all excessive force claims in the Fourth Amendment's right to be free from unreasonable seizures.[17]

Deadly Force Under *Tennessee v. Garner*

In the 1985 case *Tennessee v. Garner*, the Court assessed whether Tennessee's deadly force statute—which, like those of other states at the time, permitted police to use deadly force to shoot a fleeing felon—passed constitutional muster.[18] In that case, police were responding to a reported burglary when an officer at the scene saw a young African American male fleeing the back of the house, apparently unarmed.[19] In an effort to prevent his escape, the officer yelled for the suspect to halt and, when he failed to do so, shot him in the back of the head as he was climbing over a fence. The shot was fatal.

The victim's family brought a civil suit under Section 1983 for the alleged violation of the deceased's constitutional rights. The federal district and circuit courts both held that the officer had acted in good faith on Tennessee's use of force statute, which provided that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."[20] In a 6-3 decision authored by Justice White, the Supreme Court reversed and held that the use of deadly force against a fleeing felon is unconstitutional.

With little discussion of prior excessive force cases, Justice White noted that the use of deadly force is a "seizure" under the Fourth Amendment that must be "reasonable," the touchstone of all

(...continued)

apply. U.S CONST. amends. V & XIV. Force used against a person that has already been convicted and is incarcerated is subject to the prohibition on "cruel and unusual" punishment as protected under the Eighth Amendment. U.S. CONST. amend. VIII.

[15] U.S. CONST. amend. IV.

[16] *See* Johnson v. Glik, 481 F.2d 1028, 1033 (2d Cir. 1973) (applying substantive due process standard to claims of excessive force); Franklin v. Aycock, 795 F.2d 1253, 1258 (6th Cir. 1986) (same); Burton v. Livingston, 791 F.2d 97, 100 (8th Cir. 1986) (same). *But see* Lester v. City of Chicago, 830 F.2d 706, 711 (7th Cir. 1987) (applying Fourth Amendment to claims of excessive force).

Judge Henry Friendly's prominent use of force test in *Glik* assessed (1) "the need for the application of force," (2) "the relationship between the need and the amount of force that was used," (3) "the extent of injury inflicted," and (4) "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Johnson*, 481 F.2d at 1033.

[17] Judge Friendly's four-part test from *Glik* remains the appropriate standard when assessing force used during post-arrest, pre-trial detention. *See, e.g.*, United States v. Cobb, 905 F.3d 784, 788 (4th Cir. 1990) (instructing jury in 18 U.S.C. §242 case using *Glik* standard).

[18] Tennessee v. Garner, 471 U.S. 1 (1985).

[19] *Id.* at 5.

[20] TENN. CODE ANN. §40-7-108 (1982).

Fourth Amendment protections.[21] To determine a seizure's reasonableness, a reviewing court must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[22] On the individual's side of the ledger, the Court noted that the "intrusiveness of a seizure by means of deadly force is unmatched."[23] On the government's side, the Court highlighted the government's various law enforcement interests, including arresting suspects peacefully without putting the public at risk. Balancing these interests, the Court ultimately held that the "use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable."[24] Rather than furthering the goals of the criminal justice process, Justice White noted that killing a suspect ensures that this system will never be put in motion as the government cannot bring a deceased person to justice. While rejecting the application of deadly force against an individual for merely committing a felony, the opinion went on to describe when such force is permissible:

> 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.[25]

Note that *Garner* arose in the context of the use of *deadly* force. Four years later, the Court in *Graham v. Connor* addressed whether this same rule should extend to the use of *non*-deadly force.[26]

All Uses of Force Under *Graham v. Connor*

In *Graham v. Connor*, police officers pulled over an individual suspected of shoplifting.[27] In response to his erratic behavior, one of the officers forcefully slammed him on the hood of a police cruiser and threw him headfirst into the car. The suspect sustained significant injuries and sued the police for excessive force under Section 1983.

Resolving a dispute in the lower federal courts about whether the Fourth Amendment applied outside the context of deadly force, the Supreme Court held 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."[28] Writing for the Court, Chief Justice Rehnquist observed that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."[29] Instead, "its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is

[21] Garner, 471 U.S. at 7 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).

[22] Garner, 471 U.S. at 7 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

[23] *Id.* at 9.

[24] *Id.* at 11.

[25] *Id.* at 11-12.

[26] Graham v. Connor, 490 U.S. 386 (1989).

[27] *Id.* at 389.

[28] *Id.* at 395 (emphasis in original).

[29] *Id.* at 396.

actively resisting arrest or attempting to evade arrest by flight."[30] These three factors have taken on considerable importance in use of force jurisprudence in the lower courts.

Additionally, Chief Justice Rehnquist described the interpretive lens through which excessive force cases must be viewed. First, 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."[31] Second, 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."[32] Finally, the reasonableness inquiry must be an objective one: "the question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[33] "An officer's evil intentions," the Court concluded, "will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."[34] This last interpretive rule adheres to the traditional Fourth Amendment principle that an officer's subjective intent will not invalidate otherwise lawful conduct.[35]

Based on *Garner* and *Graham*, lower courts consistently applied the following tests: if deadly force was used, the court would assess whether the suspect posed a threat to the safety of the officers or others; if non-deadly force was used, a reviewing court would assess the three factors from *Graham*. However, in the 2007 case *Scott v. Harris*, the Court rejected these multi-factor tests and reiterated that the Fourth Amendment's more general free-form reasonableness test should apply.[36]

Scott v. Harris's Free-Form Approach

In *Scott*, the officers concluded a high-speed car chase by ramming the back of the suspect's bumper with a police cruiser, sending the suspect off the road, where he crashed and was rendered a quadriplegic.[37] Bringing a Section 1983 claim, the plaintiff argued that because the police technique constituted deadly force that *Garner* should control the analysis. Rejecting this approach, Justice Scalia, writing for an 8-1 Court, observed that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test to the use of a particular type of force in a particular situation."[38]

In his analysis, Justice Scalia surprisingly did not cite to *Graham* or the three *Graham* factors, and instructed that courts must instead "slosh [their] way through the factbound morass of 'reasonableness.'"[39] The *Scott* Court did note, however, that one factor to take into consideration

[30] *Id.*

[31] *Id.* at 396.

[32] *Id.* at 396-97.

[33] *Id.* at 397.

[34] *Id.*

[35] *See* Whren v. United States, 517 U.S. 806, 813 (1996) (rejecting argument that "constitutional reasonableness of traffic stop depends on the actual motivations of individual officers involved").

[36] Scott v. Harris, 550 U.S. 372 (2007).

[37] *Id.* at 375.

[38] *Id.*

[39] *Id.* at 383.

was the relative culpabilities of the suspect and innocent bystanders. Weighing the totality of the circumstances, the Court ultimately held that "[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."[40]

Some have come to criticize the *Scott* ruling as overly "simplistic" and have argued that it fails to provide appropriate guidance for future use of force cases.[41] Specifically, the ruling might not give officers in the field sufficient instruction on what level of force is reasonable in a particular situation. As one commentator noted, *Scott* "may serve as an incentive for agencies to re-write their policies in more general terms, avoiding specific preconditions for the use of deadly force."[42] This could potentially deprive officers of much needed instruction when in the field. The *Scott* ruling could also deprive juries of adequate instruction on what constitutes excessive force. As one post-*Scott* district court has noted:

> [D]eadly force is simply a type of excessive force. No separate legal standard applies to cases involving deadly force. Like any other excessive force claim, cases involving deadly or potentially deadly force should be evaluated under the *Graham* reasonableness test. Here, as in *Scott*, the Court has no need to decide as a matter of law whether the police used deadly force. Accordingly, the Court need only craft a charge which will help a jury decide whether the force used in this case was reasonable under all the circumstances.... The Court will not instruct the jury as to the definition of deadly force or the specific circumstances under which deadly force is or is not reasonable.[43]

As the Eighth Circuit noted in a pre-*Scott* case, failing to adequately explain the difference between deadly and non-deadly force could confuse juries:

> The problem with giving only the more general excessive-force instruction is that it may mislead the jury as to what is permissible under the law. One can easily imagine a jury, having been given only the general standard, concluding that an officer was "objectively reasonable" in shooting a fleeing suspect who posed no threat to the officer or others.[44]

As will be discussed in the next section, lower courts have interpreted this line of excessive force cases in divergent ways: some still rely on the multifactor tests of *Garner* and *Graham*, while others have held that *Scott*'s free-form test should control.

Assessing the Use of Excessive Force

Based upon Supreme Court case law, the following rules apply to an assessment of excessive use of force:

- All claims of excessive force occurring in the course of an arrest, investigatory stop, or other seizure are reviewed under the Fourth Amendment's prohibition against unreasonable seizures.
- An officer's use of force must be "objectively reasonable" under the totality of the circumstances.
- Reasonableness is determined by balancing the interests of the individual and the government.
- Reasonableness is evaluated from the perspective of a reasonable officer in the field.

[40] *Id.* at 386.

[41] *See* Karen M. Blum, Scott v. Harris: *Death Knell for Deadly Force Policies and Garner Jury Instructions?*, 58 SYRACUSE L. REV. 45, 54 (2007).

[42] *Id.* at 59-60.

[43] *See* Blake v. City of New York, No. 05-6652, 2007 WL 1975570, *3-4 (S.D.N.Y. July 6, 2007) (internal citations omitted).

[44] Rahn v. Hawkins, 464 F.3d 813, 818 (8th Cir. 2006).

Deadly Force

One of the most prominent issues surrounding police use of force has been use of deadly force against unarmed suspects. Some have raised concerns that officers are resorting to deadly force too quickly or without sufficient justification.

Although police use of deadly force, like all uses of force, is a fact-intensive inquiry that depends on the specifics of each particular case, a few trends can be noted. First, police are generally permitted to employ deadly force when the suspect is carrying a deadly weapon in what is perceived by the officer to be a threatening manner. For example, in *Montoute v. Carr*, the Eleventh Circuit held that the suspect's possession of a sawed-off shotgun posed a risk of serious physical harm to the officer or others, justifying the use of deadly force.[45] Similarly, the Fourth Circuit in the 2013 case *Ayala v. Wolfe* upheld the deadly use of force against a robbery suspect who pulled a firearm from his waistband as he was being frisked by police.[46]

Second, even where a suspect turns out to not have a firearm, the courts have held that officers are still justified in using deadly force if they reasonably believed the suspect was carrying a gun.[47] For instance, the Eleventh Circuit upheld the use of force against a fleeing suspect who had just physically assaulted an officer and appeared to be reaching under his seat for an undisclosed object, although no weapon was found in the car after the incident.[48] In another case, the Fourth Circuit upheld the shooting of a man believed to be reaching for a firearm, but which turned out to be a can of shoe polish, even though the only evidence of such possession was a citizen's report of it, corroborated by the officer's own observation.[49]

Third, the courts have generally been unwilling to second-guess officers in the field and will approve the use of force in wide-ranging contexts. Indeed, one federal court noted that "[t]his standard contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case."[50] This deference results in rules such as the one that officers are not required to use less intrusive force if the use of force in question was reasonable under the Fourth Amendment.[51] In upholding this rule, the Ninth Circuit argued "'[r]equiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment" and could "induce tentativeness" in officers that

[45] Montoute v. Carr, 114 F.3d 181, 185 (11th Cir. 1997).

[46] Ayala v. Wolfe, 546 Fed. Appx.197, 202 (4th Cir. 2013).

[47] *See, e.g.*, Thompson v. Hubbard, 257 F.3d 896, 899 (8th Cir. 2001) ("An officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun."); Lamont v. New Jersey, 637 F.3d 177 (3d Cir. 2011) (holding that officer's mistaken belief that suspect was drawing a weapon that turned out to be a crack pipe did not render use of deadly force unreasonable); Dudley v. Eden, 260 F.3d 722, 727 (6th Cir. 2001).

[48] *See* Harrell v. Decatur County, 22 F.3d 1570, 1578 (11th Cir. 1994) (Dubina, dissenting), *majority opinion vacated* Harrell v. Decatur County, 41 F.3d 1494, 1494 (11th Cir. 1995).

[49] *See* Anderson v. Russell, 247 F.3d 125, 130-31 (4th Cir. 2001).

[50] Edwards v. City of Martins Ferry, 554 F. Supp. 2d 797, 804 (S.D. Ohio 2008).

[51] *See* Plakas v. Drinksi, 19 F.3d 1143, 1149 (7th Cir. 1994); Scott v. Heinrich, 39 F.3d 912, 915 (9th Cir. 1994); Jiron v. City of Lakewood, 392 F.3d 410, 414 (10th Cir. 2004); *see generally* Illinois v. Lafayette, 462 U.S. 640, 647 (1983) ("The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means.").

might deter them from protecting the public and themselves.[52] However, some courts have noted that the "availability of alternative means" is "relevant" to a Fourth Amendment analysis.[53]

Although significant deference is accorded officers, possession of a weapon does not always justify police use of deadly force. Take, for example, the 2013 Fourth Circuit case *Cooper v. Sheehan*.[54] There, the court held that it is the *threat* posed by the possession of a firearm that justifies the use of force, not the mere possession of a firearm.[55] The court concluded that Cooper did not pose such a threat—he was coming out of his home, held the gun towards the ground, made no sudden moves, made no threats, and did not ignore any commands.[56]

Fourth, there is divergence in the lower courts in applying the Supreme Court's limited deadly force jurisprudence. For instance, questions remain whether courts should still be giving Garner's deadly force instructions after *Scott* instructed that reasonableness is the touchstone of assessing excessive force claims. Likewise, it is unclear after *Scott* how the three *Graham* factors play into the analysis. Based on Justice Scalia's rejection of *Garner* as controlling all excessive force cases, his failure to even cite to *Graham*, and admonishment that courts must still "slosh [their] way through the factbound morass of reasonableness," it appears that courts must assess excessive force claims under a free-form totality of the circumstances evaluation, untethered from *Garner* and *Graham*.[57]

Since *Scott*, several circuits, including the Ninth and Eleventh circuits, have applied this free-form approach. In *Mattos v. Agaronos*, the Ninth Circuit noted that the *Graham* factors "are not exclusive" and that courts must "examine the totality of the circumstances and consider whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*."[58] Similarly, the Eleventh Circuit observed that "none of [the *Garner*] conditions are prerequisites to the lawful application of deadly force by an officer seizing a suspect."[59]

Other circuits, on the other hand, including the Second,[60] Fourth,[61] Fifth,[62] and Sixth[63] have failed to apply *Scott*'s more general inquiry. In *Rasanen v. Doe*, for instance, the district court provided a jury instruction that failed to include the justifications for use of deadly force provided in *Garner*, but instead provided a general reasonableness instruction.[64] On appeal, the Second Circuit asserted that although *Scott* "clarified that a special instruction based on *Garner* is not

[52] *Heinrich*, 39 F.3d at 915.

[53] Lowe v. City of Seattle, No. 07-0784, 2008 WL 4083150 *6 (W.D. Wash. August 29, 2008).

[54] Cooper v. Sheehan, 735 F.3d 153 (4th Cir. 2013).

[55] *Id.*

[56] *Id.*

[57] Scott v. Harris, 550 U.S. 372, 386 (2007).

[58] Mattos v. Agaronos, 661 F.3d 433, 441 (9th Cir. 2011) (internal quotation marks omitted); *see also* George v. Morris, 736 F.3d 829, 838 (9th Cir. 2013).

[59] *See* Penney v. Eslinger, 605 F.3d 843, 850 (11th Cir. 2010); *see also* Beshers v. Harrison, 495 F.3d 1260, 1267 (11th Cir. 2007) (Recently ... in *Scott v. Harris*, the Supreme Court limited *Garner*'s applicability.).

[60] Rasanen v. Doe, 723 F.3d 325, 334 (2d Cir. 2013).

[61] Cooper v. Sheehan, 735 F.3d 153, 159 (4th Cir. 2013) (citing to *Garner* and noting that "[a] reasonable officer is entitled to use deadly force '[w]here the officer has probable cause to believe that [a] suspect poses a threat of serious physical harm, either to the officer or to others.'").

[62] *See* Sanchez v. Fraley, 376 Fed. Appx. 449, 451 (5th Cir. 2010) (citing to *Garner* and noting that "when an officer uses deadly force, our 'objective reasonableness' balancing test is constrained.").

[63] *See* Krause v. Jones, 765 F.3d 675, 680 (6th Cir. 2014).

[64] Rasanen v. Brown, 841 F. Supp. 2d 687, 697-98 (E.D.N.Y. 2012), *vac'd sub nom*., 723 F.3d 325 (2d Cir. 2013).

necessary (or even appropriate) in all deadly-force contexts," a *Garner* instruction should still be given in its original context: "the fatal shooting of an unarmed suspect."[65] Thus, in the Second Circuit, in a case "involving use of force highly likely to have deadly effects, an instruction regarding justifications for the use of deadly force is required."[66]

Non-Deadly Force

Like the use of deadly force, use of so-called "non-deadly," "non-lethal," or "less than lethal" force has caused controversy in recent months. Although nominally non-lethal, recent deaths caused by chokeholds,[67] tasers,[68] and pepper spray[69] have raised significant concerns about when these methods of force should be permitted. Moreover, some in the public have questioned the use of pepper spray, batons, and other non-lethal uses of force against individuals who are protesting the very use of force being used against them.[70]

Tasers

Over the past several decades, law enforcement agencies in the United States have significantly increased their acquisition of tasers—a weapon capable of incapacitating a human being with an electroshock.[71] As of 2013, over 12,000 law enforcement agencies were reportedly using tasers.[72] While apparently reducing the numbers of police shootings and held out as a safer alternative to the use of a firearm, it has been reported that between 2001 and 2012, 500 people died after being shocked with a taser.[73]

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[65] *Rasanen*, 723 F.3d at 334.

[66] *Id.* at 333.

[67] J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (December 3, 2014), *available at* http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0.

[68] Editorial Board, *Questions Still Remain Over the Death of Natasha McKenna*, WASH. POST (September 8, 2015), *available at* https://www.washingtonpost.com/opinions/an-accounting-but-not-the-end/2015/09/08/5660cc4c-5670-11e5-abe9-27d53f250b11_story.html; Wesley Lowery, *Two Former Ga. Police Officers Charged with Murder for Stun Gun Death of Handcuffed Man*, WASH. POST (August 18 2015), *available at* https://www.washingtonpost.com/news/post-nation/wp/2015/08/18/two-former-ga-police-officers-charged-with-murder-for-stun-gun-death-of-handcuffed-man/.

[69] Associated Press, *Authorities: Man Dies After Being Pepper Sprayed By Police*, N.Y. TIMES (July 11, 2015), *available at* http://www.nytimes.com/aponline/2015/07/11/us/ap-us-pepper-spray-police-death.html.

[70] *See* U.S. Dep't of Justice, Office of Community Oriented Policing Services, After-Action Assessment of the Police Response to the August 2014 Demonstrations in Ferguson, Missouri (2015); *Ferguson Protestors File Lawsuit Against Police for "Excessive Use of Force"*, The Guardian (August 29, 2014), *available at* http://www.theguardian.com/world/2014/aug/29/ferguson-protesters-lawsuit-police-excessive-force.

[71] AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL'S CONCERNS ABOUT DEATHS AND ILL-TREATMENT INVOLVING POLICE USE OF TASERS 1 (2004) [hereinafter Amnesty International 2004 Report].

"Taser" is the name for a particular type of conducted energy device (the technical name for these less-lethal weapons), but it is commonly used to refer to all types of conducted energy devices, much like photocopiers are commonly called "Xerox" machines.

[72] U.S Dep't of Justice, Bureau of Justice Statistics, Local Police Departments, 2013: Equipment and Technology (2013), *available at* http://www.bjs.gov/content/pub/pdf/lpd13et.pdf.

[73] Amnesty International, *USA: Stricter Limits Urged as Deaths Following Police Taser Use Reach 500* (February 15, 2012), *available at* https://www.amnesty.org/en/latest/news/2012/02/usa-stricter-limits-urged-deaths-following-police-taser-use-reach/.

Tasers can be deployed in two modes. One of the most popular tasers used in the field—the X26, made by Taser International, Inc.—can fire two probes up to 35 feet and "discharges pulsed energy to deliver a 50,000 volt shock designed to override the subject's central nervous system, causing uncontrollable contraction of the muscle tissue and instant collapse."[74] Alternatively, the X26 and other similar devices can be used in "stun mode," in which the device is physically pressed against a human body to deliver a more localized shock.[75]

Like all other use of force cases, those assessing the use of tasers tend to be heavily fact-specific from which it is difficult to derive universal principles. That said, a few general trends can be noted. First, the courts have held that the use of a taser is least justified against "nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officer."[76] For instance, in *Brown v. City of Golden Valley*, a woman and her husband were allegedly pulled over for speeding.[77] When the officers reportedly engaged in aggressive behavior, the woman called 911, and refused to hang up when commanded by the officers.[78] One of the officers tased her arm and threw the phone on the ground. The Eighth Circuit rejected the officer's defense of qualified immunity, noting that the woman was only suspected of committing a minor offense and did not pose a threat to the safety of the officers.[79] In another case, the Sixth Circuit held that an officer was not entitled to qualified immunity when she "gratuitously" shocked a man after he had been restrained by police.[80]

Second, the courts have generally held that the use of a taser against persons who are belligerent or violent is permitted under the Fourth Amendment.[81] In one case, a 9th grade student was tased by a police officer after he attempted to punch a police officer after refusing to hand over his portable video game console.[82] The court rejected the student's Section 1983 claim, observing that it was "simply impossible" to say that the amount of force used was unreasonable under the Fourth Amendment.

Somewhere in the grey area between active resistance and no resistance are cases where law enforcement used a taser against someone who was *passively* resisting the officer's commands. The majority of cases seem to permit the use of a taser for individuals against such passive resisters. In *Buckley v. Haddock*, for example, the Eleventh Circuit upheld the use of a taser on a man who fell to the ground after being handcuffed and refused to get up after several requests from the officer.[83] After giving the man several warnings, the officer tased him several times. In rejecting his claim, the court put significant weight on the government's interest, noting that "[t]he government has an interest in arrests being completed efficiently and without waste of limited resources: police time and energy that may be needed elsewhere at any moment."[84]

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[74] Amnesty International 2004 Report, *supra* note 71, at 4; *see also* Taser International, Inc., Taser Electronic Control Devices Electrical Characteristics (February 1, 2009), *available at* http://www.ecdlaw.info/outlines/EC_02-01-09_%20X26_Elec_Char.pdf.

[75] Amnesty International 2004 Report, *supra* note 71, at 5.

[76] Brown v. City of Golden Valley, 574 F.3d 491, 499 (8th Cir. 2009).

[77] *Id.* at 500.

[78] *Id.* at 494.

[79] *Id.* at 498.

[80] *See* Roberts v. Manigold, 240 Fed. Appx. 675, 678 (6th Cir. 2007).

[81] *See* Zivojinovich v. Barner, 525 F.3d 1270, 1278 (11th Cir. 2008).

[82] Johnson v. City of Lincoln Park, 434 F. Supp. 2d 467, 480 (E.D. Mich. 2006).

[83] Buckley v. Haddock, 292 Fed. Appx. 791, 792-93 (11th Cir. 2008).

[84] *Id.* at 794.

In another case, the U.S. District Court for the Southern District of Ohio held that a police officer was justified in using a taser on an elderly suspect suffering from Alzheimer's disease who had "refused to comply" with the officer's orders. Once the officer decided to engage the suspect, the court posited, "he had to continue, and it seems the only way he was able to do this was with a taser."[85] In doing so, the court denied the fact that the age or potential mental illness of a suspect should require a heightened use of force standard.[86]

Similarly, the Western District of Washington upheld the use of a taser against a mentally ill woman who attempted to drive away from two police officers who were sent to check on the suspect after her mother reported that she might attempt suicide.[87] The district court upheld this use of force for two reasons. First, it found credible the officer's belief that Lowe posed a risk to the safety of the officers and others when she got into her truck, which he believed could have been used as a weapon. Second, the court construed Lowe's actions as "attempting to avoid legitimate contact by law enforcement.... "[88]

Beyond the level of threat posed by the individual, the courts have taken other factors into consideration including the degree of harm caused by the Taser and how many times it was used in a specific situation.[89] For instance, the Eleventh Circuit observed that "[a]lthough being struck by a taser gun is an unpleasant experience, the amount of force [the officer] used—a single use of a taser gun causing a one-time shocking—was reasonably proportionate to the need for force and did not inflict any serious injury."[90] To the contrary, the fact that an individual had suffered "serious injury requiring emergency medical care" and its multiple applications contributed to a court finding that the use of a taser multiple times was unreasonable.[91] Because in the large majority of cases the target of the tasing is not going to suffer permanent injuries, the courts may be inclined to find that such use of force is reasonable in most cases. However, these opinions did not take into account the potential injury—including death—that might be caused by these devices. Other factors taken into consideration have included the vulnerability of the victim,[92] and whether the officers provided a warning to the target before employing the taser.[93]

Pepper Spray

Like tasers, the use of pepper spray by local police as a law enforcement tool has engendered considerable public attention, including well-known incidents during the Occupy Wall Street protests,[94] and more recently during the protests in Ferguson, Missouri.[95]

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[85] *Id.* at 807.

[86] *Id.*

[87] *See* Lowe v. City of Seattle, No. 07-0784, 2008 WL 4083150 (W.D. Wash. August 29, 2008).

[88] *Id.* at *6.

[89] *See, e.g.*, Draper v. Reynolds, 369 F.3d 1270, 1278 (11th Cir. 2004); Lowe, 2008 WL 4083150, at *6 ("[P]laintiff was not seriously injured, and she received treatment both at the scene and at Harborview immediately after.").

[90] *Draper*, 369 F.3d at 1278.

[91] Michaels v. City of Vermillion, 539 F. Supp. 2d 975, 987 (N.D. Ohio 2008).

[92] *See* Moretta v. Abbott, 280 Fed. Appx. 823, 825 (11th Cir. 2008).

[93] *See* Casey v. City of Federal Heights, 509 F.3d 1278, 1282-83 (10th Cir. 2007); Buckley v. Haddock, 292 Fed. Appx. 791, 795 (11th Cir. 2008).

[94] *See* Phillip Kennicott, *US Davis Pepper Spraying Raises Questions About Role of Police*, WASH. POST. (November 20, 2011), *available at* https://www.washingtonpost.com/lifestyle/style/uc-davis-pepper-spraying-raises-questions-about-role-of-police/2011/11/20/gIQAOr8dfN_story.html; Maura Judkis, *Occupy's 84-year-old Pepper Spray Victim: Is this the Most Iconic Image of the Movement?*, Wash. Post (November 16, 2011), *available at*
(continued...)

Pepper spray, or oleoresin capsicum, is a chemical agent used by law enforcement to subdue violent or combative suspects without resorting to higher levels of force.[96] The effects of pepper spray include "(1) dilation of the capillaries and instant closing of the eyes through swelling of the eyelids, (2) immediate respiratory inflammation, including uncontrollable coughing, retching, shortness of breath and gasping for air with a gagging sensation in the throat, and (3) immediate burning sensations to the mucous membranes, skin and inside the nose and mouth."[97]

The federal courts have generally been less deferential to law enforcement when using pepper spray on passive resisters than they have been with tasers. In cases in which the individual is only passively resisting—say, simply failing to listen to an officer's order—the courts have generally held that the use of pepper spray is a violation of the Fourth Amendment.[98] Take, for instance, *Young v. County of Los Angeles*, in which the Ninth Circuit held that the use of pepper spray against a nonviolent traffic offender was unreasonable under the Fourth Amendment.[99] Similarly, in *Headwaters Forest Defense v. County of Humboldt*, the Ninth Circuit held that the use of pepper spray against nonviolent protestors constituted an unreasonable seizure under the Fourth Amendment.[100]

While these cases disapproved of the use of pepper spray against persons who were passive resisters, there have been rulings upholding such use of force in the course of traffic stops. In *Mecham v. Frazier*, the Tenth Circuit rejected the plaintiff's Fourth Amendment claim that a police officer used excessive force when he sprayed her with pepper spray after she refused to leave her vehicle after a traffic stop.[101] The court found that the officer's actions were justified based on Mecham's "disregard for the officer's instructions, the length of the encounter, and the implausibility of Mecham's rationale for not cooperating." Like the use of tasers, the courts have generally held that an officer's use of pepper spray is not unreasonable when a suspect is actively resisting arrest or fails to heed an officer's direct command. In *Singleton v. Darby*, the Fifth Circuit upheld the use of pepper spray against a group of individuals, including the plaintiff Jeanette Singleton, who were protesting the Keystone XL Pipeline.[102] In rejecting Singleton's Section 1983 claim premised on excessive force, the court held that the use of the pepper spray was not unreasonable because (1) the state had a significant interest in keeping public roads clear; (2) the officer faced an "explosive situation" in which he was greatly outnumbered by the

(...continued)

http://www.washingtonpost.com/blogs/arts-post/post/occupys-84-year-old-pepper-spray-victim-is-this-the-most-iconic-image-of-the-movement/2011/11/16/gIQAzateRN_blog.html.

[95] See German Lopez, Cops in Ferguson Hit A Photojournalist with Pepper Spray. Then Something Amazing Happened, VOX (August 11, 2015), available at http://www.vox.com/2015/8/11/9130221/ferguson-pepper-spray.

[96] NAT'L INST. OF JUSTICE, OLEORESIN CAPSICUM: PEPPER SPRAY AS A FORCE ALTERNATIVE 1 (1994).

[97] Park v. Shiflett, 250 F.3d 843, 849 (4th Cir. 2001).

[98] *See, e.g.*, Young v. County of Los Angeles, 655 F.3d 1156, 1159 (9th Cir. 2011); Headwaters Forest Defense v. County of Humboldt, 240 F.3d 1185, 1205-06 (2000); Adams v. Metiva, 31 F.3d 375, 386 (6th Cir. 1994); Greene v. Barber, 310 F.3d 889, 898 (6th Cir. 2002).

[99] *See Young*, 655 F.3d at 1167.

[100] *See* Headwaters Forest Defense v. County of Humboldt, 240 F.3d 1185, 1205-06 (2000). The Supreme Court granted certiorari in this case, vacated the decision, and remanded the case for further consideration in light of *Saucier v. Katz*, 533 U.S. 194 (2001), which altered the way qualified immunity cases are evaluated. Upon reevaluating the case, the Ninth Circuit's original ruling on the Fourth Amendment merits of the officer's use of force was not altered. *See* Headwaters Forest Defense Fund v. County of Humboldt, 276 F.3d 1125 (9th Cir. 2002).

[101] *Id.* at 1205.

[102] Singleton v. Darby, 609 Fed. Appx. 190, 195 (5th Cir. 2015).

protesters; (3) he provided a warning before using the spray; and (4) pepper spray was likely the least intrusive force available to the officer.[103]

Finally, like with tasers, federal courts have generally held that it is unreasonable to use pepper spray against individuals who are not resisting and pose no danger to the officer or others.[104]

Assessing the Reasonableness of Non-Deadly Force

Based on federal case law, the following questions have been asked when assessing the reasonableness of the non-deadly use of force:

- Was the individual actively or passively resisting arrest or capture?
- What was the severity of the crime?
- Was the individual in a class of vulnerable persons (e.g., mental disability, age)?
- What was the extent, if any, of the individual's injuries inflicted by the use of force?
- How many times, for how long, and where on the individual's body was the force employed?
- Did the officer provide a warning?

Remedies for Use of Force

To provide legal remedies for the unconstitutional use of force by law enforcement officers, Congress has primarily relied on three federal statutes: (1) a criminal offense for violations of constitutional rights, including excessive force; (2) a civil cause of action for deprivation of such rights; and (3) a statute authorizing the Attorney General to bring civil suits for injunctive relief against police departments engaged in a "pattern or practice" of such unconstitutional use of force. In each of these statutes, Congress relied on its power under the Fourteenth Amendment to "enforce, by appropriate legislation" certain constitutional safeguards including the right to be free from unreasonable seizures.[105]

Federal Criminal Civil Rights Statute (18 U.S.C. §242)

Following the Civil War, Congress enacted the Civil Rights Act of 1866, which made it a criminal offense to deprive another of a civil right while acting under color of law. While primarily intending to protect the rights of newly freed African Americans, the statute protects victims of all races.[106] Codified at 18 U.S.C. Section 242, the statute provides, in relevant part,

> 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

[103] *Id.*

[104] *See, e.g.*, Vinyard v. Wilson, 311 F.3d 1340, 1347-348 (11th Cir. 2002); Park v. Shiflett, 250 F.3d 843, 853 (4th Cir. 2001).

[105] *See* U.S. CONST. amend. XIV; Lugar v. Edmonton Oil Co., Inc., 457 U.S. 922 (1982) (quoting Lynch v. Household Finance Corp., 405 U.S. 538, 545 (1972) (Section 1983 was enacted "for the express purpose of 'enforc [ing] the Provisions of the Fourteenth Amendment.'"); *see also* CRS Report R44104, *Federal Power over Local Law Enforcement Reform: Legal Issues*, by (name redacted)

[106] *See* United States v. Classic, 313 U.S. 299, 326-27 (1941).

> prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both[.][107]

A prosecution under Section 242 requires the government to prove three elements: (1) the defendant deprived an individual of a right secured by the Constitution or the laws of the United States; (2) he or she acted under color of law when depriving this individual of constitutional right; and (3) acted willfully to deprive such individual of this right. Again, prosecutions under Section 242 do not require that the officer use force based upon an individual's race.[108] It is enough that the individual is deprived of his or her constitutional rights.

For various reasons, including sympathetic juries, the close relationship between the police and prosecutors, the high evidentiary threshold needed to secure a conviction, and lack of resources, Section 242 is not frequently utilized.[109] In fact, it has been reported that between 1981 and 1990, DOJ only prosecuted 1% of civil rights complaints it received.[110]

Perhaps the greatest hurdle to successful prosecutions under Section 242 is its specific intent element.[111] As originally drafted, the statute did not require that a constitutional deprivation be done "willfully";[112] however, Congress added that term to the precursor to Section 242 as part of the criminal code codification in 1909,[113] evidently in an attempt to make the section "less severe."[114] DOJ has declined to prosecute Section 242 cases at an extremely high rate, with "lack of criminal intent" being one of the primary reasons.[115] To understand why prosecutions might be so limited and what Congress might do, if anything, to alter the current statute, the seminal 1945 Supreme Court case *United States v. Screws* and subsequent federal circuit court cases interpreting Section 242's *mens rea* requirement must be reviewed.

Screws v. United States and the Specific Intent Requirement

In *Screws*, the Court faced a "shocking and revolting episode in law enforcement."[116] In that case, M. Claude Screws, Sheriff of Baker County, Georgia; Frank Jones, a police officer; and Jim Kelley, a special deputy, went late at night to Robert Hall's home to arrest him for theft of a tire.[117] Hall, a 30-year-old African American, was handcuffed and taken by car to the courthouse. Upon arriving at the courthouse, the three officers began beating him with their fists and with a "solid-bar blackjack about eight inches long and weighing two pounds."[118] They claimed that

[107] 18 U.S.C. §242.

[108] *See* Classic, 313 U.S. at 326-27.

[109] *See* Rachel Harmon, *Promoting Civil Rights Through Proactive Police Reform*, 62 STAN. L. REV. 1, 9 (2009) ("Federal criminal civil rights prosecutions face significant legal and practical obstacles, including that federal law imposes an onerous intent requirement on civil rights crimes; that victims of police misconduct often make problematic witnesses; and that juries frequently believe and sympathize with defendant officers"); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3203 (2014) (noting DOJ's lack of resources to bring civil rights criminal prosecutions).

[110] Rushin, *supra* note 109.

[111] *See* Michael J. Pastor, *A Tragedy and a Crime? Amadou Diallo, Specific Intent, and the Federal Prosecution of Civil Rights Violations*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 171 (2002-2003).

[112] Act of April 1866, ch. 31, §2.

[113] Act of March 4, 1909, 35 Stat. 1092.

[114] 43 Cong. Rec. 60th Cong., 2d Sess., p. 3599.

[115] TRAC REPORTS, UNDER COLOR OF LAW (2004), *available at* http://trac.syr.edu/tracreports/civright/107/.

[116] Screws v. United States, 325 U.S. 91, 92 (1945).

[117] *Id.*

[118] *Id.*

Hall had attempted to pull out a gun and had used insulting language towards the officers. After Young, still handcuffed, had been knocked to the ground, the officers beat him mercilessly from 15 to 30 minutes until he was unconscious. Hall's body was then dragged feet first through the courthouse yard into the jail and "thrown upon the floor dying."[119] He was taken to the hospital, but died less than an hour later without ever regaining consciousness. The three officers were charged under 18 U.S.C. Section 52—the precursor to Section 242.

The prosecution was premised on the claim that the officers deprived Hall of "life without due process of law."[120] The defendants challenged the statute on vagueness grounds, arguing that they were being prosecuted under a constitutional provision that "provides no ascertainable standard of guilt."[121] Justice Douglas, writing for a four-member plurality joined by Chief Justice Stone and Justices Black and Reed, attempted to assuage such concerns by noting that "the decisions of the courts are ... a source of reference for ascertaining the specific concept of due process." At the same time, Justice Douglas acknowledged that the act "incorporate[d] by reference a large body of changing and uncertain law" that could "cast law enforcement agencies loose at their own risk on a vast uncharted sea."[122] To remedy this potential vagueness problem, Justice Douglas turned to the interpretation of the *mens rea* element.

Justice Douglas noted that traditionally the *mens rea* term "intent" only required that "if a man intentionally adopts certain conduct in certain circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."[123] However, the plurality noted that merely requiring this form of general intent would make government actors into criminals "though his motive was pure and his purpose was unrelated to the disregard of any constitutional guarantee."[124] Latching onto the term "willfully" in the statute, the plurality noted that generally "willfully" means "an act done with bad purpose," and, as such, "an evil motive to accomplish that which the statute condemns becomes a constituent element of the crime."[125] Requiring proof of a "specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid."[126] The thinking goes, if a person specifically intends to violate the constitutional rights of another, he cannot then complain he did not know what he was doing violated the law.

In an effort to further explain this standard, the plurality infused confusion into its new rule. First, the Court noted that the defendant need not "have been thinking in constitutional terms ... where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution."[127] As noted by one circuit court, there seems to be some contradiction in saying that the officers need not be thinking in constitutional terms, but that it is enough that their "aim" is to deprive a citizen of a constitutional right.[128] How can an officer aim

[119] *Id.* at 93.

[120] *Id.* at 95.

[121] *Id.*

[122] *Id.* at 96.

[123] *Id.*

[124] *Id.* at 97.

[125] *Id.* at 101.

[126] *Id.*

[127] *Id.* at 106.

[128] *See* United States v. Johnstone, 107 F.3d 200, 208 (3d Cir. 1997).

to deprive a citizen of a right if he or she is not thinking in terms of that right?[129] The Court does not provide a clear answer.

Second, although he asserted that specific intent is required under Section 242, Justice Douglas then posited that an individual can be prosecuted under the lesser "reckless disregard" *mens rea* standard: "[A defendant] is under no necessity of guessing whether the statute applies to him for he either knows or acts in reckless disregard of its prohibition of the deprivation of a defined constitutional or other federal right."[130] The plurality similarly noted in another part of the opinion: "When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite."[131]

Needless to say, *Screws* "is not a model of clarity."[132] On the one hand, it seemed to be saying that requiring specific intent was necessary to ensure that the statute was not unnecessarily vague. On the other hand, the plurality opinion appeared to endorse a "reckless disregard" standard—a *mens rea* standard significantly lower than specific intent and one that would likely permit many more prosecutions to go forward.

Circuit Courts' Interpretation of Section 242

In the wake of *Screws*, the lower courts have been left to determine the meaning of "willfully" and how to apply Section 242's specific intent requirement. In one camp, several courts read *Screws* and Section 242 stringently to require that a defendant have the specific intent to do what the law forbids. In another camp, courts seem to require an intent to do the physical act, but not necessarily the purpose to violate another's constitutionally protected right, akin to general intent at common law. In the third group, courts have latched onto the "reckless disregard" language from the plurality opinion in *Screws* to permit a conviction under Section 242 on this lesser *mens rea* standard.

Courts in the first camp have read *Screws* strictly to require not only an intent to commit the physical act in question, but also an intent to deprive that person of a constitutional right. In *United States v. Garza*, a county sheriff in Texas and his special investigator were convicted under Section 242 for, among other things, arresting individuals without probable cause, detaining them for long periods, subjecting them to repeated questioning, and failing to bring them before a magistrate judge as required under Texas law.[133] At their trial, the district court defined "willfully" in Section 242 as follows:

> The word "willfully," as that term has been used from time to time in these instructions means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids. That is to say, with a bad purpose either to disobey or to disregard the law.[134]

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[129] One way to reconcile these statements is to say that the officer need not be thinking "I want to invade this suspect's Fourth Amendment right to be free from unreasonable seizures," but rather need only be thinking, "I am going to apply more force than I think is reasonable in these circumstances." In this situation, the officer is not necessarily thinking in constitutional terms, but is intentionally applying more force than he thinks is reasonable, beyond that which he was instructed during his training.

[130] *Screws*, 325 U.S. at 104.

[131] *Id.*

[132] *Johnstone*, 107 F.3d at 208.

[133] United States v. Garza, 754 F.2d 1202, 1204 (5th Cir. 1985).

[134] *Id.* at 1209.

The Fifth Circuit upheld these instructions, finding that they complied with the Supreme Court's instructions that "willfully in 18 U.S.C. §242 implies conscious purpose to do wrong and intent to deprive another of a right guaranteed by the Constitution, federal statutes, or decisional law."[135] Indeed, this instruction seems to comport with the more stringent rule announced in *Screws* that the defendant must actually intend to violate the constitutional rights of the victim.

In an earlier case, *United States v. Kelsey*, the Fifth Circuit reversed the defendant's conviction based upon the district court's failure to properly instruct the jury on the "willfully" element under Section 242.[136] There, the district court had instructed the jury as follows:

> [T]he evidence must establish beyond reasonable doubt that the Defendant knew that the degree of force which he utilized on Mr. de la Osa at the time of the arrest was not reasonably necessary to effect the arrest, but, despite this knowledge, he knowingly and intentionally exerted force which he knew to be unlawful under all the circumstances to accomplish the arrest.
>
> An act is done "intentionally" if it is done voluntarily and with the specific intent to do the act in question, as distinguished from an act done through inadvertence, mistake, accident or for some other innocent reason.[137]

The Fifth Circuit rejected the district court's instructions for two reasons. First, although the district court instructed the jury that the defendant had to knowingly and intentionally exert force that he knew to be unlawful, it did not "instruct the jury that willfulness means an act which is done with a bad purpose or an evil motive."[138] Second, although the instruction required that the act be done with the specific intent to do the act in question, it failed to require that he have the specific intent to deprive the victim of his constitutional rights.[139] Thus, under the Fifth Circuit's test, it is not enough that the defendant intentionally and knowingly commits an act which he *knows* would violate an individual's rights; he must *intend* to violate those rights.

Similarly, the Northern District of Ohio applied this more stringent test in a case stemming from the National Guard shooting at Kent State. There, the court held that

> even the specific intent to injure, or the reckless use of excessive force, without more, does not satisfy the requirements of § 242 as construed in *Screws*. There must exist an intention to 'punish or to prevent the exercise of constitutionally guaranteed rights, such as the right to vote, or to obtain equal protection of the law.'[140]

The second group of courts permits a somewhat lesser showing by requiring that the defendant intend to commit the physical act, but not necessarily intend to violate the constitutional rights of another. In *United States v. Cobb*, the Fourth Circuit addressed an appeal by three officers who were convicted under Section 242 for beating a prisoner while detained and in handcuffs.[141] At the trial, the district court provided the following instruction on the *mens rea* element of Section 242:

> Fourth, that the defendant willfully and knowingly intended to subject Kenneth Pack to the deprivation of his constitutionally protected right....

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[135] *Id.*

[136] United States v. Kerley, 643 F.2d 299, 303 (5th Cir. 1981).

[137] *Id.* at 301.

[138] *Id.* at 303.

[139] *Id.*

[140] United States v. Shafer, 384 F. Supp. 496, 503 (N.D. Ohio 1974).

[141] United States v. Cobb, 905 F.2d 784, 785 (4th Cir. 1990).

> [The government] must show that a defendant had the specific intent to deprive Kenneth Pack of his right not to be subjected to unreasonable and excessive force. If you find that a defendant knew what he was doing and that he intended to do what he was doing, and if you find that he did violate a constitutional right, then you may conclude that the defendant acted with the specific intent to deprive the victim of that constitutional right.[142]

In its brief analysis, the Fourth Circuit upheld this instruction, observing that "the instruction on element (4) expressly conditions guilt on a finding that the defendants 'willfully and knowingly' acted with a 'specific intent to deprive' Pack of his liberty interest." The court continued: "The instruction could not have been more emphatic that conviction was contingent upon a finding that appellants wilfully, knowingly, and intentionally assaulted Pack in contravention of his constitutional rights."[143] It appears from this language that the court did not require that the defendant intentionally violate the rights of another, but instead that he intended to engage in the physical act. Again, in *Screws*, Justice Douglas noted that *traditionally* "intent" only required that "if a man intentionally adopts certain conduct in certain circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent." This is one iteration of what was known as general intent at common law. However, Justice Douglas went on to say in *Screws* that under Section 242 this form of general intent was insufficient. It appears that the Fourth Circuit was adopting this form of general intent rejected by the plurality in *Screws*. That said, in *Screws*, the court also endorsed a reckless disregard standard that is lower than both specific intent and general intent.

Courts in the third camp require the least stringent showing under Section 242 by permitting a conviction under a reckless disregard standard. The Third Circuit adopted this approach after conceding that it had great difficulty in reconciling the seemingly inconsistent statements in *Screws*.[144] In an attempt to reconcile these "facially inconsistent standards—that an individual can intend to violate a right even if the individual is not thinking in terms of any right," the court accepted that willfulness in Section 242 can include reckless disregard. The only remaining question for the court was whether this standard should be applied subjectively or objectively.[145] An objective standard, generally used in the civil context, would require that the officer was indifferent to the rights of another that the officer knew or was so obvious that the officer should have known.[146] The subjective standard, on the other hand, would require that the prosecution prove that the defendant was indifferent to a right that he was personally aware, either through training or otherwise.[147] The Third Circuit did not resolve this question, as it found that the officer was liable under either standard.[148]

The Ninth Circuit in *United States v. Gwaltney* similarly upheld the following reckless disregard instruction: "It is not necessary for the government to prove the defendant was thinking in

[142] *Id.* at 788.

[143] *Id.* at 789.

[144] United States v. Johnstone, 107 F.3d 200, 208 (3d Cir. 1997).

[145] *Id.* at 208 n.11.

[146] *Id.*

[147] *Id.*

[148] As the Third Circuit notes, the Supreme Court suggested in dicta in *Farmers v. Brennan* that the subjective approach was the appropriate test to apply in §242 cases. *See id.* (citing Farmers v. Brennan, 511 U.S. 825, 839 n.7 (1994)).

constitutional terms at the time of the incident, for a reckless disregard for a person's constitutional rights is evidence of specific intent to deprive that person of those rights."[149]

In sum, there is much debate in the lower courts about how exactly to interpret the phrase "willfully" in Section 242 or how to apply the *Screws* ruling. Confusion in the lower courts in such a sensitive area of the law could be considered troublesome for two reasons. First, the subject matter—the use of deadly force—is the most serious action a government can take against its citizenry. Second, with a potential penalty of life imprisonment or death, it would be beneficial to officers in the field to know exactly what level of culpability is required to subject them to these punishments.

The recent shootings in Ferguson and elsewhere have prompted some commentators to call for an overhaul of Section 242 to better clarify the *mens rea* element in the hopes of spurring more consistent enforcement.[150] In its 2000 report "Revisiting *Who is Guarding the Guardians*," the U.S. Commission on Civil Rights recommended removing the specific intent standard.[151] However, as discussed, the Third and Ninth Circuits already employ a reckless disregard standard, but it is not clear whether this less stringent burden of proof has prompted DOJ to bring more prosecutions in those circuits.

Additionally, there could be unintended consequences to lowering the *mens rea* threshold in Section 242. If Section 242 is amended, it will affect not only cases of excessive force, but all claims of constitutional violations by those acting under color of law. This might work to ensnare the unknowing government worker that unwittingly violates the constitutional rights of another. For example, the town clerk who denies a parade permit might be deemed to recklessly disregard the First Amendment rights of an applicant. A more targeted approach would be to create a standalone statute that lowers the mens rea specifically for police use of force cases. This is well within Congress's authority, as it had the constitutional authority to pass Section 242 to begin with, and this standalone statute would merely represent a part of that subject matter.

No matter which *mens rea* standard is used, Section 242 is a *criminal* statute, and as such the prosecution must still prove beyond a reasonable doubt that the government official committed the offense.[152] Civil suits under the federal civil rights statute, on the other hand, require a lower threshold—preponderance of the evidence—and have had much greater success in the courtroom.

Federal Civil Rights Claims (42 U.S.C. §1983)

In addition to criminal liability, victims of police abuse can bring civil suits under 42 U.S.C. Section 1983. Like Section 242, Section 1983 was enacted during the Reconstruction Era to secure the constitutional rights of African Americans.[153] Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

[149] United States v. Gwaltney, 790 F.2d 1378, 1386 (9th Cir. 1986).

[150] Mark Joseph Stern, *Why the Feds Can't Charge Darren Wilson*, SLATE (November 26, 2014), *available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2014/11/will_justice_department_charge_darren_wilson_supreme_court_gutted_civil.html.

[151] U.S. Comm. on Civil Rights, *Revisiting* Who is Guarding the Guardians*: A Report on Police Practices and Civil Rights in America* (2000), *available at* http://www.usccr.gov/pubs/guard/ch5.htm#_ftnref7.

[152] *In re* Winship, 397 U.S. 358, 364 (1970).

[153] Civil Rights Act of 1871, ch. 22, §1, 17 Stat. 13.

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.][154]

Section 1983 "is not itself a source of substantive rights," but instead looks to the Fourth Amendment and other constitutional and civil rights laws for its content.[155] To prove a violation under Section 1983 for claims of excessive force, the plaintiff must prove that (1) the officer deprived the individual of his or her right to be free from unreasonable seizures under the Fourth Amendment and (2) the officer acted under color of law.[156] Note that Section 1983, "unlike its criminal counterpart, 18 U.S.C. §242, contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right."[157] Plaintiffs in Section 1983 actions can seek damages, injunctive relief, or other equitable relief.[158]

Qualified Immunity

Even if an officer has engaged in unconstitutional conduct, the doctrine of qualified immunity insulates an officer from personal civil liability if his or her actions did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[159] The Court has noted that qualified immunity represents a balance between two important interests: "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[160] That qualified immunity provides a broad shield to liability is evidenced by the Court's observation that it "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[161] This doctrine has frequently come under attack for shielding officers from liability even when they have engaged in unconstitutional conduct.[162] In response to this concern, it should be noted that qualified immunity appears to be derived from common law, and is not constitutionally compelled. Thus, Congress can alter its contours or eliminate it altogether via statute.

The process for applying this doctrine has evolved in recent years. Under older precedent, the Court mandated a two-step sequence for qualified immunity claims.[163] First, a reviewing court had to decide whether the facts alleged by the plaintiff amounted to a constitutional violation.

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[154] 42 U.S.C. §1983. Section 1983 is directed solely at state and local actors and does not apply to federal law enforcement officers. However, the Supreme Court interpreted the Fourth Amendment to include an implied cause of action against federal officers in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

[155] Graham v. Connor, 490 U.S. 386, 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979) (internal quotation marks omitted)).

[156] West v. Atkins, 487 U.S. 42, 48 (1988).

[157] Daniels v. Williams, 474 U.S. 327, 329-30 (1986).

[158] MARTIN A. SCHWARTZ, SECTION 1983 LITIG. CLAIMS & DEFENSES §16.01 (2015).

[159] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[160] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[161] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[162] *See* Diana Hassel, *Excessive Reasonableness*, 43 INDIANA L. REV. 117, 118 (2009) ("The Court's development of the qualified immunity doctrine has stretched the rationale underlying the defense to a breaking point. Instead of providing protection only to those government actors who violate the law unwittingly and reasonably, qualified immunity has metastasized into an almost absolute defense to all but the most outrageous conduct.").

[163] Saucier v. Katz, 533 U.S. 194, 201 (2001).

Second, if the plaintiff made this showing, the court had to decide whether the right was "clearly established" at the time of the misconduct. The Court noted that skipping ahead to the "clearly established" prong of the test would deprive future courts of case law defining the parameters of the right in question. However, lower courts frequently criticized this "rigid order of battle" on "practical, procedural, and substantive grounds."[164] Under the older regime, lower courts were required to fully litigate the constitutional merits when in many instances it was obvious that the law relied upon was not clearly established at the time. In an effort to give courts more flexibility, in the 2009 case *Pearson v. Callahan*, the Court overruled its prior rule and held that lower courts "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[165] That being said, the Court noted that following the *Saucier* order is "often beneficial."[166]

For a law to be clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[167] This provides officers "fair warning" which conduct will violate the Constitution.[168] This standard "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified."[169] The Court has instructed lower courts not to define a clearly established rule at a high level of generality.[170] That being said, the Court does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."[171]

In the use of force context, the major Supreme Court precedents, *Tennessee v. Garner*,[172] *Graham v. Connor*,[173] and *Scott v. Harris*,[174] are each written at a very high level of abstraction. As aptly noted by Justice Scalia, the very nature of the objective reasonableness/totality of the circumstances approach necessarily requires courts to "slosh [their] way through the factbound morass of 'reasonableness.'"[175] The by-product of the generality of these tests is that they commonly cannot be applied as precedents in use of force qualified immunity cases. For instance, in *Wilson v. City of Lafayette*, the Tenth Circuit addressed the use of a taser that resulted in the death of the suspect.[176] After concluding that there were no controlling circuit cases on point at the time (2006), the court looked to Supreme Court case law but found that there was no "clear lesson to be drawn from *Graham*," and thus granted the officer qualified immunity.

[164] Purtell v. Mason, 527 F.3d 615, 622 (7th Cir. 2008).

[165] Pearson, 555 U.S. at 236.

[166] *Id.*

[167] Anderson v. Creighton, 483 U.S. 635, 640 (1987). The qualified immunity test is the same under both §1983 and *Bivens*. *See* Wilson v. Layne, 526 U.S. 603, 609 (1999).

[168] Hope v. Pelzer, 536 U.S. 730, 741 (2002).

[169] *Anderson*, 483 U.S. at 639.

[170] Ashcroft v. al-Kidd, 563 U.S. 731, ___, 131 S. Ct. 2074, 2084 (2011).

[171] *Id.* at 2083.

[172] Tennessee v. Garner, 471 U.S. 1 (1985).

[173] Graham v. Connor, 490 U.S. 386 (1989).

[174] Scott v. Harris, 550 U.S. 372 (2007).

[175] *Scott*, 550 U.S. at 383.

[176] Wilson v. City of Lafayette, 510 F. App'x 775, 777 (10th Cir.).

Note that even if an officer is held liable under Section 1983 in his personal capacity, he may be indemnified by state or local government.[177] The right to indemnification is not governed by federal law, but is a matter of state or local law.

Municipal Liability

In addition to suing the police officers directly involved in an incident of excessive force, many Section 1983 plaintiffs can go after the "deep pocket of municipalities" that employ these officers.[178] In a series of cases, the Court addressed under what circumstances municipalities may be held liable under Section 1983.

The Court in *Monell v. Department of Social Services of New York* held that municipalities can be held liable as "persons" under Section 1983, but only when the municipality *itself* caused the constitutional violation.[179] Thus, a municipality cannot be held liable solely because it employs someone who violates the constitutional rights of another.[180] Rather, to hold a municipality liable, it must be the execution of the government's "policy or custom" that inflicts the constitutional injury.[181]

In *City of Canton, Ohio v. Harris*, the Court addressed whether a failure to train can rise to the level of a "policy." The Court answered in the affirmative, but limited this rule to instances where the failure to train amounted to a "deliberate indifference to the rights of persons with whom the police come into contact."[182] A failure to adequately train a class of officers will not always be deemed a city "policy." It is only where the "need for more training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can be said to have been deliberately indifferent to the need."[183]

In *Board of County Commissioners of Bryan Country v. Brown*, the Court addressed whether a single hiring decision by a municipality can be a "policy" permitting *Monell* liability.[184] In that case, the plaintiff was severely injured after she was thrown to the ground during a traffic stop by a sheriff's deputy with a criminal history, including arrests for assault and battery, resisting arrest, and public drunkenness. The plaintiff proceeded against the county on the theory that its hiring decision resulted in her injury. Although the Court did not foreclose the theory that one hiring decision might result in liability, it observed that "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee."[185] Ultimately, the Court rejected the plaintiff's claim, noting that she had not

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[177] *See, e.g.*, 745 ILL. COMP. STAT. §10/9-102; MO. ANN. STAT. §105.711; Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L REV. 885, 885 (2014) ("Through public records requests, interviews, and other sources, I have collected information about indemnification practices in forty-four of the largest law enforcement agencies across the country, and in thirty-seven small and mid-sized agencies. My study reveals that police officers are virtually always indemnified: During the study period, governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement.").

[178] Hudson v. Michigan, 547 U.S. 586, 597 (2006).

[179] Monell v. Department of Social Services of New York, 436 U.S. 658 (1978).

[180] *Id.* at 694.

[181] *Id.*

[182] *Id.* at 388.

[183] *Id.* at 390.

[184] Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown, 520 U.S. 397, 405 (1997).

[185] *Id.* at 405.

demonstrated that the sheriff's hiring decision reflected a "conscious disregard for a high risk" that the officer would use excessive force in violation of the plaintiff's constitutional rights.[186]

"Pattern or Practice" Suits (42 U.S.C. §14141)

The third federal remedy for unconstitutional conduct by law enforcement officers is 42 U.S.C. Section 14141, the "pattern or practice" statute. Enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, the need for this statute was partially prompted by several judicial rulings that held that both private litigants and the Department of Justice (DOJ) lacked legal standing to seek equitable relief to stop unlawful police practices absent specific statutory authorization.[187]

Section 14141 prohibits government authorities or agents acting on their behalf from engaging in a "pattern or practice of conduct by law enforcement officers ... that deprives persons of rights ... secured or protected by the Constitution or laws of the United States."[188] It authorizes the Attorney General to sue for equitable or declaratory relief when he or she has "reasonable cause to believe" that such a pattern of constitutional violation has occurred.

The scope of investigations under Section 14141, primarily conducted by the Special Litigation Section of DOJ's Civil Rights Division, has ranged from police use of force and unlawful stops and searches to racial and ethnic biases.[189] Many of these investigations are resolved by consent decree—a judicially enforceable settlement between DOJ and the local police department—which outlines the various measures the local agency must take to remedy its unconstitutional police practices. For instance, after two years of extensive investigation into the New Orleans Police Department's policies and practices in which DOJ found numerous instances of unconstitutional conduct, DOJ entered into a consent decree with the City of New Orleans requiring the city to implement new policies and training to remedy these constitutional violations.[190] The content of each consent decree can differ, but many include provisions concerning use-of-force reporting systems, citizen complaint systems, and early warning systems to identify problem officers.[191]

Reforming Police Use of Force

In response to the recent law enforcement-related deaths in Ferguson and elsewhere, Members have introduced various bills in the 114th Congress to rein in police use of excessive force and provide accountability.

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[186] *Id.* at 415-16

[187] *See* Los Angeles v. Lyons, 461 U.S. 95, 97-98 (1983); United States v. City of Philadelphia, 644 F.2d 187, 206 (3d Cir. 1980).

[188] 42 U.S.C. §14141.

[189] *See generally* Police Executive Research Forum, *Civil Rights Investigations of Local Police: Lessons Learned*, (2013), http://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf.

[190] United States v. City of New Orleans, No. 12-1924 (E.D. La. July 24, 2012) (consent decree regarding the New Orleans Police Department), *available at* http://www.nola.gov/getattachment/NOPD/About-Us/NOPD-Consent-Decree/NOPD-Consent-Decree-7-24-12.pdf/.

[191] *See* Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits In Context*, 22 ST. LOUIS U PUB. L. REV. 6 (2003).

Excessive Use of Force Prevention Act of 2015 (H.R. 2052)

The Excessive Use of Force Prevention Act of 2015 (H.R. 2052) would amend 18 U.S.C. Section 242 so that "the application of any pressure to the throat or windpipe which may prevent or hinder breathing or reduce intake of air" would be considered "a punishment, pain, or penalty."[192] It is not clear how this statute would operate in practice. Most excessive force prosecutions brought under Section 242 rely on the statute's first prong, the deprivation of a constitutional right, and not the second prong, the unequal punishment on account of a person's race, color, or alien status.[193] It would appear that prosecutions under H.R. 2052 would occur only when an officer administers a chokehold as a punishment or penalty based on the suspect's race, color, or alien status.

Police Accountability Act of 2015 (H.R. 1102)

The Police Accountability Act of 2015 (H.R. 1101) would create a new federal crime for certain homicides committed by law enforcement officers.[194] H.R. 1102 would provide that any state or local officer in a public agency that receives funding under the Edward Byrne Memorial Justice Assistance Grant (JAG) Program who engages in conduct in the line of duty that would constitute murder or manslaughter if it were to occur in the special maritime and territorial jurisdiction of the United States would be punished as provided for that offense under federal law. The constitutionality of this bill has been addressed previously by CRS.[195]

National Statistics on Deadly Force Transparency Act of 2015 (H.R. 306)[196]

The National Statistics on Deadly Force Transparency Act of 2015 would reduce a state or local government's JAG funding[197] by 10% if it fails to submit data concerning police use of excessive force, including data concerning the following:

- identifying characteristics of the person who was the target of the use of deadly force and the officer who used deadly forced;
- time, date, and location of the use of deadly force;
- alleged criminal activity of the person who was the target of deadly force;
- nature of the deadly force used, including the use of a firearm;
- explanation, if any, from the relevant law enforcement agency on why deadly force was used;
- copy of deadly force guidelines in effect at the time deadly force was used; and
- description of any non-lethal efforts employed to apprehend or subdue the person who was the target of the use of deadly force before deadly force was used.

[192] H.R. 2052, 114th Cong. (2015).

[193] *See* 18 U.S.C. §242.

[194] H.R. 1102, 114th Cong. (2015).

[195] *See* CRS Report R44104, *Federal Power over Local Law Enforcement Reform: Legal Issues*, by (name redacted)

[196] H.R. 306, 114th Cong. (2015).

[197] See CRS Report RS22416, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, by (name redacted) for an overview of the JAG program.

Police Reporting Information, Data, and Evidence Act of 2015 (PRIDE Act) (S. 1476, H.R. 3481)

The Police Reporting Information, Data, and Evidence Act of 2015 (PRIDE Act) (S. 1476, H.R. 3481) would require the collection of data concerning any incident where the use of force by either a law enforcement officer or a civilian results in serious bodily injury or death. Such data shall include the following:

- gender, race, ethnicity, and age of each individual who was shot, injured, or killed;
- date, time, and location of the incident;
- whether the civilian was armed, and, if so, the type of weapon the civilian had;
- the type of force used against the officer, the civilian, or both, including the types of weapons used;
- number of officers involved in the incident; and
- a brief description regarding the circumstances surrounding the incident.

President's Task Force on 21st Century Policing

On December 21, 2014, President Barack Obama signed an executive order establishing the Task Force on 21st Century Policing.[198] The task force was charged with identifying best police practices, including use of force policies. In May 2015, the task force issued its final report with the following recommendations for law enforcement agencies concerning the use of force:[199]

- Develop comprehensive policies on the use of force that include training, investigations, prosecutions, data collection, and information sharing. These policies must be clear, concise, and openly available for public inspection.
- Training on use of force should emphasize de-escalation and alternatives to arrest or summons in situations where appropriate.
- Mandate external and independent criminal investigations in cases of police use of force resulting in death, officer-involved shootings resulting in injury or death, or in-custody deaths.
- Mandate the use of external and independent prosecutors in cases of police use of force resulting in death, officer-involved shootings resulting in injury or death, or in-custody deaths.
- Require agencies to collect, maintain, and report data to the federal government on all officer-involved shootings, whether fatal or nonfatal, as well as any in-custody death.
- Policies should clearly state what types of information will be released, when, and in what situation, to maintain transparency.
- Establish a Serious Incident Review Board comprising sworn staff and community members to review cases involving officer-involved shootings and

[198] Exec. Order No. 13684, Establishment of the President's Task Force on 21st Century Policing, 79 Fed. Reg. 76865 (December 23, 2014).

[199] Final Report, President's Task Force, *supra* note 6, at 20-22.

other serious incidents that have the potential to damage community trust or confidence in the agency. The purpose of this board should be to identify any administrative, supervisory, training, tactical, or policy issues that need to be addressed.

- Implement nonpunitive peer review of critical incidents separate from criminal and administrative investigations.

Other Reform Proposals

In addition to introduced legislation, academics, civil rights advocates, and others have suggested other reform proposals:

- lower the *mens rea* standard in 18 U.S.C. Section 242;[200]
- create a standalone excessive force statute;[201]
- alter the "deliberate indifference" standard for failure to train claims under Section 1983;[202] and
- amend 42 U.S.C. Section 14141 to permit lawsuits by private citizens.[203]

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[200] Pastor, *supra* note 111.

[201] John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WISC. L. REV. 789 (2000).

[202] Guarding the Guardians, *supra* note 151 ("The burdensome standards imposed by the courts severely limiting the liability of municipalities for the unlawful conduct of their police officers often leave victims with no real remedy.").

[203] Myriam E. Giles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1386 (2000).