REINVIGORATING THE FEDERAL GOVERNMENT'S ROLE IN CIVIL RIGHTS ENFORCEMENT UNDER 18 U.S.C. § 242: THE GEORGE FLOYD JUSTICE IN POLICING ACT'S NOT SO RECKLESS PROPOSAL

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I. INTRODUCTION

The deaths of George Floyd, Daunte Wright, Breonna Taylor, Jacob Blake, Ahmaud Arbery, Tamir Rice, Eric Garner, Michael Brown, and many others ignited intense protests throughout the country[1] in 2020 and a fierce debate in Congress concerning police reform.[2] The widespread protests following the death of George Floyd, in particular,

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[1] *See, e.g.*, Helier, Cheung, *George Floyd Death: Why US Protests Are So Powerful This Time*, BBC NEWS (June 8, 2020), https://www.bbc.com/news/world-us-canada-52969905; *Angry Crowd Gathers After Missouri Police Shoot Teen*, CBS NEWS (Aug. 10, 2014, 12:00 AM), 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 (Aug. 15, 2014, 10:30 PM), http://www.cbsnews.com/news/darren-wilson-ferguson-police-officer-who-fatally-shot-michael-brown-identified/; Elahe Izadi & Peter Holley, *Video Shows Cleveland Officer Shooting 12-Year Old Tamir Rice Within Seconds*, WASH. POST (Nov. 26, 2014), 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), 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), 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, 8:10 PM), https://www.reuters.com/article/idUSKBN0NL1GO20150501; Mark Berman, *South Carolina Police Officer in Walter Scott Shooting Indicted on Murder Charge*, WASH. POST (June 8, 2015), http://www.washingtonpost.com/news/post-nation/wp/2015/06/08/police-officer-who-shot-walter-scott-indicted-for-murder/.

[2] *See* Liz Zhou & Ella Nilsen, *The House Just Passed a Sweeping Police Reform Bill*, VOX (June 25, 2020, 8:50 PM), https://www.vox.com/2020/6/25/21303005/police-reform-bill-house-democrats-senate-republicans.

catalyzed a new civil rights movement in the United States,[3] with demonstrators pressing Congress to take action to hold police more accountable.[4] These deaths have been the subjects of numerous congressional hearings and have led to the introduction of several legislative measures.[5] More prominently, the House of Representatives passed the George Floyd Justice in Policing Act of 2020 on June 25, 2020.[6] Some of the Act's notable authors describe the legislation as "the first-ever bold, comprehensive approach to hold police accountable."[7]

The primary federal statutory vehicle to remediate police misconduct is 18 U.S.C. § 242.[8] Section 242 is a federal criminal statute which prohibits individuals acting under the color of law from "willfully" depriving another of a constitutional right.[9] Under Section 242, federal

[3] *See* Leila Miller, *George Floyd Protests Have Created a Multicultural Movement That's Making History*, L.A. TIMES (June 7, 2020, 6:00 AM), https://www.latimes.com/california/story/2020-06-07/george-floyd-protests-unite-black-activists-new-allies.

[4] *See* Grace Segers & Caitlin Huey-Burns, *Congress Crafts Police Reform Legislation in Response to Police Violence*, CBS NEWS (June 5, 2020, 4:16 PM), https://www.cbsnews.com/news/congress-police-reform-plan-legislative-response-violence-protests/.

[5] *See* Claudia Grisales, *George Floyd's Brother Testifies Before House Judiciary Committee*, NPR (June 10, 2020), https://www.npr.org/2020/06/10/874339970/george-floyds-brother-testifies-before-house-judiciary-committee. In response to the public outcry for justice and police reform, then-President Donald Trump also issued an Executive Order on Safe Policing Act for Safe Communities, directing "the Attorney General to establish best practices for law enforcement agencies and condition federal grants on compliance with those standards." CONGRESSIONAL RSCH. SERV., CONGRESS AND POLICE REFORM: CURRENT LAW AND RECENT PROPOSALS 4, https://crsreports.congress.gov/product/pdf/LSB/LSB10486 (last updated June 25, 2020).

[6] George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/house-bill/7120. *See* Catie Edmondson, *House Passes Sweeping Policing Bill Targeting Racial Bias and Use of Force*, N.Y. TIMES (June 25, 2020), https://www.nytimes.com/2020/06/25/us/politics/house-police-overhaul-bill.html.

[7] George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/house-bill/7120. The notable authors include New Jersey's very own Senator Cory Booker, then-Senator Kamala Harris, Congressional Black Caucus Chair Karen Bass, and House Judiciary Committee Chair Jerrold Nadler. *See* U.S. HOUSE COMM. ON THE JUDICIARY, CHAIR BASS, SENATORS BOOKER AND HARRIS, AND CHAIR NADLER INTRODUCE THE JUSTICE IN POLICING ACT OF 2020 1, https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3005 (last updated June 8, 2020).

[8] *See* 18 U.S.C. § 242.

[9] *Id.* Individuals prosecuted under Section 242 "typically include police officers, sheriff's deputies, and prison guards;" but, other government actors such as prosecutors, judges and other public officials can also be under prosecuted under Section 242. STATUTES ENFORCED BY THE CRIMINAL SECTION, U.S. DEP'T OF JUST., https://www.justice.gov/crt/statutes-enforced-criminal-section (last updated July 28, 2017).

prosecutors may criminally charge police officers for willfully violating individuals' civil rights.[10] Section 242, however, is ineffective because the Department of Justice (DOJ) does not frequently utilize it.[11] This idleness is due in large part to the Supreme Court's seventy-five-year-old plurality opinion in *Screws v. United States*.[12] In 1945, *Screws* essentially relegated Section 242 to a dead letter by imposing the highest standard of intent upon federal prosecutors to bring Section 242 claims.[13] *Screws* requires the government to prove that the defendant had the specific intent to deprive the victim of her constitutional rights.[14] With *Screws*' obscure guidance and no subsequent clarification by the Supreme Court, the lower federal courts have been left to determine the meaning of "willfully" and how to apply it to Section 242 prosecutions.[15] As a consequence, the federal circuit courts are split on how to interpret "willfully" as provided in Section 242 and *Screws*.[16]

In an attempt to facilitate federal enforcement of Section 242, the George Floyd Justice in Policing Act of 2020 ("JIPA") proposes lowering the high mens rea standard of Section 242 set by *Screws*.[17] The Act strikes the mens rea term "willfully" from Section 242 and instead inserts "knowingly or recklessly."[18] The Act addresses various policies and issues in connection with policing practices and law enforcement

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[10] U.S. DEP'T OF JUST., *supra* note 9.

[11] *See* Rachel Harmon, *Promoting Civil Rights Through Proactive Police Reform*, 62 STAN. L. REV. 1, 9 (2009).

[12] *See* Screws v. United States, 325 U.S. 91 (1945) (plurality); *see also* John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 806–11 (2000) (discussing "the fitful history of the attempts by federal prosecutors" to charge under Section 242).

[13] *See Screws*, 325 U.S. at 101, 106; *see also* Robert L. Spurrier, *McAlester and After: Section 242, Title 18 of the United States Code and the Protection of Civil Rights*, 11 TULSA L.J. 347, 353 n.25 (1976) ("The *Screws* specific intent rule is often blamed for the failure to secure [S]ection 242 convictions.").

[14] *See* Harry H. Shapiro, *Limitations in Prosecuting Civil Rights Violations*, 46 CORNELL L.Q. 532, 537 (1961).

[15] United States v. Johnstone, 107 F.3d 200, 208 (3d Cir. 1997) (noting that *Screws* "is not a model of clarity").

[16] *See, e.g.*, United States v. Garza, 754 F.2d 1202, 1210 (5th Cir. 1985) (intent to act and deprive); United States v. Kerley, 643 F.2d 299, 302 (5th Cir. 1981) (intent to act and deprive); United States v. Cobb, 905 F.2d 784, 789 (4th Cir. 1990) (specific intent to deprive); *Johnstone*, 107 F.3d at 208 (reckless disregard standard); United States v. Gwaltney, 790 F.2d 1378, 1386 (9th Cir. 1986) (reckless disregard standard); United States v. Bradley, 196 F.3d 762, 769 (7th Cir. 1999) (reckless disregard standard).

[17] George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/house-bill/7120.

[18] *Id.* at 7–8. Additionally, the bill amends Section 242 by declaring use of chokeholds and carotid hold as civil rights violations. *Id.* at 74.

accountability.[19] The legislation "includes measures to increase accountability for law enforcement misconduct, to enhance transparency and data collection, and to eliminate discriminatory policing practices."[20] Most impressively, the George Floyd Justice in Policing Act (JIPA) seeks to "facilitate[] federal enforcement of constitutional violations . . . by state and local law enforcement."[21] It is no surprise that, in the wake of several high-profile police shootings and other police-related deaths in recent years, the role of the federal government—specifically, the United States Department of Justice's role in prosecuting civil rights crimes—has come under scrutiny.[22]

This Comment commends the House's various proposals in JIPA, especially the long overdue amendment to remove "willfully" from Section 242.[23] This Comment urges the Senate to pass JIPA's Section 242 amendment, lowering the mens rea requirement from "willfully" to "recklessly." This Comment further argues that JIPA should include the Model Penal Code's definition of "recklessly" to ensure uniform enforcement.[24] A recklessness standard, as defined by the Model Penal Code in Section 242, would resolve the persistent interpretation problem, serve as a tool to combat police misconduct, and spur more consistent enforcement.[25] Further, expanding statutory coverage to include a lesser mens rea requirement than the current "willful" requirement in Section 242 would clear the way for federal prosecutors to pursue charges for manslaughter and other reckless homicides perpetrated by police officers that do not rise to the level of a "willful" deprivation of constitutional rights.

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[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Lauren-Brooke Eisen, *What the Federal Government Can Do to Help Fix Policing in America*, BRENNAN CTR. FOR JUST. (June 16, 2020), https://www.brennancenter.org/our-work/research-reports/what-federal-government-can-do-help-fix-policing-america.

[23] Paul Savoy, *Reopening Ferguson and Rethinking Civil Rights Prosecutions*, 41 N.Y.U. REV. L. & SOC. CHANGE 277, 315 (2017).

[24] *See infra* Part V.

[25] This Comment recognizes that decisions to prosecute state and local officers federally are often very complex and that there may be other reasons why federal prosecutors choose not to charge police officers under Section 242, including evidence and proof. For the purposes of this Comment and for the sake of argument, however, this Comment proceeds under the presumption that there typically is insufficient evidence to prove specific intent, relying on several publicized memos from the Department of Justice and press releases from various Offices of the United States Attorney, discussing its decision not to charge, and that *but for* the difficult burden, federal prosecutors would utilize Section 242 more.

Part II explains the current statutory vehicle for federal prosecutors to seek remediation for police misconduct, namely, Section 242, and why it is inadequate and underutilized given the misleading *Screws* precedent. Part II also discusses the circuit split regarding mens rea that has resulted from the *Screws* plurality decision. Part III analyzes and critiques the DOJ's interpretation of *Screws* and its inconsistent applications to Section 242 prosecutions. Part III also briefly discusses Michael Brown, Eric Garner, and Tamir Rice's cases to highlight the difficulty the specific intent requirement poses for successful prosecutions. Part IV argues Congress should amend the mens rea standard from "willfully" to "recklessly" in Section 242 and makes the case for the recklessness standard by focusing on Congress's, *Screws*'s, and the courts' openness to the recklessness standard. Part V contains a draft of the proposed amendment to Section 242. Part VI briefly concludes by urging the Senate to pass the George Floyd Justice in Policing Act.

II. RECONSTRUCTION TO DECONSTRUCTION: THE TRANSFORMATION OF SECTION 242 OVER THE YEARS

The following Sections provide an overview of the current debate and debacle surrounding Section 242. Section A of this Part first describes Section 242's noble origins and the rise of the DOJ's Civil Rights Division. Next, Section B of this Part discusses the infamous *Screws* case and concludes by highlighting the substantial circuit split concerning Section 242's willfulness requirement.

A. *Section 242: A Federal Enforcement Device to Protect the Rights of Newly Freed African Americans Post-Civil War*

Following the Civil War, Congress enacted the Civil Rights Act of 1866.[26] It was the "first federal law to define citizenship and affirm that all citizens are equally protected by the law."[27] The original language of Section 242 is found in Section 2 of the Civil Rights Act of 1866.[28] Section 2 of the Civil Rights Act of 1866 made it a criminal offense to deprive another of a civil right while acting under the color of law.[29] Section 2 of the Civil Rights Act of 1866 provided:

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[26] HISTORY, ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, *The Civil Rights Bill of 1866*, https://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Bill-of-1866/.

[27] VANESSA HOLLOWAY, BLACK RIGHTS IN THE RECONSTRUCTION ERA 4 (2018).

[28] *Id.*

[29] Civil Rights Act, ch. 31, § 2, 14 Stat. 27 (1866), http://academic.brooklyn.cuny.edu/history/johnson/civrights1866.htm.

> *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for any crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.[30]

Section 242 emerged as a result of the Southern States' unwillingness to enforce the newly enacted law and protect the federal rights of *all*.[31] It "provided for separate federal enforcement as a device to cure the harassment and terror being employed against the newly freed blacks in the South."[32]

Originally, Section 242 did not contain an explicit scienter requirement, namely, the term "willfully."[33] From its enactment in 1866 until 1909, Section 242 did not require proof of the defendant's state of mind.[34] In 1909, Congress amended the statute and added the term "willfully" to Section 242 to ensure that individuals acting under the color of law were punished only when they acted with a bad purpose.[35] Section 242, entitled "Deprivation of Rights Under Color of Law" reads as follows:

> 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

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30 *Id.*

31 Spurrier, *supra* note 13, at 348.

32 *Id.*

33 *See generally*, ROBERT J. KACZORWOSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876 (1985).

34 *See* Jacobi, *supra* note 12, at 807 (noting the original statute did not require proof of willfulness or "any specific state of mind when acting to deprive another of his or her civil rights").

35 *See* Screws v. United States, 325 U.S. 91, 100 (1945) ("[W]e are told 'willfully' was added to [Section 242] in order to make the section 'less severe.'").

> to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.[36]

A violation of Section 242 is a misdemeanor unless federal prosecutors prove one of the statute's aggravating factors, including bodily injury, use of dangerous weapons, kidnapping, or death, in which case a violator may face "graduated penalties up to and including life in prison or death."[37] "Although the original statutory language may have seemed sufficiently broad to support vigorous federal enforcement, on a grand scale, actual practice did not live up to the expectations of the Act's drafters."[38]

B. *The Birth of the Department of Justice's Civil Rights Section: A Sword for Violations of Rights*

In 1939, Attorney General Frank Murphy—later Associate Justice Murphy—established the Civil Rights Section within the DOJ's Criminal Division,[39] seeking to reinstate Section 242 as an "effective instrument[] for the protection of the rights of the individual."[40] By 1947, the Civil

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[36] 18 U.S.C. § 242. This Comment recognizes the availability of other criminal civil rights statutes, namely 18 U.S.C. § 241, but it only addresses Section 242. *See* 18 U.S.C. § 241. Section 241 is a conspiracy statute, requiring "two or more persons [to] conspire to injure" and thus is inapplicable to police brutality cases involving one law enforcement officer. *Id.*

[37] *See Statutes Enforced by the Criminal Section*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/statutes-enforced-criminal-section (last updated July 28, 2017)

[38] Spurrier, *supra* note 13, at 348.

[39] Henry Putzel, Jr., *Federal Civil Rights Enforcement: A Current Appraisal*, 99 U. PA. L. REV. 439, 442 n.16 (1951).

[40] Tom C. Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 47 COLUM. L. REV. 175, 180 (1947).

Rights Section had received 70,000 civil rights complaints.[41] It investigated 850 of those complaints, prosecuted 178, and secured 130 convictions.[42] In 1957, the Civil Rights Section "was elevated to full Divisional status" and today is called the Civil Rights Division.[43] Prior to the establishment of the Civil Rights Section, federal prosecutors had utilized Section 242 in only two cases.[44] The creation of the Civil Rights Section marked a turning point in official thinking toward viewing the protection of civil rights as a "sword to be wielded by the federal executive against state, or local, public or private violations of rights."[45] Attorney General Murphy's main purpose in creating the Civil Rights Section was "to send a warning that the full might of the federal government would be brought to bear to protect the civil rights of oppressed minority groups in the United States."[46] Notwithstanding, "[S]ection 242 remained on the statute books without benefit of authoritative construction by the nation's highest tribunal" for over seventy years.[47]

C. *The Build-Up to* Screws*: The Civil Rights Section's Litigation Strategy*

To reinvigorate the federal government's role in civil rights enforcement, Attorney General Murphy began studying the existing statutes the federal government could use to prosecute civil rights violations.[48] Of course, one of the statutes was Section 242.[49] Given the uncertainty concerning the scope of Section 242, Civil Rights Section lawyers sought test cases "to take to the Supreme Court to obtain a

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41 *Id.* at 181.

42 *Id.*

43 Paul J. Watford, *Hallows Lecture:* Screws v. United States *and the Birth of Federal Civil Rights Enforcement*, 98 MARQ. L. REV. 465, 474 (2014).

44 Robert K. Carr, Screws v. United States*: The Georgia Police Brutality Case*, 31 CORNELL L. REV. 48, 50–51 (1945) (citing United States v. Buntin, 10 Fed. 730 (S.D. Ohio. 1882) & United States v. Stone, 188 Fed. 836 (D. Md. 1911)).

45 John T. Elliff, *Aspects of Federal Civil Rights Enforcement: The Justice Department and the FBI, 1939–1964*, *in* 5 PERSPECTIVES IN AMERICAN HISTORY: LAW IN AMERICAN HISTORY 605, 605 (1971).

46 Watford, *supra* note 43, at 475 (citing J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 203 (1968)).

47 Spurrier, *supra* note 13, at 349.

48 *See* Carr, *supra* note 44, at 49.

49 *See id.*

definitive construction of the statute."[50] *Screws* seemed ideal because of its compelling facts that would force the Supreme Court to decide whether Section 242 applied to cases involving police brutality.[51]

D. *Sword-Turned-Shield:* Screws*'s Specific Intent Interpretation*

1. The Tragic Facts

Screws involved a brutal beating of an African American man by three police officers in 1945.[52] The defendants were Screws—the Sheriff of Baker County, Georgia—and his two deputies.[53] At the time, Baker County was viewed as one of the most "backward" counties in the State.[54] The victim was a well-known thirty-year-old African American man named Robert Hall.[55] Hall was a leader within the local black community and carried a pistol.[56] In the 1940s, African Americans who tried to assert their constitutional rights in Georgia were often targets of local law enforcement and the Ku Klux Klan.[57]

Upon learning that Hall was carrying a pistol, Screws directed one of his deputies, without any basis, to seize Hall's pistol, stating, "[I]f any of these negroes think they can carry pistols, I am going to take them."[58] Shortly thereafter, Hall went to Screws's house and asked him to return his pistol, but Screws refused, saying Hall needed a court order.[59] Hall subsequently appeared before a grand jury and requested it to compel Screws to return the pistol.[60] The grand jury did not have the authority to order Screws to return Hall's pistol, so Hall hired a local attorney to send Screws a letter stating that he wrongfully seized Hall's gun.[61]

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50 Watford, *supra* note 43, at 477; *see also* United States v. Screws, 325 U.S. 91, 141 (1945) (Roberts, J., dissenting) (noting that Section 242 was before the Court "for the first time on full consideration as to its meaning and its constitutionality").

51 Watford, *supra* note 43, at 477.

52 *Screws*, 325 U.S. at 92 (describing the facts as a "shocking and revolting episode in law enforcement").

53 *Id.*

54 Watford, *supra* note 43, at 467.

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

56 Watford, *supra* note 43, at 467.

57 *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863–1877, at 428–29 (Henry Steele Commager & Richard B. Morris eds., Perennial Classics ed. 2002).

58 Watford, *supra* note 43, at 467.

59 *Id.* at 467–68.

60 *Id.* at 468.

61 *Id.*

Angered by this letter, Screws began telling some of the residents that he would "get" Hall.[62] Screws sent two of his deputies to Hall's house to arrest him for stealing a tire.[63] The officers drove Hall to the town square, where Screws was waiting.[64] Screws and the two officers began to beat Hall with their fists and continued beating him for thirty minutes, even after he fell to the ground and lay motionless.[65] The officers had crushed the back of Hall's skull, leaving a pool of blood in the middle of the town square.[66] The officers then took Hall to the jail and left him on a cell's floor with other inmates.[67] Screws eventually summoned an ambulance, but Hall died shortly after arriving at the hospital.[68]

2. The DOJ's Swing of the Sword

After Georgia failed to bring charges against Screws and the other two officers, the DOJ indicted the three men for depriving Hall of his federal constitutional rights, namely, the right not to be deprived of his life without due process of law.[69] They were indicted under Section 242, which makes it a federal crime to willfully deprive someone of "any rights, privileges or immunities secured or protected by the Constitution or laws of the United States," while acting "under color of any law."[70] A jury convicted all three defendants of violating Section 242, rejecting the officers' claims that they were acting in self-defense. The Fifth Circuit affirmed the convictions, and the Supreme Court granted the defendants' petition for certiorari.[71] The issue before the Court was whether Section 242 was too vague to be the basis for criminal liability.[72]

3. The Splintered *Screws* Opinions

Justice Douglas authored the plurality opinion that vacated the convictions, holding the officers did not act willfully, despite characterizing the case as a "shocking and revolting episode in law

62 United States v. Screws, 325 U.S. 91, 93 (1945)

63 *Id.* at 93.

64 Watford, *supra* note 43, at 468.

65 *Screws*, 325 U.S. at 92–93.

66 Watford, *supra* note 43, at 92.

67 *Id.* at 93.

68 *Id.*

69 *Id.*

70 18 U.S.C. § 242.

71 United States v. Screws, 325 U.S. 91, 94 (1945)

72 *See id.* at 94–96.

enforcement."[73] Justice Douglas addressed the vagueness problem by latching onto Section 242's requirement that the defendant must have acted "willfully" in depriving another of her constitutional rights.[74] He held "willfully" should be construed to mean "connoting a purpose to deprive a person of [a] specific constitutional right," which has been made definite by "the express terms of the Constitution or laws of the United States or by decisions interpreting them."[75] Justice Douglas explained that, traditionally, the mens rea term "intent" only required that "[i]f a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."[76]

The plurality, however, noted that merely requiring this form of general intent would turn a government actor into a criminal "though his motive was pure and though his purpose was unrelated to the disregard of any constitutional guarantee."[77] To give Section 242 its requisite specificity, Justice Douglas stated that in a criminal statute, "willful" means an "act done with a bad purpose" or "an evil motive."[78] Justice Douglas effectively interpreted "willfully" as requiring the government to "prove beyond a reasonable doubt that the defendant committed the acts which constituted the deprivation . . . [and] prove, again beyond a reasonable doubt, that the [defendant] intended to bring about that particular deprivation."[79]

Screws also discussed the ways the federal government can prove specific intent.[80] The plurality gave an example of a police officer who continues to enforce an ordinance that the court has held invalid.[81] Justice Douglas explained that the officer "violates the statute not merely because he has a bad purpose but because he acts in defiance of

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[73] *Id.* at 92, 113. On remand, the case was again tried before a jury and all defendants were acquitted and resumed their duties as law enforcement officers. *See* Shapiro, *supra* note 14, at 535.

[74] *Screws*, 325 U.S. at 103.

[75] *Id.* at 101, 104.

[76] *Id.* at 96.

[77] *Id.* at 97.

[78] *Id.* at 101 ("In the event something more is required than the doing of the act proscribed by the statute . . . . An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime.").

[79] Spurrier, *supra* note 31, at 353.

[80] United States v. Screws, 325 U.S. 91, 103–105 (1945).

[81] *Id.* at 104.

announced rules of law."[82] When constitutional requirements have been defined, individuals acting under the color of law meet the willfulness requirement when "they act in open defiance or in *reckless disregard* of a constitutional requirement which has been made specific and definite."[83] Justice Douglas recognized that Section 242 as construed has a narrower range, but posited, "[i]f Congress desires to give [Section 242] wider scope, it may find ways of doing so."[84]

Appalled by Justice Douglas's reasoning in reversing the officers' convictions, Justice Murphy authored a sharp dissent.[85] According to Justice Murphy, the "[t]he evidence [was] more than convincing that the officials willfully, or at least with wanton disregard of the consequences, deprived Robert Hall of his life without due process of law."[86] He articulated,

> Knowledge of a comprehensive law library is unnecessary for officers of the law to know that the right to murder individuals in the course of their duties is *unrecognized* in this nation. No appreciable amount of intelligence or conjecture on the part of the lowliest state official is needed for him to realize that fact; nor should it surprise him to find out that the Constitution protects persons from his reckless disregard of human life and that statutes punish him therefor.[87]

Although the plurality upheld Section 242, "the rationale [made] prosecutions exceptionally difficult because of the increased burden on the prosecution"[88] The prosecutor that tried the *Screws* case on remand felt "handicapped by the necessity of proving 'willfulness.'"[89] The Civil Rights Section lawyers also viewed *Screws*'s specific intent requirement as a huge loss, adding that "the burden that the Government now has under the general theme of the *Screws* case in proving the necessary willful intent in such cases is going to continue to build up very high hills to climb."[90]

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82 *Id.*

83 *Id.* at 105 (emphasis added). A person having fair warning of prohibited conduct under any statute 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." *Id.* at 104.

84 *Id.* at 105.

85 *See id.* at 134 (Murphy, J., dissenting).

86 United States v. Screws, 325 U.S. 91, 137 (1945) (Murphy, J., dissenting).

87 *Id.* at 136–37 (emphasis added).

88 Spurrier, *supra* note 31, at 353.

89 ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 115 (1947).

90 *Id.*

E. *Battle of the Interpretations Among the Lower Courts and the DOJ*

As courts have been called to interpret and apply *Screws*, notable disagreement has arisen among the circuit courts regarding the application of *Screws*'s specific intent requirement to Section 242 prosecutions.[91] With "willfully" still in the statute, lower federal courts have taken it upon themselves to reinterpret *Screws*.[92] Courts generally have relied on a few passages from *Screws* to define "willfully."[93] While specific intent continues to be the controlling legal standard, courts differ in its actual application.[94]

Courts have read *Screws* in three different ways.[95] Some courts read *Screws* and Section 242 to require the federal government to prove both that a police officer intended to commit the physical act and that he intended to deprive that person of a constitutional right. A few other courts allow a lesser showing by requiring the government to prove that a police officer had the intent to do the physical act, but not necessarily the purpose to violate another's constitutionally protected right.[96] A third group of courts, adopting a different concoction of Justice Douglas's plurality opinion in *Screws*, permit a conviction under a reckless disregard standard, in which the mens rea requirement is satisfied when officers act with reckless disregard of others' constitutional rights.[97] While *Screws* gave the federal government some measure of success when bringing Section 242 claims, "the decision did not augur well for future enforcement."[98]

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91 Spurrier, *supra* note 31, at 355.

92 Watford, *supra* note 43, at 482.

93 *Id.* at 477.

94 *See infra* Sections II.E.1–3.

95 *Id.*

96 *See, e.g.*, United States v. Garza, 754 F.2d 1202, 1210 (5th Cir. 1985) (requiring proof of physical intent and bad purpose); United States v. Cobb, 905 F.2d 784, 785 (4th Cir. 1990) (requiring proof of physical act only).

97 *See, e.g.*, United States v. Johnstone, 107 F.3d 200, 208 (3d Cir. 1997) (finding proof of reckless disregard sufficient); United States v. Gwaltney, 790 F.2d 1378, 1386 (9th Cir. 1986) (same).

98 *See* United States v. Screws, 325 U.S. 91, 103–105 (1945); *see also* Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens REA of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2120–21 (1993) ("In short, the opinions in *Screws* are inadequate both for the tasks they attempted and the subsequent reliance that has been placed upon them.").

1. First Camp: Bad Purpose and Intentional Wrongful Act

The Fifth Circuit and the United States District Court for the Northern District of Ohio are in the first camp of courts that have interpreted willful to mean that the government must prove the officers acted with an evil motive or bad purpose. In *United States v. Garza*, 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*.[99]

The Fifth Circuit upheld these instructions finding they complied with *Screws*'s instructions that "willfully in [Section 242] implies conscious purpose to do wrong and intent to deprive another of a right guaranteed by the Constitution, federal statutes, or decisional law."[100] In *United States v. Shafer*, the United States District Court for the Northern District of Ohio held that "[e]ven 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*."[101] The court explained that 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."[102]

The DOJ interprets the willfulness requirement in a similar manner as the above courts. The DOJ's Memorandum discussing its decision not to pursue charges against the Ferguson police officer involved in the death of Michael Brown is illustrative.[103] This Memorandum states that acting "willfully" requires a prosecutor to prove not only that Officer Wilson intended to kill Brown, but that he killed him knowing that it was a wrongful act.[104] The accompanying press release describes the requirement as "knowing that it was a wrongful act."[105] On December 29, 2020, the DOJ again explained its interpretation of Section 242's "willful" requirement in connection with the fatal shooting of Tamir

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99 *Garza*, 754 F.2d at 1210 (emphasis added).

100 *Id.*

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

102 *Id.*

103 *See generally* U.S. DEP'T OF JUST., REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown.pdf.

104 *Id.* at 11.

105 *Id.*

Rice.[106] The press release stated, "to prove that a shooting violated Section 242, the government must prove beyond a reasonable doubt that the officers acted willfully . . . [this standard requires] that the officer acted with the specific intent to do something the law forbids."[107]

2. Second Camp: Willful and Knowing Act

The Fourth and Seventh Circuits are in the second camp of courts that have interpreted "willful" to mean that the government must prove that the defendant intended to commit the physical act, but not necessarily that he intended to violate the constitutional rights of another. In *United States v. Cobb*, three officers appealed a Section 242 conviction for beating a prisoner while detained and in handcuffs.[108] The Fourth Circuit upheld the following jury instruction, explaining "willfully":

> Fourth, that the defendant willfully and knowingly intended to subject Kenneth Pack to the deprivation of his constitutionally protected right . . . . [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.[109]

The Fourth Circuit upheld this instruction, explaining 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."[110] The second camp does not require that the defendant intentionally violate another's rights, but instead that they intended to engage in the physical act. This interpretation mimics general intent at common law. In *Screws*, Justice Douglas, however, declared general intent was insufficient under Section 242. Similarly, in *United States v. Bradley*, the Seventh Circuit

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106 *See* Press Release, U.S. Dep't of Just., Justice Department Announces Closing of Investigation into 2014 Officer Involved Shooting in Cleveland, Ohio (Dec. 29, 2020) [hereinafter Tamir Rice Press Release], https://www.justice.gov/opa/pr/justice-department-announces-closing-investigation-2014-officer-involved-shooting-cleveland.

107 *Id.*

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

109 *Id.* at 788.

110 *Id.* at 789.

held that "[w]illfulness under [Section 242] essentially requires that the defendant intend to commit the unconstitutional act without necessarily intending to do that act for the specific purpose of depriving another of a constitutional right."[111]

3. Third Camp: Reckless Disregard of Risk or Definite Right

The Third, Seventh, and Ninth Circuits are in the third camp of courts that have adopted the reckless disregard standard—lower than purpose and knowledge.[112] These courts require the least stringent showing under Section 242. The third camp has accepted that "willfulness" in Section 242 can include reckless disregard. In *United States v. Johnstone*, the Third Circuit held that to prevail under Section 242, "the government must show that the defendant had the particular purpose of violating a protected right made definite by rule of law or recklessly disregarded the risk that he would violate such a right."[113] In *United States v. Gwaltney*, the Ninth Circuit upheld the following definition of reckless disregard: "'It is not necessary for the government to prove the defendant was thinking in 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.'"[114]

III. A "WILLFUL" LOSS TO THE FEDERAL GOVERNMENT'S SECTION 242 ENFORCEMENT EFFORTS TODAY

The federal government plays a vital role in protecting individual civil rights. It is the responsibility of the federal government to prosecute civil rights abuses under Section 242.[115] Yet, the specific intent requirement in *Screws* poses a significant hurdle for federal prosecutors who typically do not pursue Section 242 charges primarily

111 United States v. Bradley, 196 F.3d 762, 770 (7th Cir. 1999).

112 The discussion in *Screws* of reckless disregard is akin to willful blindness, which is discussed in greater detail in Part IV, *infra*. Whereas the Seventh and Ninth Circuits have followed *Screws*, the Third Circuit appears to have taken a different approach, adopting a standard similar to recklessness. *See, e.g.*, United States v. Johnstone, 107 F.3d 200, 208–09 (3d Cir. 1997). Because all the courts in the third camp accept a reckless disregard interpretation of willfulness, they are all in one camp.

113 *Johnstone*, 107 F.3d at 210.

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

115 Specifically, the Criminal Section of the Civil Rights Division of the United States Justice Department is responsible for prosecuting these cases under federal criminal civil rights statutes.

because of the willfulness requirement.[116] In fact, the DOJ has declined to prosecute Section 242 cases at an alarmingly high rate, with lack of "willfulness" being one of the primary reasons.[117] In 2019, federal prosecutors brought Section 242 charges in just 49 cases out of 184,274 total federal prosecutions.[118] The specific intent requirement and ensuing lower court disagreement chills DOJ enforcement and serves only to hinder the ability of prosecutors to pursue initial convictions.

The willfulness requirement "has enabled some defense attorneys to persuade the jury that virtually none but a constitutional lawyer could violate the statute since others would not be capable of possessing the specific intent to deprive the victim of a known constitutional right."[119] Proving the accused officer's "specific intent" to deprive an individual of his or her civil rights has become an insurmountable task for federal prosecutors even in cases where there is highly suggestive evidence of civil rights abuses by law enforcement. In fact, Section 242's specific intent requirement served the fatal blows in the highly publicized and deeply disturbing cases of Michael Brown, Eric Garner, and more recently, Tamir Rice.[120] If Section 242's willful requirement remains unchanged, it is entirely possible that requiring proof of specific intent could thwart justice in future police brutality cases.

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116 In 2019, however, a federal jury convicted Brett Palkowitsch, a St. Paul, Minnesota police officer, under Section 242 for "using excessive force against an unarmed civilian." *See* Press Release, U.S. Dep't of Just., Jury Convicts St. Paul Police Officer of Excessive Force (Nov. 26, 2019), https://www.justice.gov/opa/pr/jury-convicts-st-paul-police-officer-excessive-force; Michael Gelb, *Feds Charged Just 27 Cops For Excessive Use of Force*, CTR. ON MEDIA CRIME & JUST. AT JOHN JAY COLL. (June 23, 2020), https://thecrimereport.org/2020/06/23/despite-protests-federal-charges-of-excessive-use-of-force-remain-low-report.

117 *See Police Officers Rarely Charged for Excessive Use of Force in Federal Court*, TRAC REPORTS (2019), https://trac.syr.edu/tracreports/crim/615; *see also* Press Release, U.S. Dep't of Just., Statement by United States Attorney Richard P. Donoghue (July 16, 2019) (emphasis added), https://www.justice.gov/usao-edny/pr/statement-united-states-attorney-richard-p-donoghue ("[W]e determined that there was insufficient evidence to prove a beyond reasonable doubt that Pantaleo acted in *willful* violation of the law. . . . [and that] there is insufficient evidence to bring a federal criminal charge against Officer Pantaleo for his role in the untimely death of Mr. [Eric] Garner.").

118 *See* TRAC REPORTS, *supra* note 117. In 1998, Richard Roberts, the Criminal Section Chief of the DOJ, told the Human Rights Watch that the low rate of federal civil rights prosecutions was due to the "requirement of proof of the accused officer's 'specific intent' to deprive an individual of his or her civil rights as distinguished, for example, from an intent simply to assault an individual." *See Low Rate of Federal Prosecutions*, HUM. RTS. WATCH, https://www.hrw.org/legacy/reports98/police/uspo34.htm#TopOfPage (last visited Apr. 27, 2022).

119 Putzel, Jr., *supra* note 39, at 450.

120 *See infra* Sections III.A–D.

A. *Michael Brown, African American, 18, Unarmed*

Around noon on August 9, 2014, an officer stopped Michael Brown and his friend for jaywalking because they were walking in the middle of the street.[121] The officer told the duo to use the sidewalk and began to drive away, but the officer quickly reversed and exited his car.[122] Michael and his friend attempted to flee, and the officer shot at Michael.[123] Upon being shot, Michael turned around and put his hands in the air, saying, "I don't have a gun. Stop shooting!"[124] An autopsy revealed that Michael was shot six times, twice in the head, one of which likely led to his death.[125]

On March 4, 2015, the DOJ announced it would not pursue a Section 242 prosecution against a Ferguson Missouri Police Department officer for the killing of Michael Brown.[126] Ferguson, Missouri, is in the Eighth Circuit, which is in the first camp of courts, interpreting "willfully" to require the government to prove bad purpose.[127] It was one of the first times the DOJ publicly released the closing memo in a case.[128] It appears that the Eighth Circuit's interpretation of Section 242's willfulness informed the DOJ's analysis. An eighty-six-page memo highlighted the "high bar"—the requisite "willful" criminal intent—for a Section 242 prosecution, concluding that the officer did not willfully violate Brown's constitutional right to be free from unreasonable force.[129]

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121 Amanda Taub, *11 Essential Facts About Ferguson and the Shooting of Michael Brown*, VOX (Aug. 18, 2014, 3:10 PM), https://www.vox.com/2014/8/18/6029019/9-essential-facts-about-whats-happening-in-ferguson-missouri-michael-brown.

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 U.S. DEP'T OF JUST., *supra* note 103, at 5. The Washington Post provides an excellent overview of the report. *See generally* Glenn Kessler, *Harris, Warren Ignore DOJ Report To Claim Michael Brown Was "Murdered,"* WASH. POST (Aug. 13, 2019), https://www.washingtonpost.com/politics/2019/08/13/harris-warren-ignore-doj-report-claim-that-michael-brown-was-murdered. This Comment has excluded the facts of each of the four cases in the interests of brevity and to highlight the difficulty posed by Section 242's willful requirement.

127 U.S. CT. OF APPEALS, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT (2017), https://ecf.mowd.uscourts.gov/jmi/Criminal-Jury-Instructions-2017.pdf.

128 *Id.*

129 *Id.* at 11.

B. *Eric Garner, African American, 43, Unarmed*

On July 17, 2014, Eric Garner was accused of selling untaxed cigarettes on a sidewalk in Staten Island, New York.[130] Two officers attempted to arrest Mr. Garner, but he refused to be handcuffed.[131] Bystanders captured the encounter between the two officers and Mr. Garner on their cellphones.[132] The video showed an officer applying a chokehold, wrapping his arm around Mr. Garner's neck, while Mr. Garner gasped, "I can't breathe."[133] Mr. Garner died after uttering "I can't breathe" eleven times as two officers forced him to the pavement.[134] Shortly thereafter, the New York City medical examiner's officer declared that Mr. Garner's death was a homicide caused by neck compressions from an apparent chokehold.[135]

Despite the appalling facts, on July 16, 2019, one day before the fifth anniversary of Mr. Garner's death, the United States Attorney's Office for the Eastern District of New York announced its decision not to pursue Section 242 charges in connection with Eric Garner's death.[136] Rather, it simply declared that the government would fail to prove beyond a reasonable doubt that the officer acted willfully— "the highest standard of intent imposed by law."[137] New York is part of the Second Circuit, which has adopted the first camp's interpretation, requiring the government to prove that an officer had the specific intent to deprive rights under the color of law.[138]

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130 Katie Benner, *Eric Garner's Death Will Not Lead to Federal Charges for N.Y.P.D. Officer*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/nyregion/eric-garner-case-death-daniel-pantaleo.html.

131 *Id.*

132 *Id.*

133 *Id.*

134 Melissa Chan, *Officer in Eric Garner Death Fired After NYPD Investigation. Here's What to Know About the Case*, TIME (Aug. 19, 2019, 1:19 PM), https://time.com/5642648/eric-garner-death-daniel-pantaleo-suspended.

135 *Id.*

136 *See* Press Release, U.S. Att'y's Off., E.D.N.Y., Statement by United States Attorney Richard P. Donoghue (July 16, 2019), https://www.justice.gov/usao-edny/pr/statement-united-states-attorney-richard-p-donoghue.

137 *Id.*

138 *See* United States v. Curcio, 712 F.2d 1532, 1543 (2d Cir. 1983).

C. *Tamir Rice, African American, 12, Unarmed*

Tamir was twelve years old on the day he was shot and killed by a police officer in Cleveland, Ohio.[139] He was playing with a pellet gun on a playground and soon heard a patrol car.[140] Tamir immediately stood up and began walking forward toward the passenger side of the approaching patrol car.[141] Upon realizing that the patrol car was following him, Tamir stopped walking and stood stationary.[142] At that time, Tamir had his hands in his pockets and they were not readily visible to the officers.[143] The officer later repeatedly stated that he thought Tamir was reaching for his gun.[144] Within less than two seconds of opening the passenger door, the officer fired two shots, striking Tamir in the abdomen.[145]

Curiously, the Press Release announcing the DOJ's decision not to pursue Section 242 charges, states there was "insufficient evidence to establish that Officer Loehmann acted unreasonably under the circumstances."[146] Unsurprisingly, the Press Release then goes on to say that the evidence would fail to prove Section 242's willfulness requirement.[147] Although it is unclear under which interpretation camp the Sixth Circuit falls, the DOJ's characterization of willfully as "one of the highest standards of intent imposed by law" suggests that the DOJ would have to prove that the officer acted with the specific intent to deprive rights.

D. *George Floyd, African American, 46, Unarmed*

Almost a year after the world virtually observed George Floyd's heart-wrenching death, a federal jury returned an indictment charging Derek Chauvin and three other Minneapolis police officers with violations of Section 242.[148] The indictment alleged that "all four

139 Tamir Rice Press Release, *supra* note 106.

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

145 Tamir Rice Press Release, *supra* note 106.

146 *Id*.

147 *Id.*

148 Press Release, U.S. Dep't of Just., Four Former Minneapolis Police Officers Indicted on Federal Civil Rights Charges for Death of George Floyd; Derek Chauvin Also Charged in Separate Indictment for Violating Civil Rights of a Juvenile (May 7, 2021) [hereinafter George Floyd Press Release], https://www.justice.gov/opa/pr/four-former-minneapolis-police-officers-indicted-federal-civil-rights-charges-death-george. Two

defendants willfully deprived Mr. Floyd of his constitutional right to be free" from unreasonable force.[149]

George Floyd's pleas continue to ring in many of our ears. "I'm through, I'm through. I'm claustrophobic. My stomach hurts. My neck hurts. Everything hurts. I need some water or something, please. Please? I can't breathe officer. You're going to kill me, man."[150] Unforgettably, this was all while Chauvin's knee rested on the back of Mr. Floyd's neck while he lay immobile on the ground.[151] The Press Release announcing the indictments appears to focus on this very fact to suggest willfully wrongful conduct by Chauvin.[152] Specifically, the indictment alleges that Chauvin holding his one knee across Mr. Floyd's neck and the other knee on his back and arm, as Mr. Floyd "lay on the ground, handcuffed and unresisting . . . even after Mr. Floyd became unresponsive" violated Mr. Floyd's constitutional right.[153]

On December 15, 2021, Chauvin pleaded guilty to "willfully" depriving George Floyd of his constitutional rights under Section 242.[154] Chauvin also acknowledged that his conduct resulted in death and that he acted "in callous and wanton disregard of the consequences" to George Floyd's life.[155] On February 24, 2022, after a lengthy three-week trial, a federal jury found three other former Minneapolis Police Department officers involved in George Floyd's death guilty of federal civil rights violations under Section 242.[156] They were found to have

weeks prior to this Press Release, a state trial jury found Derek Chauvin guilty of murder and manslaughter in Mr. Floyd's death. *See* Laurel Wamsley, *Derek Chauvin Found Guilty of George Floyd's Murder*, NPR (Apr. 20, 2021), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/987777911/court-says-jury-has-reached-verdict-in-derek-chauvins-murder-trial.

149 *See* George Floyd Press Release, *supra* note 148.

150 Richard A. Oppel Jr. & Kim Barker, *New Transcripts Detail Last Moments for George Floyd*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2020/07/08/us/george-floyd-body-camera-transcripts.html (last updated Aug. 11, 2020).

151 *Id.*

152 *See supra* note 148.

153 *Id.*

154 Press Release, U.S. Dep't of Just., Former Minneapolis Police Officer Derek Chauvin Pleads Guilty in Federal Court to Depriving George Floyd and a Minor Victim of Their Constitutional Rights (Dec. 15, 2021), https://www.justice.gov/opa/pr/former-minneapolis-police-officer-derek-chauvin-pleads-guilty-federal-court-depriving-george.

155 *Id.* In addition, Chauvin was tried in state court and convicted of second-degree murder and was sentenced in state court to 22.5 years in prison. *Id.*

156 Press Release, U.S. Dep't of Just., Three Former Minneapolis Police Officers Convicted of Federal Civil Rights Violations for Death of George Floyd (Feb. 24, 2022),

deprived George Floyd of his "constitutional right to be free from an officer's unreasonable force when each 'willfully' failed to intervene to stop . . . Chauvin's use of unreasonable force," resulting in George Floyd's death.[157]

While this conviction and Chauvin's guilty plea are consoling to a certain degree, notwithstanding, there remains cause for concern. The willfulness requirement will remain an encumbrance to Section 242 prosecutions, especially if this is the only type of willfully wrong conduct that could manage to pass Section 242's high bar. Unless and until the Senate passes the George Floyd Justice in Policing Act amending the mens rea requirement, there will continue to exist great difficulty in proving that the officer possessed the specific intent to deprive the victim of a known constitutional right.[158] Whether Section 242 will remain a statute that virtually none but a Chauvin-like officer or constitutional lawyer could violate will largely depend on Congress. It is in the Senate's hands to pass the Justice in Policing Act so Section 242 can effectively hold accountable police officers who deprive rights under the color of law and deliver justice.

IV. MAKING THE CASE FOR THE RECKLESSNESS STANDARD

Many legal scholars and commentators have time and again maintained that the best way to reform Section 242 is through the legislature.[159] The George Floyd Justice in Policing Act of 2020 presents a perfect opportunity to amend Section 242. Incidents of police misconduct are rife in cities throughout the country. Given recent brutal deaths at the hands of law enforcement, Congress should remove obstacles to the prosecution of civil rights violations committed by police officers. The inability of the federal government to charge violators under Section 242 because of the astronomically high mens rea standard is distressing.[160] Publicizing civil rights crimes by police officers and "their subsequent prosecution, even if unsuccessful . . . 'can have an educative and therapeutic effect upon the entire community.'"[161] When officers involved in wrongful deaths of civilians go unpunished, it conveys the impression that law enforcement is above

https://www.justice.gov/opa/pr/three-former-minneapolis-police-officers-convicted-federal-civil-rights-violations-death.

157 *Id.*

158 George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/house-bill/7120.

159 *See, e.g.*, Jacobi, *supra* note 12.

160 *See supra* Parts II–III.

161 *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297, 1299 (1965).

the law. What is the remedy when the law itself is interpreted to shield police misconduct and killings?

Reforming Section 242 to permit prosecutions under the lesser and clearer recklessness standard is one remedy. *Screws*' ambiguity and subsequent interpretation by different circuit courts suggest recklessness is on the table and would be a *workable* alternative to the current willfulness standard. Despite outcries for reform of police behavior, "internal accountability seems ill-equipped to deal with violations of constitutional rights."[162] Defendants most often challenge Section 242 convictions on the grounds that the government has failed to prove that the defendant had the specific intent to deprive a person of a right.[163] Reckless deprivation of rights in Section 242, therefore, is apposite.

Federal prosecution can provide an impartial and neutral forum to vindicate the victims' rights.[164] The close-working relationship between local prosecutors and law enforcement officers often "militates against the vigorous pursuit of police abuse cases."[165] In cases where the State has chosen not to prosecute, the federal government's ample resources could be sensibly used to prosecute cases of police misconduct.[166] On the other hand, if the State does prosecute and the case proceeds to a verdict, the federal government is in the best position to evaluate whether the state trial and verdict have effectively vindicated the

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[162] 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, 200 (2003).

[163] *Id.*

[164] This Comment recognizes that there may be other reasons why federal prosecutors would decline Section 242 prosecution. Whether a substantial federal interest exists is often the inquiry that authorizes federal prosecution. The Principles of Federal Prosecution are beyond the scope of this Comment. *See* U.S. DEP'T OF JUST., PRINCIPLES OF FEDERAL PROSECUTION (2019), https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution. This Comment further acknowledges state prosecution might be the best route in certain, if not most, cases. By no means does this Comment advocate for federal prosecution in the first instance. States could benefit from working alongside the DOJ or seeking their help in investigating certain instances of police misconduct. This Comment seeks to highlight the natural biases that often accompany state prosecutions and why federal prosecution best serves the interests of victims of police abuses.

[165] *Shielded from Justice: Police Brutality and Accountability in the United States: Obstacles to Justice*, HUM. RTS. WATCH (1998), https://www.hrw.org/legacy/reports98/police/uspo09.htm#TopOfPage.

[166] However, the federal government typically defers to "state prosecution of police officers, with potential federal prosecution serving only as a back-stop." Kami N. Chavis & Conor Degnan, *Curbing Excessive Force: A Primer on Barriers to Police Accountability*, AM. CONST. SOC. FOR L. & PUB. POL'Y (2017).

victim's rights.[167] If the DOJ determines that state charges did not sufficiently vindicate the federal interest, the DOJ can accordingly wield its sword against civil rights violations. After all, "police misconduct cases and civil rights remain an important federal priority."[168] Absent criminal liability, many police abuse victims turn to civil lawsuits, such as 42 U.S.C. § 1983, for redress.[169] While some victims have succeeded in securing civil jury awards, only "a small percentage of civil lawsuits have forced police departments themselves to accept liability for ill-treatment, leading to reforms in training or flawed policies."[170]

The current Section 242, requiring proof of willfulness, however, has limited reach. The spirit of criminal civil rights statutes, namely Section 242, is best served by having a lower mens rea requirement. Justice in Policing Act's proposal of amending Section 242 to require proof of reckless conduct would broaden the range of prosecutable conduct and in turn, honor Section 242's purpose of protecting "the civil rights of oppressed minority groups in the United States."[171]

A mens rea higher than recklessness would exacerbate the persistent interpretation problem and impede the government's Section 242's enforcement efforts.[172] And most importantly, leaving Section 242's willfulness requirement unchanged inevitably insulates many

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167 Adam Harris Kurland, *The Enduring Virtues of Deferential Federalism: The Federal Government's Proper Role in Prosecuting Law Enforcement Officers for Civil Rights Offenses*, 70 HASTINGS L.J. 771, 811, 818, 843 (2019) (emphasis added).

168 *Id.* at 812.

169 *See* Phillip Matthew Stinson, Sr., & Steven L. Brewer, Jr., *Federal Civil Rights Litigation Pursuant to 42 U.S.C. § 1983 as a Correlate of Police Crime*, 30 CRIM. JUST. POL'Y R. 223, 224 (2019). Section 1983 has its own set of obstacles. *See* Jay Schweikert, *Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability*, CATO INST., https://www.cato.org/blog/qualified-immunity-supreme-courts-unlawful-assault-civil-rights-police-accountability (last updated Mar. 5, 2018). Section 1983 has garnered a lot of attention in recent years due in part to its controversial qualified immunity defense. *Id.* A qualified immunity defense is not available as a defense in Section 242 cases. Generally, Section 242 only permits ordinary criminal law defenses such as self-defense and the like. They are beyond the scope of this Comment.

170 *Shielded from Justice: Police Brutality and Accountability in the United States: Obstacles to Justice*, *supra* note 165. This report further states, "[i]n the end, taxpayers are paying at least twice for officers who commit abuses, once for their salaries and again to pay victims of their abuse, while often getting little legitimate police work or protection from them." *Id.*

171 Watford, *supra* note 43, at 475 (citing J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 203 (1968)). Notably, police shootings have a racial component. Distressingly, "African-Americans make up twenty-five percent of police shooting victims but are only twelve percent of the population." *See* Kurland, *supra* note 167.

172 The subsequent subsection discusses the various mental states in detail.

instances of police misconduct from liability. When local prosecutors decline prosecution, federal prosecutors refuse to step in, even in strong cases, due in large part to the high legal threshold.[173] If evidence suggests reckless conduct could be proved beyond a reasonable doubt, a recklessness standard would no longer force the federal government to forfeit Section 242 prosecutions. The following Sections make the case for the recklessness standard by discussing Congress' and the courts' openness to the Model Penal Code's definition of recklessness.

A. *Congress and* Screws*'s Openness to Recklessness*

Screws left open the possibility for the recklessness standard.[174] Justice Douglas explicitly declared, "[i]f Congress desires to give [Section 242] wide scope, it may find a way of doing so."[175] Lowering the mens rea in Section 242 from "willfully" to "recklessly" is certainly one way Congress can give the statute a wider scope and help hold officers accountable for their misconduct.

Congress is fully aware of the problems with Section 242. In fact, the Criminal Code Reform Act of 1981 attempted to replace Title 18 of the United States Code, describing it as "a hodgepodge of conflicting, contradictory, and imprecise laws with little relevance to each other or to the state of the criminal law as a whole," with a "systematic, consistent and comprehensive Federal criminal code."[176] The Reform Act contained one main feature to address the interpretation problem associated with Title 18: uniform definitions to describe four levels of mens rea in the Criminal Code.[177] The Senate report noted that Title 18 used about seventy-eight terms to describe the levels of culpability for offenses, but *none* of these terms were defined in Title 18 itself.[178] If the Reform Act had been passed, it would have decreased the mental states for criminal culpability from seventy-eight to four, akin to the Model Penal Code, keeping only the following: intentional, knowing, reckless, and negligent.[179] "Willfully" certainly would have been struck from Title 18. Today, the George Floyd Justice in Policing Act similarly strikes

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173 *See supra* Part II.

174 United States v. Screws, 325 U.S. 91, 105 (1945).

175 *Id.*

176 *See* Criminal Code Reform Act, S. 1437, 95th Cong. (1977); Criminal Code Reform Act, S. 1722, 96th Cong. (1979).

177 Criminal Code Reform Act, S. 1630, 97th Cong. (1981).

178 *Id*.

179 *Id.*

"willfully" from Section 242 and seeks to replace it with "knowingly" or "recklessly."[180]

B. *The Model Penal Code's Recklessness Standard: A Model of Clarity for* Screws*'s "Reckless Disregard" Debate*

The recklessness standard holds great promise. Although Congress has not adopted the Model Penal Code, the Supreme Court and other federal courts often have looked to the Model Penal Code's definition of "recklessly."[181] Recklessness involves consciously disregarding a substantial and unjustifiable risk.[182] Under the Model Penal Code, a person acts "recklessly" when:

> [H]e consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. *The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation*.[183]

Recklessness is not commonly used as a mens rea term in the federal code. In fact, "recklessly" appears in Title 18, which includes Section 242, numerous times. Moreover, recklessness is quite prevalent under federal securities laws.[184]

The Supreme Court and lower federal courts have often relied on the Model Penal Code and its principles to interpret federal criminal statutes.[185] The Model Penal Code explicitly defines four mental states to be used in criminal codes: purposely, knowingly, recklessly, and negligently.[186] Specific intent, as used in Section 242, is a mens rea term associated with the common law.[187] Specific intent is usually limited to the defendant's state of mind concerning his conduct, the results of his

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[180] George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/house-bill/7120.

[181] *See* Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 YALE L.J. 2231, 2239 (1993).

[182] MODEL PENAL CODE § 2.02(2)(c).

[183] *Id.* (emphasis added).

[184] *Recklessness Under the Federal Securities Laws*, LAW J. NEWS LETTERS (May 2006), https://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2006/05/30/recklessness-under-the-federal-securities-laws/?slreturn=20201014230513.

[185] *See* United States v. United States Gypsum Co., 438 U.S. 422, 444 (1978) ("The ALI Model Penal Code is one source of guidance upon which the Court has relied . . .").

[186] *See generally* MODEL PENAL CODE § 2.02.

[187] *See* Lawrence, *supra* note 98, at 2183 n.318.

conduct, or the attendant circumstances.[188] Under the Model Penal Code, "specific intent" is broken down into "purposely" and "knowingly" categories of culpability.[189] A person acts "purposely" with respect to her conduct or a result of her conduct if it was her "conscious object to engage in conduct of that nature or to cause such a result" and she acts "purposely" with respect to attendant circumstances if she was "aware of the existence of such circumstances or [s]he believes or hopes that they exist."[190]

A person acts "knowingly" if she was aware of the nature of her conduct or that the relevant attendant circumstances existed.[191] If the element involves a result of her conduct, a person acts knowingly if "[s]he is practically certain that her conduct will cause such a result."[192] Strangely, the Model Penal Code addresses "willfully," as found in Section 242, in terms of knowledge.[193] The Model Penal Code states: "A requirement that an offense be committed *willfully* is satisfied if a person acts *knowingly* with respect to the material elements of the offense, unless a purpose to impose further requirement appears."[194] In *Screws*, Justice Douglas interpreted "willfully" by imposing such a further requirement: proving "bad purpose" or showing that an officer "acts in reckless disregard of its prohibition of the deprivation of a defined constitutional or other federal right."[195]

Lowering the mens rea in Section 242 from "willfully" to "knowingly" is a sound alternative. Section 242, however, can seriously benefit even further from having one clearly defined mens rea term, ideally, "recklessly" as defined in the Model Penal Code. A knowledge requirement under Section 242 is ill-advised because it certainly would not broaden the range of charges in police misconduct cases. A knowledge requirement not only would be ineffective and provide less protection to victims of police brutality, but also would exacerbate the tenacious interpretation problems. Under the knowledge standard, a police officer must be practically certain that his conduct, for example, resting his knee on the back of a suspect's neck, would cause his

188 *See id*.

189 MODEL PENAL CODE § 2.02(2)(a) & (b); *see* Eric A. Johnson, *Understanding General and Specific Intent: Eight Things I Know For Sure*, 13 OHIO ST. J. CRIM. L. 521, 534 (2016).

190 MODEL PENAL CODE § 2.02(2)(a).

191 *Id.* § 2.02(2)(b).

192 *Id*.

193 *Id.* § 2.02(8).

194 *Id*.

195 Screws v. United States, 325 U.S. 91, 103–04 (1945).

death.[196] Further, courts are split on how they define "knowingly."[197] Some courts require the government to prove that the defendant was aware of what he was doing and that he was aware to a practical certainty that his conduct would lead to a harmful result.[198] Other courts have defined "knowingly" to only require the former.[199]

Some scholars argue that Section 242's willfulness requirement may be satisfied by some form of recklessness, relying on the "reckless disregard" language in *Screws* instead of amending the existing statute.[200] In practice, this is not sensible.[201] The reckless disregard alternative permitted under *Screws* connotes willful blindness—wherein an individual is aware of attendant circumstances that a constitutional right exists, but pretends not to know—rather than traditional recklessness as defined by the Model Penal Code.[202]

Although the Court in *Screws* did not define "reckless disregard" under Section 242, in *Farmer v. Brennan*, the Court stated that in

196 MODEL PENAL CODE § 2.02(2)(b).

197 Josh Siegel, *How Michigan and Ohio Made it Harder to Accidentally Break the Law*, DAILY SIGNAL (Jan. 26, 2016), https://www.dailysignal.com/2016/01/27/how-michigan-and-ohio-made-it-harder-to-accidently-break-the-law/.

198 *See* United States v. Freed, 401 U.S. 601, 607 (1971); *see also* United States v. Averi, 715 F. Supp. 1508, 1509 (M.D. Ala. 1989).

199 *Averi*, 715 F. Supp. at 1509.

200 Kurland, *supra* note 167.

201 The Third Circuit, however, has interpreted the reckless disregard language of *Screws* by way of traditional recklessness. Whereas *Screws* did not speak of risk, the Third Circuit interpreted Justice Douglas's reckless disregard discussion in terms of an officer recklessly disregarding a *risk* that he would violate a right, a characterization attributable to the Model Penal Code's recklessness standard. United States v. Johnstone, 107 F.3d 200, 210 (3d Cir. 1999) (explaining that "willfully" depriving another of their civil rights under Section 242, requires the government to prove that the defendant had the purpose of violating a protected right or recklessly disregarded the risk that he would violate such right). In fact, jury instructions published by the Third Circuit confirm that "willfully" is also interpreted, occasionally, to include "recklessly." *See* United States v. Figueroa, 729 F.3d 267, 277 (3d Cir. 2013). The Third Circuit's jury instructions defining "recklessly" are based on the Model Penal Code's definition. This case is also discussed in Part II of this Comment.

202 Many jurisdictions, including the Second, Third, and Ninth Circuits have incorporated into their common law willful blindness doctrines, which serve as *alternatives* for knowledge. *See* Marcus, *supra* note 181, at 2241. The Third Circuit goes a step further and allows "willful blindness" to be used to prove the awareness of substantial and unjustifiable risk aspect of "recklessly." *See* Johnstone, 107 F.3d at 210; *see also* Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 225 (1991). There are critics who view willful blindness and recklessness as synonymous. *See* J. LI. J. Edwards, *The Criminal Degrees of Knowledge*, 17 MOD. L. REV. 294, 298 (1954) (discussing the relationship between willful blindness and recklessness and concluding that they are "synonymous").

criminal cases, a criminal defendant exhibits reckless disregard if he is indifferent to a risk "of which he is aware."[203] In *Brennan*, the Court's description of reckless disregard lines more closely with the Model Penal Code's traditional recklessness definition rather than Justice Douglas's explanation of reckless disregard by way of willful blindness in *Screws*. This Comment calls on Congress to elucidate this reckless disregard debate once and for all by standing behind the Model Penal Code's recklessness standard and amending Section 242 to require proof of a reckless deprivation of rights. Further, it is commonly understood in criminal law and confirmed by the Model Penal Code that when "recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly."[204]

V. REVISED AND DEFINED SECTION 242

While this Comment commends the efforts of Congress to amend Section 242 through the Justice in Policing Act, this Comment urges Congress to go a step further. JIPA suggests replacing it with knowingly or recklessly, while this Comment argues that Congress should replace willfully with recklessly and expressly define the term using the Model Penal Code definition.[205] Neither JIPA nor Title 18, which contains Section 242, define recklessly.[206] It is likely the DOJ and courts will turn to the Model Penal Code, as they have frequently done, for guidance in construing federal criminal statutes containing mens rea terms.[207] It is now well-established that the breadth of Section 242's problems stem from lack of definitive guidance from Congress and the courts.[208] An amended Section 242, thus, could benefit from having sections that define the terms of art.

Because this Comment argues for the recklessness standard, it proposes the following amendments to the JIPA. It defines "recklessly" using the Model Penal Code's definition and successively defines

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[203] 511 U.S. 825, 837 (1994). In a civil action, the Court noted, "acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Id.* at 836.

[204] MODEL PENAL CODE § 2.02(5). Generally, in criminal law, proof of a higher mens rea is sufficient to satisfy a lower mens rea. *Id.* § 2.02.

[205] H.R. 7120, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/house-bill/7120.

[206] As discussed in Section IV.A of this Comment, Title 18 greatly suffers from not having uniform definitions to describe four levels of mens rea in the Criminal Code.

[207] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319,319 (2007).

[208] *See supra* Parts II, III.

"substantial risk" using the same.[209] Although Section 242 is predominantly used in police brutality cases, the overall scheme of Section 242 applies to all public officials. The proposed statute, therefore, divides Section 242 into additional subsections—one defining law enforcement officers' conduct and the other defining public officials' conduct.[210] This Comment's proposed statute reads as follows, with the suggested edits in bold type:

The George Floyd Justice in Policing Act of 2020

TITLE 18. CRIMES AND CRIMINAL PROCEDURE, § 242. Deprivation of Rights Under Color of Law.

> (a) Whoever, under color of any law, statute, ordinance, regulation, or custom, ~~willfully~~ **recklessly** 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, . . . shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.
>
> **(b) A law enforcement officer under subsection (a) acts *recklessly* if the law enforcement officer disregarded "a substantial risk that a circumstance exists or that a result will occur."**
>
> > **(i) A substantial risk is . . . a risk the disregard of which constitutes a gross deviation from the standard of care a law-abiding officer would exercise under the circumstances."**

[209] MODEL PENAL CODE § 2.02(2)(c); George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/house-bill/7120.

[210] *Id.*

> **(c) A public official under subsection (a) acts *recklessly* if the public official disregarded "a substantial risk that a circumstance exists or that a result will occur."**
>
> > **(i) A substantial risk is . . . a risk the disregard of which constitutes a gross deviation from the standard of care a law-abiding public official would exercise under the circumstances."**

To secure a criminal conviction under the proposed Section 242, federal prosecutors will have to establish beyond a reasonable doubt the following three elements: (1) the defendant acted under color of law;[211] (2) the defendant acted recklessly, that is, with disregard to a substantial risk; and (3) the defendant's reckless conduct deprived the victim of rights secured or protected by the Constitution or United States laws.[212] The government would not be required to prove that the defendant knew this right was secured by the Constitution or United States laws.[213]

VI. CONCLUSION

The protection of civil rights of all citizens is one of the primary goals of our society. Federal criminal laws such as Section 242 can help to secure and protect these rights. Section 242's specific intent requirement served the fatal blows in the cases of Michael Brown, Eric Garner, and Tamir Rice and could possibly thwart justice in future cases. Reforming Section 242 has been long overdue. *Screws*' obscure plurality opinion continues to impede the government's ability to pursue Section 242 charges. The circuit courts are split on how to apply Section 242. A recklessness standard has the potential of resolving these lingering issues and holding police accountable for their misconduct. The Senate, therefore, should pass the George Floyd Justice in Policing Act because lowering Section 242's mens rea requirement to recklessly can alleviate the weaknesses of the present willfulness requirement and better help vindicate civil rights abuses.

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211 Screws v. United States, 325 U.S. 91, 111 (1945). Under Section 242, defendants act under color of law when they "undertake to perform their official duties . . . whether they hew to the line of their authority or overstep it." *Id.*

212 Some of the rights include the right not to be deprived of life or liberty without due process of law, including the right to be free from physical or sexual assaults. *See* United States v. Lanier, 520 U.S. 259, 262 (1997). Of course, individuals have the right to be free from unreasonable searches and seizures. *See, e.g.*, Katz v. United States, 389 U.S. 347, 353 (1967); *see also* California v. Hodari, 499 U.S. 621, 624 (1991).

213 *See Screws*, 325 U.S. at 105.