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Police Reform and the 116th Congress: Selected Legal Issues

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SUMMARY

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Police Reform and the 116th Congress: Selected Legal Issues

Nationwide protests during the spring and summer of 2020 related to police use of force have prompted calls for increased congressional regulation of federal, state, and local law enforcement. There are an array of legal issues related to federal regulation of law enforcement, including the scope of Congress's constitutional authority to legislate on law enforcement reform, current federal regulation of law enforcement, and various questions raised by reform proposals introduced in the 116th Congress.

Congress has extensive power to regulate *federal* law enforcement. However, federalism principles embodied in the Constitution place limits on Congress's power to regulate *state and local* police—an issue that the Constitution generally entrusts to the states. Congress, however, possesses some authority to regulate state and local law enforcement. Two primary tools Congress may use to act in this area are statutes designed to enforce the protections of the Fourteenth Amendment and legislation requiring states to take specified action in exchange for federal funds disbursed under the Spending Clause.

Legislating within the scope of its enumerated powers, Congress has enacted multiple statutes that regulate federal, state, and local law enforcement. Key existing legal authorities related to federal regulation of law enforcement include Department of Justice (DOJ) civil enforcement against patterns and practices of unconstitutional policing, laws imposing civil and criminal liability for officer misconduct, and grant conditions designed to spur state and local compliance with federal policies. Federal courts have supplemented these statutory authorities with certain judicially created doctrines defining the contours of liability for police misconduct.

Yet even before the high-profile events of spring and summer 2020, commentators and legislators had suggested numerous avenues for congressional reform and oversight of federal, state, and local law enforcement, and recent events have prompted additional proposals in this area. Comprehensive proposals introduced in the 116th Congress include the Just and Unifying Solutions To Invigorate Communities Everywhere (JUSTICE) Act of 2020 and the George Floyd Justice in Policing Act of 2020. Both of these proposals would incorporate and build on numerous prior legislative proposals, seeking to impose comprehensive reforms on federal, state, and local policing. The two bills address certain common issues; however, even when they tackle similar issues, they often take different approaches. As a general matter, the Justice in Policing Act would more often impose direct restrictions on federal law enforcement and invoke Congress's Spending Clause power to require federal funding recipients to enact laws placing restrictions on state and local law enforcement. By contrast, the JUSTICE Act would focus more on nonbinding measures, including funding voluntary initiatives by state and local law enforcement and gathering data on various law enforcement practices.

In addition to these comprehensive proposals, specific issues related to police reform have attracted significant attention from commentators and legislators in recent years. Recently introduced legislation seeks reform on issues such as qualified immunity, criminal liability, no-knock warrants, law enforcement identification, racial profiling, and limitations on military-grade equipment.

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Nationwide protests during the spring and summer of 2020 related to police use of force have prompted calls for increased congressional regulation of federal, state, and local law enforcement.[1] While the regulation of state and municipal law enforcement is an area that the Constitution generally entrusts to the states, Congress possesses some authority and has exercised that authority to regulate local law enforcement matters. Congress has done this primarily through statutes designed to enforce the protections of the Fourteenth Amendment and legislation requiring states to take specified action in exchange for federal funds disbursed under the Spending Clause.[2]

This report provides an overview of legal issues related to federal regulation of law enforcement by first discussing Congress's constitutional authority to regulate law enforcement agencies and officers. The report then summarizes current federal law related to police regulation and oversight, including enforcement by the U.S. Department of Justice and laws that impose criminal and civil liability for unlawful conduct by government actors, such as law enforcement officers. Finally, the report concludes by discussing recent legislative proposals related to police reform and relevant considerations for Congress.

Constitutional Authorities for Congressional Action on Police Reform

Federal regulation of law enforcement raises several constitutional considerations. While Congress may have plenary authority to regulate *federal* law enforcement officers and agencies,[3] federalism principles within the Constitution place limits on Congress's power to regulate *local police*—an issue that the Constitution generally entrusts to the states.[4] Despite these limits, Congress possesses some authority to legislate on matters involving state and local law enforcement, primarily through its enumerated powers under the Fourteenth Amendment and the Spending Clause.

Federalism Generally

The Constitution establishes a "system of dual sovereignty between the States and the Federal Government."[5] Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[6] Thus, states generally have broad authority to enact legislation, including laws regulating state and local law enforcement.[7] In contrast, Congress may only enact legislation under specific powers enumerated in the Constitution and cannot use even those enumerated powers to intrude impermissibly on the sovereign powers of the states.[8] In this vein, the Supreme

[1] Eliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning that Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020) https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html.

[2] *See, e.g.*, 42 U.S.C. § 1983; 34 U.S.C. § 60105.

[3] See CRS Report R44729, *Constitutional Authority Statements and the Powers of Congress: An Overview*, by Andrew Nolan (March 11, 2019); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 500, (2010) (noting, "Congress has plenary control over the salary, duties, and even existence of executive offices.").

[4] *See* Bond v. United States, 572 U.S. 844, 854 (2014).

[5] Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

[6] U.S. CONST. amend. X.

[7] *See Bond*, 572 U.S. at 854.

[8] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S.Ct. 1461, 1467 (2018) ("The Constitution confers on Congress not

Court has recognized that there are certain subjects that are largely of local concern where states "historically have been sovereign," such as issues related to the family, crime, and education.[9]

Because of these principles, the Supreme Court has recognized various limitations on Congress's power to legislate in areas that fall within a state's purview, observing that congressional power is "subject to outer limits," and that Congress must take care not to "effectually obliterate the distinction between what is national and what is local."[10] In addition, under the anti-commandeering doctrine, Congress is prohibited from passing laws requiring states or localities to adopt or enforce federal policies.[11] Although these principles constrain Congress's power, Congress can rely on its enumerated powers either to regulate directly when an issue raises both local and federal concerns, or to regulate indirectly in areas Congress could not otherwise reach.[12] The spending power and Section 5 of the Fourteenth Amendment are two of the most relevant authorities that Congress has used in the past to address local law enforcement issues.

Spending Power and Regulating Law Enforcement

The Spending Clause empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[13] The Supreme Court has held that incident to the spending power, Congress may further its policy objectives by attaching conditions on the receipt of federal funds.[14] These conditions often involve compliance with statutory or administrative directives and can apply to any entity receiving federal funds, including states and localities. In *South Dakota v. Dole*, for example, the Supreme Court upheld as a valid exercise of Congress's spending power a statute that conditioned the grant of federal highway funds to any state upon that state prohibiting the purchase or possession of alcohol by individuals less than 21 years old.[15]

There are four limitations on Congress's authority to attach conditions to federal funds.[16] First, a funding condition must be "in pursuit of the general welfare."[17] However, courts afford Congress substantial deference in determining what expenditures are "intended to serve general public purposes."[18] Second, if Congress intends to place conditions on federal funds, it must do so "unambiguously" so that states can knowingly choose whether or not to accept the funds.[19] Third, conditions on federal funding must be related or "germane" to "the federal interest in particular

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plenary legislative power but only certain enumerated powers."); United States v. Morrison, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

[9] United States v. Lopez, 514 U.S. 549, 564 (1995).

[10] *Id*. at 557.

[11] New York v. United States, 505 U.S. 144, 188 (1992).

[12] South Dakota v. Dole, 483 U.S. 203, 207 (1987) ("[O]bjectives not thought to be within Article I's enumerated legislative fields . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.") (internal citations and quotations omitted).

[13] U.S. CONST. art. I, §8, cl. 1.

[14] *Dole*, 483 U.S. at 206.

[15] *Id*. at 211–12.

[16] See CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*, coordinated by Andrew Nolan and Kevin M. Lewis, at 28-35 (Sept. 27, 2018).

[17] *Dole*, 483 U.S. at 207.

[18] *Id*.

[19] *Id*.

national projects or programs."[20] Fourth, other constitutional provisions may bar the conditions placed on a grant of federal funds. For instance, Congress may not induce funding recipients to take unconstitutional actions, such as by conditioning a monetary grant on "discriminatory state action or the infliction of cruel and unusual punishment."[21] Relatedly, conditions on federal funding are considered unconstitutional when they become coercive to the point that "pressure turns into compulsion" or commandeering.[22] For example, in *National Federation of Independent Business (NFIB) v. Sebelius*, the Supreme Court held that a provision in the Affordable Care Act that withheld all Medicaid grants from any state that refused to accept expanded Medicaid funding was unconstitutionally coercive because it threatened to terminate "significant independent grants" that had already been provided to the states.[23]

Courts have rarely used the foregoing spending power limitations to invalidate conditions placed on the receipt of federal funds.[24] *NFIB* remains the only instance in the modern era of the Supreme Court invalidating an exercise of the congressional spending power.[25] Post-*NFIB* Spending Clause challenges have largely been unsuccessful in the lower courts.[26] As a result, in practice Congress has faced relatively few limitations on its use of the spending power to impose conditions on federal funds to further its policy objectives. Thus, it appears that under the authority of the Spending Clause of the U.S. Constitution, Congress has significant ability to impose conditions on federal grant awards to state and local governments as a way to influence state and local law enforcement policy.[27]

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[20] *Id*.

[21] *Id*. at 210.

[22] *Id.* at 211.

[23] National Federation of Independent Business v. Sebelius, 567 U.S. 519, 580 (2012).

[24] Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575, 599 (2013) (observing that the Supreme Court has generally "declined to enforce 'direct' limits on the Spending Power"); *see also* Jonathan H. Adler & Nathaniel Stewart, *Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending After NFIB v. Sebelius*, 43 ECOLOGY L.Q. 671, 700 (2016); (arguing that the "*NFIB* plurality did not open a new line of attack against spending power statutes . . . ").

[25] Andrew B. Coan, *Judicial Capacity and the Conditional Spending Paradox*, 2013 WIS. L. REV. 339, 346 (2013) ("Prior to *NFIB*, *Butler* was the only time the Supreme Court ever invalidated an exercise of the congressional spending power.").

[26] *See, e.g.*, Miss. Comm'n on Envtl. Quality v. EPA, 790 F.3d 138, 175 (D.C. Cir. 2015) (rejecting the plaintiff's position that the "Clean Air Act's sanctions for noncompliant states impose such a steep price that State officials effectively have no choice but to comply"); Texas v. EPA, 726 F.3d 180, 197 (D.C. Cir. 2013) (rejecting the argument that the challenged federal law was of the "same magnitude and nature as the Medicaid expansion provision [at issue in NFIB] that would strip over 10 percent of a State's overall budget") (internal citations and quotations omitted); Tennessee v. United States Dep't of State, 329 F. Supp. 3d 597, 626-29 (W.D. Tenn. 2018) (rejecting the argument that the threatened loss of federal Medicaid funding to coerce support of the federal refugee program was comparable to the program at issue in *NFIB*).

[27] *See* W. Paul Koenig, *Does Congress Abuse Its Spending Clause Power by Attaching Conditions on the Receipt of Federal Law Enforcement Funds to a State's Compliance with 'Megan's Law'?*, THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, vol. 88, no. 2 (Winter, 1998), pp. 740-741; Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, ALABAMA LAW REVIEW, vol. 62, no. 2 (2011), p. 351. Scholars debate the merits of this approach toward federalism. *See* Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, ALABAMA LAW REVIEW, vol. 62, no. 2 (2011), p. 357 (suggesting that the use of federal grants to state and local law enforcement agencies can encourage a cooperative federalism relationship that entails federal-state collaboration and allow states some flexibility in implementing federal standards while preserving state and local abilities to enhance police accountability); John Kincaid, *From Cooperative to Coercive Federalism*, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, vol. 509 (May, 1990), p. 141 (describing cooperative federalism as "a pragmatic middle ground between reform and reaction that would not destroy the states but would still lower their salience from

Section 5 of the Fourteenth Amendment and Regulating Law Enforcement

The Fourteenth Amendment, in relevant part, provides that no state shall "deprive any person of life, liberty, or property, without due process of law" or "deny to any person within its jurisdiction the equal protection of the laws."[28] The Supreme Court has interpreted the Fourteenth Amendment's Due Process Clause as applying to state actors nearly all the rights found in the Bill of Rights, including those that pertain to criminal procedure and regulate the conduct of the police.[29] In turn, Section 5 of the Fourteenth Amendment grants Congress the power to enforce the Amendment through "appropriate legislation."[30]

Section 5's "positive grant of legislative power" authorizes Congress to both deter and remedy constitutional violations; and in doing so, Congress may prohibit otherwise constitutional conduct that falls within "legislative spheres of autonomy previously reserved to the States."[31] The Section 5 enforcement power (and the comparable enforcement powers found in the Thirteenth[32] and Fifteenth[33] Amendments) has been used to, for example, ban the use of literacy tests in state and national elections[34] and abolish "all badges and incidents of slavery" by banning racial discrimination in the acquisition of real and personal property.[35] Congress has also used its Section 5 power to provide remedies for the deprivation of constitutional rights.[36] For example, 42 U.S.C. § 1983 (Section 1983) provides a private cause of action for individuals claiming that their constitutional rights were violated by state actors acting pursuant to state law. And 18 U.S.C. § 242 (Section 242)—which is a product of Congress's Section 5 power[37]—imposes criminal liability on state actors who deprive individuals of their constitutional rights.

While Congress's Section 5 enforcement power is broad, it is not unlimited.[38] Section 5 allows Congress to directly enforce constitutional rights through laws like Section 1983 and Section 242. However it does not allow Congress to supplement those rights through prophylactic legislation that regulates state and local matters without evidence of a history and pattern of past constitutional violations by the states.[39] And, according to the Supreme Court, when Congress exercises its Section 5 authority to supplement a constitutional protection, its response must be congruent and proportional to a demonstrated harm.[40] Congress may justify the need for Section 5 legislation by establishing a legislative record that shows "evidence . . . of a constitutional

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constitutionally coordinate polities to more congenial laboratories of democracy and administrators of national policy.").

[28] U.S. CONST. amend. XIV.

[29] Timbs v. Indiana, 139 S.Ct. 682, 687 (2019).

[30] U.S. CONST. amend. XIV, § 8.

[31] City of Boerne v. Flores, 521 US 507, 517–18 (1997).

[32] U.S. CONST. amend. XII, § 2.

[33] *Id*. amend. XV, § 3.

[34] Oregon v. Mitchell, 400 U.S. 112, 118 (1970).

[35] Jones v. Alfred H. Mayer Co., 392 US 409, 439 (1968).

[36] Monroe v. Pape, 365 U.S. 167, 171 (1961).

[37] Screws v. United States, 325 U.S. 91, 98 (1945).

[38] City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

[39] Northwest Austin Mun. Utility Dist. v. Holder, 557 US 193, 225 (2009).

[40] *City of Boerne*, 521 U.S. at 510.

wrong."[41] For example, the Supreme Court held in City of *Boerne v. Flores* that Congress exceeded its Section 5 authority in enacting portions of the Religious Freedom Restoration Act (RFRA). RFRA, in relevant part, supplanted normal First Amendment standards to impose a heightened standard of review for state government actions that substantially burdened a person's religious exercise. But because, according to the Supreme Court, Congress had failed to establish a widespread pattern of religious discrimination by the states,[42] RFRA could not be justified as a remedial measure designed to prevent unconstitutional conduct and was outside of Congress's power over the states.[43] As a result, the Court struck down the law to the extent it applied to the states.[44]

As outlined in this case law, the scope of Congress's Section 5 power hinges in part on the scope of the constitutional right that a given federal statute aims to protect. With respect to regulating state and local police forces, one constitutional right that may be particularly relevant to Congress's use of its Section 5 power is the Fourth Amendment, which prohibits unreasonable searches and seizures by the government.[45] The Fourth Amendment applies to many situations involving law enforcement, including when police stop an individual on the street for questioning,[46] when police conduct traffic stops,[47] or when police make an arrest.[48] Police violate the Fourth Amendment, for example, if they use excessive force during an investigatory stop or arrest.[49]

According to the Supreme Court, the force used by law enforcement during an investigatory stop or arrest violates the Constitution when it is unreasonable considering the facts and circumstances of the case.[50] This analysis requires a careful balancing of "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."[51] For example, the Supreme Court has held that police use of deadly force against a fleeing suspect who poses no immediate safety threat is unreasonable in violation of the Fourth Amendment.[52] Determining whether an act of force is excessive in violation of the constitution, however, requires a fact-specific analysis—a certain act may be reasonable under some circumstances while, in a different case, the same act may amount to excessive force. For example, some courts have ruled that police use of a chokehold is objectively unreasonable when used against individuals who are already under restraint and not a danger to others.[53] In other circumstances, courts have upheld police use of a chokehold as

[41] Allen v. Cooper, 140 S.Ct. 994, 1004 (2020).

[42] *City of Boerne*, 521 U.S. at 532.

[43] *Id.*

[44] *Id.* at 536. RFRA's provisions however, still apply to federal government action.

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

[46] Terry v. Ohio, 392 U.S. 1, 9 (1968).

[47] Rodriguez v. United States, 575 U.S. 348, 354 (2015).

[48] United States v. Watson, 423 U.S. 411, 417 (1976).

[49] Graham v. Connor, 490 U.S. 386, 394 (1989); CRS Legal Sidebar LSB10516, *Police Use of Force: Overview and Considerations for Congress*, by Michael A. Foster (July 10, 2020).

[50] *Id.* at 396.

[51] Tennessee v. Garner, 471 U.S. 1, 7–8 (1985).

[52] *Id.* at 11.

[53] Coley v. Lucas County, Ohio, 799 F. 3d 530, 540 (6th Cir. 2015).

reasonable in instances where an individual was unrestrained and continued to pose a threat of serious harm.[54]

Current Federal Regulation of Law Enforcement

Legislating within the scope of the enumerated powers discussed above,[55] Congress has enacted multiple statutes that regulate federal, state, and local law enforcement.[56] Federal courts have supplemented those statutory authorities with certain judicially created doctrines defining the contours of liability for police misconduct.[57] The executive branch also plays a role in federal regulation of law enforcement, including through federal Department of Justice (DOJ) civil and criminal investigations of police misconduct[58] and implementation of federal grant programs and data collection initiatives.[59] This section presents several existing legal authorities related to federal regulation of law enforcement, including DOJ civil enforcement against patterns and practices of unconstitutional policing, individual criminal and civil liability for officer misconduct, government liability for law enforcement misconduct, and grant conditions designed to spur state and local compliance with federal policies.

DOJ Civil Enforcement

A primary method of enforcing the various constitutional standards governing policing is through Section 12601 of the Violent Crime Control and Law Enforcement Act of 1994, which enables the DOJ to sue state and local police departments to reform systemic civil rights violations.[60] Congress passed the statute in the wake of widely circulated bystander video footage of Los Angeles police beating, clubbing, and stomping on black motorist Rodney King.[61] Subsequently, Section 12601 has served as a primary tool for the federal government to promote compliance with the Constitution by state and local law enforcement agencies. This subsection discusses the Section's procedures, relevant constitutional considerations, and DOJ's enforcement actions in recent years.

Section 12601's Requirements and Procedures

Section 12601 authorizes the U.S. Attorney General to sue local law enforcement agencies for "engag[ing] in a pattern or practice of conduct" that "deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[62] The statute

[54] Williams v. City of Cleveland, Miss., 736 F. 3d 684, 688 (4th Cir. 2013).

[55] *See supra* "Constitutional Authorities for Congressional Action on Police Reform."

[56] *See infra* "DOJ Civil Enforcement," "Section 1983," "The Federal Tort Claims Act."

[57] *See infra* "The *Bivens* Doctrine," "Qualified Immunity."

[58] *See infra* "DOJ Civil Enforcement."

[59] *See infra* "Grant Conditions and Data Collection."

[60] 34 U.S.C. § 12601. The provision was originally codified as 42 U.S.C. § 14141.

[61] Koon v. United States, 518 U.S. 81, 87 (1996); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3191 (2014); Chiraag Bains and Dana Mulhauser, *The Trump Administration Abandoned a Proven Way to Reduce Police Violence*, WASH. POST (June 9, 2020), at https://www.washingtonpost.com/outlook/2020/06/09/trump-pattern-or-practice/ (last visited Sept. 10, 2020). The Rodney King video footage is at https://abcnews.go.com/Archives/video/march-1991-rodney-king-videotape-9758031 (last visited Sept. 10, 2020).

[62] 34 U.S.C. § 12601(a).

provides no private right of action, meaning that individuals cannot sue to enforce it.[63] Moreover, DOJ cannot sue for money and instead can only seek injunctive relief under the statute.[64] Section 12601 cases, the DOJ explains, are "geared toward changing polices, practices, and culture across a law enforcement agency."[65] The term "pattern or practice," which is also used in other statutes authorizing the Attorney General's enforcement, requires "more than an isolated, sporadic incident;" wrongdoing must be "repeated, routine, or of a generalized nature."[66]

Constitutional Violations and Section 12601

First, Fourth, and Fifth Amendment Violations

Perhaps the most frequent focus of Section 12601 cases is a potential pattern of Fourth Amendment violations, which may include improper searches, seizures, detentions, and use of force. As noted above, the Supreme Court has construed the Fourth Amendment to require that law enforcement searches, seizures, arrests, and uses of force be "reasonable."[67] And "law enforcement officers must satisfy escalating legal standards of 'reasonableness' for each level of intrusion upon a person—stop, search, seizure, and arrest."[68] For instance, an officer's decision to stop an individual must be supported by "reasonable suspicion."[69] A mere "hunch" or inarticulable suspicion does not meet this standard.[70] Systemic violations of these requirements justify a Section 12601 action.

For example, investigation of the Warren Police Department in Ohio revealed a pattern of improper strip and body cavity searches, while in Newark, New Jersey, and Maricopa County, Arizona, investigators discovered widespread theft of property by police officers.[71] Specifically, Maricopa County deputies routinely seized small items as "trophies."[72] In Baltimore, Maryland, and New Orleans, Louisiana, DOJ identified patterns of unlawful stops.[73] DOJ also brought to light excessive use of force in the Yonkers, New York, Police Department, the Seattle, Washington, Police Department, the Puerto Rico Police Department, and others.[74]

While the foregoing investigations focused on patterns or practices of Fourth Amendment violations, any constitutional violations can justify a Section 12601 case. Some misconduct uncovered in Section 12601 investigations has included alleged Fifth Amendment and due

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[63] *Id.* § 12601(b). Private parties may sue under 42 U.S.C. § 1983, discussed *infra*.

[64] *See* Bains and Mulhauser, *supra* note 61.

[65] U.S. DEP'T OF JUSTICE, THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT, at 20 (2017), https://www.justice.gov/crt/file/922421/download.

[66] United States v. Johnson, 122 F. Supp. 3d 272, 348 (M.D.N.C. 2015).

[67] Terry v. Ohio, 392 U.S. 1, 10, 30 (1968).

[68] U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT, at 7 (July 22, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf#page=10.

[69] United States v. Powell, 666 F.3d 180, 185–86 (4th Cir. 2011) (noting "reasonable suspicion is a particularized and objective basis for suspecting" wrongdoing).

[70] Floyd v. City of New York, 959 F. Supp. 2d 540, 567 (S.D.N.Y. 2013).

[71] U.S. DEP'T OF JUSTICE, SPECIAL LITIGATION SECTION CASE SUMMARIES, https://www.justice.gov/crt/special-litigation-section-case-summaries/download#WPD (last visited August 31, 2020).

[72] Melendres v. Maricopa Cty., 897 F.3d 1217, 1220 (9th Cir. 2018), *cert. denied sub nom*., Maricopa Cty., Arizona v. de Jesus Ortega Melendres, 140 S. Ct. 96 (2019).

[73] *Special Litigation Section Case Summaries*, *supra*, note 71.

[74] *Id.*

process violations, such as coerced confessions in the Ville Platte Police Department and Evangeline Parrish Sherriff's Office of Louisiana.[75] In settlements with the Puerto Rico Police Department and the Baltimore Police Department, DOJ imposed measures to curb potential patterns of First Amendment violations—officers' retaliation for perceived insulting remarks and attempts to stop bystanders from filming police with cell phone cameras.[76] In another instance, DOJ charged Colorado City, Arizona, and Hildale, Utah, police with a pattern of violating the Establishment Clause for carrying out orders of fundamentalist Mormon leader Warren Jeffs.[77]

Equal Protection Violations

DOJ's Section 12601 cases sometimes aim to remedy racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, such as patterns and practices of racial profiling.[78] Departments may violate equal protection when they single people out for arrest or search because of race or national origin.[79] A person's racial appearance, standing alone, is not considered grounds for individualized suspicion.[80] Moreover, police can violate equal protection even if they can justify a search under the Fourth Amendment. Such is the case when police pull over speeding Black drivers—the traffic violation justifies each stop as far as the Fourth Amendment is concerned—but ignore White speeders.[81]

That said, under the case law, a law enforcement activity's *unintentional* racial impact does not violate equal protection standards.[82] To make out a constitutional challenge, "plaintiffs must show that those responsible for the profiling did so 'at least in part "because of," not merely "in spite of," its adverse effects upon' the profiled racial groups."[83] Such cases are hard to prove. To determine whether a police department has engaged in illicit racial profiling, courts have looked

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[75] THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 65, at 47.

[76] *Special Litigation Section Case Summaries, supra* note 71; U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 119 (Aug. 10, 2016), https://www.justice.gov/crt/file/883296/download.

[77] Compl. at 3, United States v. Town of Colo. City, No. 3:12-CV-8123-HRH, 2012 WL 12842256, at *2 (D. Ariz. Nov. 29, 2012).Complaint available at https://www.justice.gov/sites/default/files/crt/legacy/2012/07/18/coloradocity_complaint_6-21-12.pdf#page=3.

[78] U.S. CONST. amend. XIV; INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT, *supra* note 76 at 47; U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 59 (Mar. 16, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf. Title VI of the Civil Rights Act of 1964 also authorizes these suits for departments with federal funding. 42 U.S.C. § 2000d. DOJ has invoked Title VI for targeted enforcement *and* for underpolicing, for example, situations where police provided no translation services and routinely failed to respond to calls seeking police assistance in a language other than English. INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, *supra* note 78, at xii. For further discussion of racial profiling, see CRS Legal Sidebar LSB10524, *Racial Profiling: Constitutional and Statutory Considerations for Congress*, by April J. Anderson, (July 24, 2020).

[79] Melendres v. Arpaio, 989 F. Supp. 2d 822, 827 (D. Ariz. 2013), aff'd in part, vacated in part on other grounds, 784 F.3d 1254 (9th Cir. 2015).

[80] Floyd v. City of New York, 959 F. Supp. 2d 540, 563 (S.D.N.Y. 2013).

[81] Whren v. United States, 517 U.S. 806, 813 (1996).

[82] The DOJ may pursue disparate impact claims under Title VI. In these cases, the DOJ need not show intentional discrimination; it can identify practices that have a disproportionate effect because of race that is "unintentional, but avoidable." INVESTIGATION OF THE NEWARK POLICE DEPARTMENT, *supra* note 68, at 17. To prevail, the DOJ must identify a police practice causing a disparate impact, and the police department may then defend the practice if the department can show that said practice is necessary for proper law enforcement. *Id.* at 19. Because it is hard to prove that officers or departments *intended* to discriminate, Title VI can sometimes be invoked more easily against race-based enforcement actions.

[83] *Floyd*, 959 F. Supp. at 662.

at metrics such as how often people of color are subjected to stops and searches relative to their proportion of the population; whether searches frequently turn up contraband; and how often stops lead to an arrest or charges.[84] DOJ must generally compile a significant body of statistical and anecdotal evidence to succeed in a racial profiling case.[85]

DOJ has uncovered equal protection violations related to racial and ethnic profiling in a number of jurisdictions. DOJ found that the sheriff's department in Maricopa County, Arizona, targeted Hispanics by responding to complaints that alleged no criminal activity, but instead simply reported people with "dark skin" congregating in an area or employees speaking Spanish at a local business.[86] Similarly, DOJ concluded that police in Suffolk County, New York, discouraged Latinos from filing complaints and failed to investigate anti-Latino hate crimes. In Baltimore, Maryland, Newark, New Jersey, and East Haven, Connecticut, DOJ imposed remedies for patterns of racially targeted traffic and pedestrian stops.[87]

Not all Equal Protection violations involve profiling. Discriminatory policing based on sex or sexual orientation can also raise equal protection concerns.[88] DOJ has found discrimination because of sex in departments that underserve victims of sexual and domestic violence. For instance, DOJ determined that New Orleans police consistently declined to investigate domestic violence and rape because of stereotyped assumptions about female victims.[89] In Puerto Rico, similarly, DOJ found police disregarded sex-related crimes and domestic violence.[90]

Section 12601 Remedies and Consent Decrees

Where there is a pattern or practice of unconstitutional policing, Section 12601 authorizes "appropriate equitable and declaratory relief to eliminate the pattern or practice."[91] Thus, unlike a civil suit for monetary damages, Section 12601 requires a court to set rules to correct illegal behavior going forward. The statute aims "to identify, remedy and even prevent substantive violations."[92] Typically, DOJ and the target jurisdiction negotiate a court-approved settlement—a consent decree—outlining steps for reform.[93] If the parties cannot agree on appropriate measures, a court may try the case and impose reforms, but Section 12601 cases rarely go to trial.[94] Most consent decrees set up an independent monitoring team, appointed by the court, to review

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[84] INVESTIGATION OF THE BALTIMORE CITY POLICE DEP'T, *supra* note 76, at 4; INVESTIGATION OF THE NEWARK POLICE DEP'T, *supra* note 68, at 2, 16-21.

[85] *See Id.*; Melendres v. Arpaio, 989 F. Supp. 2d 822, 827 (D. Ariz. 2013), adhered to, No. CV-07-02513-PHX-GMS, 2013 WL 5498218 (D. Ariz. Oct. 2, 2013), aff'd in part, vacated in part, 784 F.3d 1254 (9th Cir. 2015), and aff'd, 784 F.3d 1254 (9th Cir. 2015), https://www.justice.gov/crt/file/890351/download.

[86] SPECIAL LITIGATION SECTION CASE SUMMARIES, *supra* note 71; U.S. Dep't of Justice, *Letter from Thomas E. Perez, Assistant Attorney General, Department of Justice, to Bill Montgomery, County Attorney, Maricopa County* 3, (Dec. 15, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf.

[87] SPECIAL LITIGATION SECTION CASE SUMMARIES, *supra* note 71.

[88] INVESTIGATION OF THE NEW ORLEANS POLICE DEP'T, *supra* note 78, at 32, 34.

[89] *Id.* at 32, 34, 43-51.

[90] SPECIAL LITIGATION SECTION CASE SUMMARIES, *supra* note 71. The DOJ has also sought remedies for police discrimination based on sexual orientation. THE CIVIL RIGHTS DIV.'S PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 65, at 7.

[91] 34 U.S.C. § 12601(b).

[92] United States v. City of Columbus, No. CIV.A.2:99CV1097, 2000 WL 1133166, at *9 (S.D. Ohio Aug. 3, 2000), https://www.clearinghouse.net/chDocs/public/PN-OH-0001-0046.pdf.

[93] THE CIVIL RIGHTS DIV.'S PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 65, at 22.

[94] *Id.* at 18.

progress and issue reports. For agencies with only minor problems, however, DOJ may issue only a court- enforceable "memorandum of agreement" or a "technical assistance" letter of voluntary recommendations.[95]

In designing its settlement orders, DOJ relies on local leaders, experts, and nationally recognized best practices.[96] Typical provisions include enhanced training, peer intervention initiatives, improved officer-to-supervisor ratios, hiring programs, increased use of equipment such as video cameras, and revisions to agency handbooks and policies.[97]

As a police department implements changes, the monitoring team may track metrics like racial patterns in stops, documented grounds for suspicion supporting searches, and ratios of arrests to charged offenses.[98] The monitoring process can last years—two years is a common goal—ending only with court approval.[99] If a jurisdiction fails to comply, the court may intervene and even find officials in contempt.[100]

Prosecutorial Discretion and DOJ's Enforcement History

As with other law enforcement matters, DOJ may use its discretion in deciding whether to pursue litigation, even if facts would support a case.[101] Since 2017, DOJ has reported one new Section 12601 matter, an investigation of Springfield, Massachusetts, Police Department's Narcotics Bureau.[102] Commenters vary in how they quantify Section 12601 enforcement in prior Administrations, employing different ways of assessing DOJ's activity and dating a case's beginning.[103] By one observer's count, DOJ opened 22 investigations during the Clinton Administration and 21 during the George W. Bush Administration.[104] Another, more recent commentator cites 20 new investigations during the Obama Administration, with 10 during the

[95] *Id.* at 21; *See, e.g.*, Letter from Shanetta Y. Cutlar, Special Litigation Section, U.S. Dept. of Justice, to Roosevelt F. Dorn, Mayor, City of Inglewood, Ca. (Dec. 28, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/inglewood_pd_Jail_findlet_12-28-09.pdf.

[96] THE CIVIL RIGHTS DIV.'S PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 65, at 20.

[97] *Id.* at 27-28, 31-32;

[98] *Id.* at 24.

[99] *Id.* at 35.

[100] Megan Cassidy, *Judge strips Arpaio of some internal affairs oversight*, THE ARIZONA REPUBLIC (July 21, 2016), https://www.usatoday.com/story/news/nation-now/2016/07/21/judge-strips-arpaio-internal-affairs-oversight/87412472/ (last visited Sept. 10, 2020).

[101] Heckler v. Chaney, 470 U.S. 821, 834 (1985).

[102] U.S. DEPT. OF JUSTICE, INVESTIGATION OF THE SPRINGFIELD, MASSACHUSETTS POLICE DEPARTMENT'S NARCOTICS BUREAU (July 8, 2020), https://www.justice.gov/crt/case-document/file/1292961/download; *see also* SPECIAL LITIGATION SECTION CASE SUMMARIES, *supra* note 71; Transcript of Attorney General William Barr on 'Face the Nation,' (June 7, 2020), https://www.cbsnews.com/news/bill-barr-george-floyd-protests-blm-face-the-nation-transcript/ (last visited Sept. 10, 2020) (noting the DOJ has opened one new investigation under Trump).

[103] Joshua M. Chanin, *Negotiated Justice? The Legal, Administrative, and Policy Implications of 'Pattern or Practice' Police Misconduct Reform*, at 196 (June 6, 2011) (unpublished Ph. D. dissertation, American University), https://www.ncjrs.gov/pdffiles1/nij/grants/237957.pdf#page=212.

[104] Rushin *supra* note 61, at 3232.

George W. Bush Administration.[105] DOJ's website lists some 23 matters commenced between 2009 and 2016.[106]

While the Trump Administration may have different enforcement priorities than prior Administrations in forgoing formal investigations, Section 12601 cases were never frequent. As of 2017, DOJ reported that it had opened 69 formal investigations in the statute's history.[107] Historically, DOJ has initiated about three pattern-or-practice investigations a year, with about one in three of the investigations leading to significant structural reform through a detailed consent decree and monitoring.[108] To help put this number in perspective, there are about 18,000 law enforcement agencies in the nation.[109]

DOJ Criminal Enforcement

In addition to civil pattern-or-practice enforcement, DOJ may also bring criminal charges based on law enforcement misconduct. A provision of the federal criminal code, 18 U.S.C. § 242 (Section 242) makes it a crime for government officials, including law enforcement officers, to subject any person to a deprivation of federally protected rights or impose different punishments based on a person's race.

Section 242 originates from Section 2 of the Civil Rights Act of 1866.[110] Congress amended and broadened the statute in 1874 pursuant to its constitutional authority to enforce the protections of the Fourteenth Amendment through "appropriate legislation."[111] Although Congress has amended the statute several times since then and changed its location in the U.S. Code, the law's core prohibition has changed little since the nineteenth century. As currently in force, Section 242 imposes criminal penalties on any person acting "under color of any law, statute, ordinance, regulation, or custom" who

> willfully subjects any person . . . to [1] the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to [2] 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[.][112]

A simple violation of the statute is punishable by a fine and/or up to a year in prison.[113] If bodily injury results, the offender may be fined and/or imprisoned for up to ten years. If death results or other aggravating factors are present, Section 242 provides for a fine and/or imprisonment for ten years to life or a death sentence.[114]

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[105] Connor Maxwell & Danyelle Solomon, *Expanding the Authority of State Attorneys General to Combat Police Misconduct*, CENTER FOR AMERICAN PROGRESS (December 12, 2018), https://cdn.americanprogress.org/content/uploads/2018/12/11084336/PoliceAccountability_.pdf?_ga=2.188590440.1922505801.1598912009-1173309197.1598912009.

[106] *Special Litigation Section Case Summaries*, *supra* note 71.

[107] THE CIVIL RIGHTS DIV.'S PATTERN AND PRACTICE POLICE REFORM WORK, *supra*, note 65, at 8.

[108] Rushin, *supra* note 61 at 3193, 3230.

[109] *Id.* at 3230.

[110] 14 Stat. 27-30, § 2 (39th Cong. 1866).

[111] *See* United States v. Price, 383 U.S. 787, 802-03 (1966).

[112] 18 U.S.C. § 242.

[113] *See id.*

[114] *See id.* While Section 242 provides for a death sentence in certain circumstances, the Constitution forbids death sentences for non-homicide offenses. *See* Coker v. Georgia, 433 U.S. 584, 597 (1977).

A related provision of federal criminal law, 18 U.S.C. § 241 (Section 241), makes it a crime for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States[.]" Violations of Section 241 are punishable by up to ten years in prison or, if certain aggravating factors are present, up to life in prison or death.[115]

The U.S. Department of Justice (DOJ) enforces Sections 241 and 242 by bringing criminal charges against individuals accused of violating the statutes.[116] To secure a criminal conviction under Section 242, DOJ must establish three elements: (1) the defendant acted "under color of" law; (2) the defendant acted "willfully"; and (3) the defendant deprived the victim of rights under the Constitution or federal law *or* subjected the victim to different punishments on account of the victim's race, color, or alien status.[117] The following subsections examine each of those elements in greater detail.

Acting Under Color of Law

Section 242 applies only to persons acting "under color of" law. That statutory phrase originates from the Reconstruction era, and variations of it appear in multiple federal hate crime and civil rights statutes.[118] As interpreted by the Supreme Court, a person acts under color of law when they act with either actual or apparent federal, state, or local government authority.[119] Officers and employees of the government generally fall within this category: the Supreme Court has held that "officers of the State . . . performing official duties," including public safety officers, act under color of law for purposes of Section 242.[120] Government officials act under color of law if they derive their *perceived authority* from state or local law, even if their conduct *was not actually authorized* under state or local law—for example, because they abused their official position.[121] Off-duty law enforcement officers may also be subject to Section 242 if they act or claim to act in their official capacity.[122] Moreover, a person need not actually be a government employee or official to act under color of law, as long as he or she participates in activity "attributable to the

[115] 18 U.S.C. § 241.

[116] The statutes provide no private right of enforcement, meaning that victims of official misconduct cannot sue under Section 241 or 242. A victim of conduct that violates Section 242 may be able to bring a separate civil suit under 42 U.S.C. § 1983 or, for federal officers, under the *Bivens* doctrine. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). However, the doctrine of qualified immunity may limit officials' liability. *See infra* "Qualified Immunity"; *see also* CRS Legal Sidebar LSB10492, *Policing the Police: Qualified Immunity and Considerations for Congress*, by Whitney K. Novak (July 25, 2020).

[117] United States v. Lanier, 520 U.S. 259, 264 (1997).

[118] *See, e.g.*, 18 U.S.C. §§ 245, 249; 42 U.S.C. §§ 1981, 1983.

[119] *See* Screws v. United States, 325 U.S. 91, 107 (1945); U.S. Dep't of Justice, Civil Rights Division, *Addressing Police Misconduct Laws Enforced by the Department of Justice*, https://www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice (last visited Sept. 10, 2020).

[120] *See Screws*, 325 U.S. at 110.

[121] For instance, in one leading case, a Georgia sheriff who arrested a black man on suspicion of theft and then beat him to death argued that he did not act under color of state law because the killing was illegal under Georgia law. The Supreme Court rejected that argument, explaining that "[a]cts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." *Screws*, 325 U.S. at 111.

[122] U.S. Dep't of Justice, Civil Rights Division, *Law Enforcement Misconduct*, https://www.justice.gov/crt/law-enforcement-misconduct (last visited Sept. 10, 2020).

State."[123] However, a person acting purely in a private capacity is not subject to Section 242, even if the person is a government employee.[124]

Deprivation of Rights

A defendant may violate Section 242 by depriving a person of "any rights, privileges, or immunities secured or protected by" either the "laws of the United States" or the Constitution.[125] With regard to the "laws of the United States," DOJ generally does not bring Section 242 charges based solely on statutory violations. In the analogous context of civil claims under Section 1983, courts have shown reluctance to imply a *civil* remedy for ordinary statutory violations;[126] the courts may be even less likely to impose *criminal* liability under statues that, standing alone, do not expressly provide for any criminal penalties.[127] Moreover, the scope of statutory rights subject to Section 242 may be limited by the constitutional authority Congress relied on to enact the statute. As noted above, Section 242 is a product of Congress's power under Section 5 of the Fourteenth Amendment, which allows Congress to enforce the Fourteenth Amendment's guarantees through "appropriate legislation." As discussed above, Supreme Court precedent allows Congress to use its Section 5 authority to enact prophylactic legislation regulating state and local matters based on evidence of a history and pattern of past constitutional violations by the states, if such federal legislation is congruent and proportional to a demonstrated constitutional wrong.[128] Absent such circumstances, however, it is uncertain when Section 242 could be used to prosecute violations of "laws of the United States" that do not amount to violations of the Constitution.

In light of the foregoing, prosecutions under Section 242 generally allege a deprivation of constitutional rather than statutory rights. Charges under Section 242 may involve rights guaranteed by the Fourteenth Amendment, including provisions of the Bill of Rights that have been incorporated against the states.[129] For example, DOJ has brought Section 242 charges based on infringement of the right to vote,[130] imposition of cruel and unusual punishment,[131] and various due process violations.[132] And, of particular relevance to law enforcement reform, DOJ may bring Section 242 charges alleging the use of excessive force in violation of the Fourth Amendment's protections against unreasonable seizures.[133] In recent years, Sections 241 and 242 have formed

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[123] For example, in *United States v. Price*, the Supreme Court held that private individuals who conspired with law enforcement to murder three civil rights workers could be charged under Section 242. 383 U.S. 787, 794 (1966).

[124] *See, e.g., Screws*, 325 U.S. at 111 (stating that "acts of [law enforcement] officers in the ambit of their personal pursuits are plainly excluded").

[125] 18 U.S.C. § 242.

[126] See Blessing v. Freestone, 520 U.S. 329, 340-41 (1997); CRS Legal Sidebar LSB10320, *Courts Split on Whether Private Individuals Can Sue to Challenge States' Medicaid Defunding Decisions: Considerations for Congress (Part I of II)*, by Wen W. Shen (July 3, 2010).

[127] *See* Callanan v. United States, 364 U. S. 587, 596 (1961) (explaining that the rule of lenity is used to resolve statutory ambiguity in favor of a criminal defendant).

[128] *See supra* "Section 5 of the Fourteenth Amendment and Regulating Law Enforcement."

[129] *See* McDonald v. City of Chicago, Ill., 561 U.S. 742 (2010).

[130] *See, e.g.*, United States v. Classic, 313 US 299, 307 (1941).

[131] *See, e.g.*, United States v. Barnes, 890 F.3d 910, 921 (10th Cir. 2018).

[132] *See, e.g.*, Screws v. United States, 325 U.S. 91, 107 (1945); United States v. Lanier, 520 U.S. 259, 261 (1997); United States v. Delerme, 457 F.2d 156, 161 (3d Cir. 1972).

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

the basis of police excessive force criminal cases[134] and provided the legal basis for DOJ investigations into several police killings across the country.[135]

Differential Punishment

In the alternative, a defendant may violate Section 242 by subjecting a person to different "punishments, pains, or penalties" "by reason of" the victim's color or race or "on account of" the victim's alien status.[136] In practice, however, it appears DOJ rarely brings charges under this provision of Section 242. One reason for this seems to be the general difficulty of proving that a defendant had a particular subjective motivation[137]—in this context, the motivation to impose a different punishment "by reason of" the victim's race or other covered characteristic. Furthermore, as a DOJ official involved in Section 242 litigation in the 1940s stated, "When a community has consistently permitted its law enforcement officers to deny the protection of the laws to certain groups, the same methods will assuredly be used against members of other groups who happen to offend the officials."[138] Thus, pervasive misconduct by law enforcement officers could *undermine* DOJ's case on this element. Another possible reason for the dearth of charges under the "punishments, pains, or penalties" provision of Section 242 is that conduct that violates that provision likely also violates the statute's deprivation of rights provision: the Equal Protection Clause prohibits the government from imposing different punishments because of protected characteristics such as a person's race.[139]

Willfulness Requirement

By its text, Section 242 applies only to violations that are committed "willfully."[140] The Supreme Court stringently construed the willfulness standard in the 1945 case Screws v. United States.[141] In *Screws*, a defendant convicted of violating the statute now codified as Section 242 argued that the law was void for vagueness—that is, it violated the Fifth Amendment's Due Process Clause because it did not give potential defendants clear notice of the conduct it proscribed.[142] The Supreme Court rejected that argument by interpreting "willfully" to require the government to show that a defendant acted with a "specific intent to deprive a person" of constitutional rights or with "open defiance or in reckless disregard of a constitutional requirement."[143]

The *Screws* plurality recognized that its interpretation of Section 242 differed from the usual mental state standard in criminal cases. To obtain a conviction for a crime, the plurality explained,

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[134] *See, e.g.*, United States v. Bradley, 196 F.3d 762, 764 (7th Cir. 1999); United States v. Reese, 2 F.3d 870, 880 (9th Cir. 1993).

[135] *See* Paul Lewis, *Federal Officials May Use Little-Known Civil Rights Statute in Police Shooting Cases*, THE GUARDIAN (Dec. 24, 2014), http://www.theguardian.com/us-news/2014/dec/24/federal-review-michael-brown-eric-garner-crawford-hamilton (last visited Sept. 10, 2020).

[136] 18 U.S.C. § 242.

[137] *See, e.g.*, United States v. Peterson, 509 F. 2d 408, 412 (D.C. Cir. 1974).

[138] David Dante Troutt, *Screws, Koon, and Routine Aberrations: the Use of Fictional Narratives in Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18, 49 (2018) (quoting Victor Rotnem, Address Before the National Bar Association, Chicago, Ill. (Dec. 4, 1944)).

[139] *See, e.g.*, United States v. Smart, 518 F. 3d 800, 804 n.1 (10th Cir. 2008).

[140] 18 U.S.C. § 242.

[141] 325 U.S. 91 (1945). The main opinion in *Screws* was joined by only four justices, but binding opinions of the Supreme Court have since adopted its analysis. *See, e.g.*, United States v. Lanier, 520 U.S. 259, 267 (1997).

[142] *Screws*, 325 U.S. at 94.

[143] *Id.* at 105.

the prosecution usually must show that the defendant intentionally performed some action, and the action was prohibited by law; but prosecutors ordinarily need not show that the defendant knew the conduct at issue was illegal or specifically intended to violate the law.[144] However, Section 242 imposes criminal liability for constitutional violations, and courts examining the "broad and fluid definitions of due process" may interpret the Constitution to protect rights not expressly enumerated in the Constitution or prior court decisions.[145] In those circumstances, the plurality observed, "[t]hose who enforced local law today might not know for many months (and meanwhile could not find out) whether what they did deprived some one of due process of law."[146] In the view of the *Screws* plurality, such a construction would raise serious vagueness concerns:

> Under that test a local law enforcement officer violates [Section 242] and commits a federal offense for which he can be sent to the penitentiary if he does an act which some court later holds deprives a person of due process of law. And he is a criminal though his motive was pure and though his purpose was unrelated to the disregard of any constitutional guarantee.[147]

To avoid that result, the plurality concluded that in a Section 242 case the prosecution must prove the defendant had "a specific intent to deprive a person of a federal right made definite by decision or other rule of law."[148] Such a defendant cannot assert a lack of notice because he "is aware that what he does is precisely that which the statute forbids."[149] However, the plurality explained, the defendant's "purpose need not be expressed; it may at times be reasonably inferred from all the circumstances attendant on the act."[150]

Much of the analysis in *Screws* indicates that Section 242 requires proof that a government official intended to violate a specific federal right of which the officer either knew or had notice. For instance, the defendant in *Screws* was a sheriff who beat to death a man in his custody. The plurality concluded that it was not enough to show a "generally bad purpose" to assault the arrestee; rather "it was necessary for [the jury] to find that [the defendant] had the purpose to deprive the prisoner of a constitutional right, e.g. the right to be tried by a court rather than by ordeal."[151] However, other portions of the *Screws* plurality opinion could suggest a less stringent mental state requirement. For instance, the plurality stated that "[t]he fact that the defendants may not have been thinking in constitutional terms is not material where their aim was . . . to deprive a citizen of a right and that right was protected by the Constitution."[152] The plurality further opined that Section 242 defendants must "at least act in reckless disregard of constitutional prohibitions or guarantees"—indicating it might suffice for a defendant to ignore rather than deliberately violate a constitutional right.[153]

Lower federal courts vary in how they apply the willfulness analysis in *Screws*. The U.S. Court of Appeals for the Fifth Circuit requires that a violation of Section 242 be "committed voluntarily

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[144] *Id.* at 96.

[145] *Id.* at 95.

[146] *Id.* at 97.

[147] *Id.*

[148] *Id.* at 103.

[149] *Id.* at 104.

[150] *Id.* at 106.

[151] *Id.* at 107.

[152] *Id.* at 106.

[153] *Id.*

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."[154] By contrast, the U.S. Court of Appeals for the Third Circuit, while remarking that "*Screws* is not a model of clarity,"[155] has held that it is sufficient if a defendant "exhibited reckless disregard for a constitutional or federal right."[156] Overall, however, the Supreme Court's interpretation of the willfulness requirement has resulted in what some view as a significant hurdle to bringing Section 242 claims.[157]

Private Rights of Action: Civil Liability for Law Enforcement Officers

In addition to the civil and criminal penalties discussed above, several federal laws allow *private actors* to pursue litigation to impose civil liability on government actors—such as police officers—who violate the Constitution. This subsection discusses the primary federal laws that provide remedies for constitutional violations committed by government actors, including 42 U.S.C. §1983 (Section 1983), the corresponding judicially created cause of action under *Bivens v. Six Unknown Named Agent of Federal Bureau of Narcotics*, and the Federal Tort Claims Act (FTCA). This subsection also discusses the qualified immunity doctrine, a judicially created immunity used to shield public officials in civil rights lawsuits brought under *Bivens* and Section 1983.

Section 1983

A key federal law designed to prevent and redress constitutional violations by *state and local* government actors is Section 1983. Passed as part of the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act),[158] Section 1983 provides a cause of action to recover money damages or injunctive relief for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."[159] As applied to the conduct of police officers, Section 1983 provides a legal remedy for individuals claiming that a state or local police officer acting under the color of state or local law violated the plaintiff's constitutional rights, such as the right to be free from excessive force under the Fourth Amendment.[160] Analogizing Section 1983 to the role common law tort actions have in deterring wrongful conduct, the Supreme Court has described this civil rights remedy as a "vital component . . . for vindicating cherished constitutional guarantees."[161]

Section 1983 suits often name individual law enforcement officers as defendants but, in limited circumstances, plaintiffs may use Section 1983 to seek damages from local governments or local

[154] United States v. Garza, 754 F. 2d 1202, 1210 (5th Cir. 1985).

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

[156] *Id.* at 209. In *Johnstone*, the Third Circuit upheld a jury instruction stating both that "an act is done willfully if it is done voluntarily and intentionally, and with a specific intent to do something the law forbids," and that the jury could "find that a defendant acted with the required specific intent even if you find that he had no real familiarity with the Constitution or with the particular constitutional right involved." *Id.* at 209-210.

[157] *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 171,172 (2002).

[158] Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 665 (1978).

[159] 42 U.S.C. § 1983.

[160] Graham v. Connor, 490 U.S. 386, 393–94 (1989).

[161] Owen v. Independence, 445 U.S. 622, 651 (1980).

government agencies. In *Monell v. Department of Social Services*, the Court held that a municipality is a "person" subject to suit under Section 1983.[162] However, the Court further held that a local government cannot be sued "for an injury inflicted solely by its employees or agents" under the theory of *respondeat superior* (the legal doctrine that an employer may be liable to suit for wrongful acts of its employees).[163] Rather, under *Monell*, a Section 1983 plaintiff must show that an injury stems from a "policy or custom" of the municipality.[164] This requires a showing that, "through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged,"[165] and that the municipality acted with "deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow."[166] This exacting standard has led one commentator to assert that municipal liability "is practically a dead letter."[167]

The *Bivens* Doctrine

As discussed above, Section 1983 was designed to prevent and redress constitutional violations committed by *state and local* government actors. Federal action, however, is beyond the statute's reach.[168] Nonetheless, the Supreme Court has recognized an implied cause of action, similar to the remedy provided in Section 1983, for individuals seeking money damages against individual federal law enforcement officers. In a 1971 decision, *Bivens v. Six Unknown Named Agent of Federal Bureau of Narcotics,*[169] the Supreme Court established that in limited circumstances, "victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."[170] In *Bivens*, the plaintiff filed a claim against a group of federal narcotics agents after they conducted what he alleged to be an unconstitutional search of his home in violation of the Fourth Amendment.[171] The Court, in holding that the plaintiff could pursue money damages for his Fourth Amendment claim, reasoned that when federally protected rights have been "invaded," a plaintiff is entitled to a remedy—whether that remedy is statutorily or judicially created.[172] Thus, the Court implied a private cause of action for individuals seeking money damages for Fourth Amendment violations.[173]

The Court implied a remedy for constitutional violations committed by federal actors in two other circumstances following *Bivens*. In a 1979 case, *Davis v. Passman*, the Court held that an administrative assistant who sued a Congressman for gender discrimination could pursue money damages for violating the equal protection principles embodied in the Fifth Amendment's Due Process Clause.[174] And, a year later in *Carlson v. Green*, the Court extended a *Bivens* remedy to a federal prisoner's estate seeking money damages against the Director of the Federal Bureau of

[162] 436 U.S. 658, 690 (1978).

[163] *Id.* at 694.

[164] *Id.*

[165] Board of Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 404 (1997).

[166] *Id.* at 411.

[167] Avidan Y. Cover, *Revisionist Municipal Liability*, 52 GA. L. REV. 375, 379 (2018).

[168] District of Columbia v. Carter, 409 U.S. 418, 424 (1973).

[169] 403 U.S. 388 (1971).

[170] Carlson v. Green, 446 U.S. 14, 18 (1980).

[171] *Bivens*, 403 U.S. at 389.

[172] *Id*. at 392.

[173] *Id.*

[174] 442 U.S. 228, 248 (1979).

Prisons for allegedly failing to provide adequate medical treatment in violation of the Eighth Amendment.[175]

The Supreme Court has not implied a new cause of action under *Bivens* in more than 30 years.[176] For example, the Court declined to extend a *Bivens* remedy in a First Amendment suit against a federal employer,[177] in several Eighth Amendment cases brought against private prison officials under contract with the Federal Bureau of Prisons,[178] and in a Fifth Amendment case claiming federal government interference with a landowner's property rights.[179] The Court continued its trend of limiting *Bivens* remedies in its 2017 decision *Ziglar v. Abbasi*.[180] In *Abbasi*, the Court considered the availability of a *Bivens* remedy for a group of non-citizens—mostly of Arab or South Asian descent—who had been detained following the September 11, 2001, attacks.[181] In declining to extend the doctrine, the Court observed that since *Bivens* was decided, the Court had "adopted a far more cautious course" in allowing recovery under judicially created causes of action, recognizing that it is a "significant step under separation-of-powers principles for a court to determine that it has the authority . . . to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation."[182] Viewing it as Congress's role to create such a remedy, the Court considered the expansion of the *Bivens* doctrine to be a "disfavored judicial activity."[183]

The *Abbasi* Court provided a two-part test to determine whether a *Bivens* remedy is available. First, the Court looks at whether the case presents a "new context"—that is, whether the case differs meaningfully from the three cases where a *Bivens* remedy has been established (i.e., *Bivens*, *Davis*, or *Carlson*).[184] Second, if the case does present a new context, the Court considers whether there are "special factors" counseling against creating a remedy.[185] Central to this analysis, according to the Court, are separation-of-powers principles.[186] The Court has declined to extend *Bivens* remedies in cases implicating issues more appropriate for the other branches, such as federal fiscal policy[187] or international relations.[188]

Applying this test earlier this year in *Hernández v. Mesa*, the Court declined to extend a *Bivens* remedy in a case involving a United States Border Patrol agent who fatally shot a 15-year-old Mexican national who was on the Mexican side of the U.S.-Mexico border.[189] In so holding, the Court determined that the case arose under a "new context" because it involved a cross-border shooting claim: although the plaintiffs invoked the same constitutional authorities at issue in

[175] 446 U.S. 14, 19 (1980).

[176] Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).

[177] Bush v. Lucas, 462 U.S. 367. 390 (1983).

[178] Minneci v. Pollard, 555 U.S. 118, 120 (2012); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63 (2001).

[179] Wilkie v. Robbins, 551 U.S. 537, 537 (2007).

[180] 137 S. Ct. at 1843.

[181] *Id.* at 1853.

[182] *Id.* at 1855–56.

[183] *Id.* at 1857.

[184] *Id.* at 1859.

[185] *Id.* at 1857.

[186] Hernández v. Mesa, 140 S. Ct. 735, 743 (2020).

[187] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

[188] *Hernández,* 140 S. Ct. at 743-4.

[189] *Id.* at 739.

Bivens and *Davis*, the underlying facts were "meaningfully different."[190] Moreover, the special factors analysis precluded extension of a *Bivens* remedy because the availability of a damages remedy for incidents arising on foreign soil implicated considerations involving foreign policy, counseling hesitation about extending *Bivens* to this context.[191]

Despite these limitations on the *Bivens* doctrine, the Supreme Court has emphasized that *Bivens* itself is "well-settled law."[192] The Court continues to allow claims against federal actors for money damages in the three limited contexts it has already recognized, including those against federal law enforcement officers for violations of the Fourth Amendment—such as claims alleging excessive use of force.[193] Nonetheless, even if a federal court allows a plaintiff to pursue a *Bivens* remedy for an alleged constitutional violation by a federal official, as discussed below, qualified immunity may nevertheless shield that federal official from liability.[194] And, because the Court has expressed its reluctance to extend the *Bivens* doctrine to new contexts, some commentators argue that this judicial restraint in extending *Bivens* leaves individuals without a civil damages remedy against many federal actors who may have violated their constitutional rights.[195]

The Federal Tort Claims Act

The FTCA also provides a civil remedy for the wrongful acts of federal officials, including federal law enforcement. Subject to various exceptions, limitations, and prerequisites, the FTCA—enacted in 1946—allows plaintiffs to sue the United States for money damages for certain types of state law torts committed by its employees.[196] The FTCA acts as a waiver of federal sovereign immunity in limited cases involving tortious acts—such as negligence—committed by United States employees within the scope of their employment.[197] Unlike a *Bivens* claim, an action brought pursuant to the FTCA is one *against the United States* and not the individual employee.[198] A plaintiff may not sue the United States in federal court under the FTCA until he or she first exhausts administrative remedies in the relevant federal agency.[199]

Generally, plaintiffs may not recover for intentional misconduct committed by federal employees.[200] However, in 1974—in response to a series of no-knock drug enforcement raids on private homes performed by federal law enforcement agents[201]—Congress amended the FTCA to

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[190] *Id.* at 744.

[191] *Id.* at 749.

[192] Ziglar v. Abbasi, 137 S. Ct. 1843, 1848 (2017).

[193] *See, e.g.*, Bueno Diaz v. Mercurio, 442 F. Supp. 3d 701, 712 (S.D.N.Y. 2020).

[194] *See infra* "Qualified Immunity."

[195] Mark Joseph Stern, *Democrats' Police Reform Bill Lets Federal Agents Off the Hook*, SLATE (June 8, 2020), https://slate.com/news-and-politics/2020/06/democrats-police-reform-bill-federal-agents.html (last visited Sept 11, 2020).

[196] See CRS Report R45732, *The Federal Tort Claims Act (FTCA): A Legal Overview*, by Kevin M. Lewis (Nov. 20, 2019).

[197] Levin v. United States, 568 U.S. 503, 506–07 (2013).

[198] Daniel A. Morris, *Federal Employees' Liability Since the Federal Employees Liability Reform & Tort Compensation Act of 1988 (the Westfall Act)*, 25 CREIGHTON L. REV. 73, 82 (1991).

[199] 28 U.S.C. § 2675(a).

[200] *Id.* § 2680(h).

[201] James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 132 (2009).

allow for claims of intentional torts of assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution committed by certain federal law enforcement officers.[202] The amendment applies to "investigative or law enforcement officer[s]" defined as "any officer of the United States who is empowered by law to (1) execute searches, (2) seize evidence, or (3) make arrests for violations of Federal law."[203]

Congress enacted the 1974 FTCA amendment nearly three years after the Supreme Court's *Bivens* decision. In 1980, the Supreme Court clarified that the 1974 amendment to the FTCA did not preempt a *Bivens* claim, meaning that the judicially created *Bivens* remedy was still available to plaintiffs who could also bring an FTCA claim.[204] In reaching its decision, the Court emphasized that Congress had expressed its intent that the FTCA and *Bivens* actions be "parallel, complementary causes of action."[205] The Court also highlighted four factors that suggested the *Bivens* remedy is more "effective" than the FTCA and therefore should coexist with claims brought under the FTCA:

1. the *Bivens* remedy, because it authorizes damages against individual officers, serves a "deterrent purpose,"
2. a court may award punitive damages in a *Bivens* suit, while the FTCA generally prohibits courts from awarding punitive damages against the United States,
3. a plaintiff cannot opt for a jury in an FTCA action, and
4. an action under FTCA exists only if the state in which the alleged misconduct occurred has a law prohibiting the conduct.[206]

In 1988, Congress passed the Westfall Act to substitute the United States as the defendant in FTCA claims, seeking to "protect Federal employees from personal liability for common law torts committed within the scope of their employment."[207] Congress, however, did not extend the Westfall Act's protections for individual federal employees who commit *constitutional violations*, thus effectively preserving the *Bivens* remedy.[208] Therefore, FTCA claims against the United States for certain intentional torts committed by federal law enforcement may remain available alongside the limited *Bivens* actions available against individual federal law enforcement officials.[209] Nonetheless, some courts have interpreted provisions of the FTCA to preclude simultaneous recovery under both the FTCA and a *Bivens* action; thus in some jurisdictions, plaintiffs must choose whether to proceed under the FTCA or *Bivens*.[210]

Qualified Immunity

While federal law provides remedies for individuals to recover against government officials for constitutional violations, the doctrine of qualified immunity may afford government officials a shield from civil liability. As discussed below, the doctrine plays a particularly prominent role in

[202] 28 U.S.C. § 2680(h).

[203] *Id.*

[204] Carlson v. Green, 446 U.S. 14, 23 (1980).

[205] *Id.* at 20.

[206] *Id.* at 20.

[207] Pub. L. No. 100-694, 102 stat. 4563 (1988).

[208] *See* Pfander & Baltmanis, *supra* note 201, at 134.

[209] Manning v. United States, 546 F.3d 430, 431 (7th Cir. 2008).

[210] James E. Pfander & Neil Aggarwal, *Bivens, the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. ST. THOMAS L.J. 417, 418 (2011).

defense of civil rights lawsuits against federal law enforcement officials under the *Bivens* doctrine and against state and local police under Section 1983.

What Is Qualified Immunity?

Qualified immunity is a judicially created legal doctrine that shields government officials performing discretionary duties from civil liability in cases involving the deprivation of statutory or constitutional rights.[211] Government officials are entitled to qualified immunity so long as their actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[212] The Supreme Court has observed that qualified immunity balances 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."[213] The immunity's broad protection is intended for "all but the plainly incompetent or those who knowingly violate the law"[214] and to give government officials "breathing room" to make reasonable mistakes of fact and law.[215] According to the Supreme Court, the "driving force" behind qualified immunity was to ensure that "insubstantial claims" against government officials were resolved at the outset of the lawsuit.[216] Qualified immunity provides immunity not only from civil damages, but from having to defend against suit altogether—if the doctrine applies, a case must be dismissed.[217]

Courts apply a two-part analysis when determining whether an official is entitled to qualified immunity: (1) whether the facts the plaintiff alleges amount to a constitutional violation, and (2) if so, whether the constitutional right at issue was "clearly established" at the time of the misconduct.[218] Supreme Court precedent provides flexibility in applying this standard, granting courts the discretion to decide which prong to address first in light of the facts of the case at hand.[219] Whether a right is clearly established depends on whether "the contours of a right are sufficiently clear" so that every "reasonable official would have understood that what he is doing violates that right."[220] When conducting this analysis, courts look to see whether it is "beyond debate" that existing legal precedent establishes the illegality of the conduct.[221]

Qualified immunity is available for local and state government officials such as, for example, law enforcement officers, teachers, or social workers. Federal officials who face liability in cases brought under the *Bivens* doctrine[222] may also claim qualified immunity.[223]

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

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

[213] *Pearson*, 555 U.S. at 231.

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

[215] Ashcroft v. Al-Kidd, 563 U.S. 731, 743 (2011).

[216] *Pearson*, 555 U.S. at 231.

[217] *Id.*

[218] *Id.* at 232.

[219] *Id.* at 236.

[220] *Ashcroft*, 563 at 741.

[221] *Id.*

[222] *See supra* "The *Bivens* Doctrine."

[223] Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017).

Historical Development of Qualified Immunity

The Supreme Court developed the doctrine of qualified immunity as part of its interpretation of Section 1983. While the modern qualified immunity test was first set forth in the Supreme Court's 1982 decision *Harlow v. Fitzgerald*,[224] the concept of qualified immunity as a "good faith defense" has origins in common law.[225] The Court first extended a "good faith defense" to police officers in a Section 1983 case in its 1967 decision *Pierson v. Ray*.[226] There, the Court held that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," and therefore, common law defenses such as good faith were applicable to actions brought under Section 1983.[227] The Court determined that although common law immunities were not expressly included in Section 1983, there was no evidence in the legislative record that Congress intended to abolish such immunities.[228]

Fifteen years later in *Harlow*, the Court again recognized that the common law afforded government officials some level of immunity to "shield them from undue interference with their duties and from potentially disabling threats of liability," but distinguished qualified immunity from absolute immunity.[229] Absolute immunity provides a complete immunity from civil liability and is usually extended to, for example, the President of the United States, legislators, judges, and prosecutors acting in their official duties.[230] Absolute immunity, according to the Court, provides high-level officials a "greater protection than those with less complex discretionary responsibilities."[231] However, the Court explained that qualified immunity is still necessary for other government officials, to balance "the importance of a damages remedy to protect the rights of citizens" with "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[232] Thus, the Court established the modern test, granting qualified immunity to those government officials whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[233]

In the years since *Harlow*, the Supreme Court has continued to refine and expand the reach of the doctrine.[234] For example, one legal scholar examined eighteen qualified immunity cases that the Supreme Court heard from 2000 until 2016, each considering whether a particular constitutional right was clearly established.[235] In sixteen of those cases, many of which involved police use of excessive force in violation of the Fourth Amendment, the Court found that the government officials were entitled to qualified immunity because they did not act in violation of clearly

[224] Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

[225] Pierson v. Ray, 386 U.S. 547, 557 (1967).

[226] *Id.*

[227] *Id.*

[228] *Id.* at 555.

[229] *Harlow*, 457 U.S. at 806–07.

[230] *Id.* at 811.

[231] *Id.* at 807.

[232] *Id.*

[233] *Id.* at 818.

[234] Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. 62, 63 (2016).

[235] *Id.*

established law.[236] In deciding what constitutes clearly established law, the Court has focused on the "generality at which the relevant legal rule is to be identified."[237] Recently, the Court has emphasized that a clearly established right must be defined with specificity, such that even minor differences between the case at hand and the case in which the relevant legal right claimed to be violated was first established, can immunize the defendant police officer.[238] For example, in the 2019 case *City of Escondido, California v. Emmons*, the Court reviewed a claim brought by a man who alleged police used excessive force in arresting him.[239] Following past incidents of domestic abuse by a husband against his wife, police in Escondido, California, responded to a domestic disturbance call at the residence of the couple.[240] After police failed to make contact with anyone inside the home, a man—who later turned out to be the wife's father—eventually opened the door and passively brushed past the police.[241] An officer took the man to the ground and handcuffed him, allegedly injuring him in the process.[242] In holding the officer was entitled to qualified immunity, the Court explained that the appropriate inquiry is not whether the officer violated the man's clearly established right to generally be free from excessive force, but rather whether clearly established law "prohibited the officers from stopping and taking down a man in these circumstances."[243] In so holding, the Court rejected the lower court's attempts to analogize this case to another that generally involved the use of excessive force in response to "passive resistance" by a criminal suspect.[244] Instead, the Court, citing other recent precedent, stressed the need to "identify a case where an officer under similar circumstances was held to violate the Fourth Amendment."[245]

The Debate over Qualified Immunity

As courts have expanded the protections of qualified immunity over the years, criticism of the doctrine has also increased. At least three major criticisms of the doctrine have emerged. First, some scholars have argued that qualified immunity has no basis in the common law—the body of law from which the Court determined the doctrine originated.[246] In several separate opinions, Justice Thomas has advocated for reconsidering the Court's qualified immunity jurisprudence on these grounds, arguing that the modern doctrine bears little resemblance to common law immunity and instead represents a "freewheeling policy choice" that the Court lacks the power to make, and that usurps the role of Congress.[247]

Other criticisms of the doctrine focus more on its practical application, with some arguing that qualified immunity no longer achieves its policy goals of protecting public officials from the expense and distraction of litigation, and that the fear of being sued will prevent officials from

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[236] *Id.*

[237] Anderson v. Creighton, 483 U.S. 635, 639 (1987).

[238] City of Escondido, Cal. v. Emmons, 139 S. Ct. 500, 503 (2019).

[239] *Id.* at 501.

[240] *Id.*

[241] *Id.* at 502.

[242] *Id.*

[243] *City of Escondido, Cal*. 139 S. Ct. at 503.

[244] *Id.*

[245] *Id.* at 504.

[246] *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018).

[247] Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., dissenting); Baxter v. Bracey, 140 S. Ct. 1862, (2020) (Thomas, J., dissenting).

performing their duties or from entering public service altogether.[248] For example, Justice Breyer has argued that police departments' indemnification of their employees may alleviate employees' concerns about facing liability for misconduct.[249] And, according to one study, police officers are "virtually always indemnified,"—meaning even if they are found liable for their own individual conduct, the city or county that employs them covers any monetary damages.[250]

There is also some concern that the level of specificity required has made it increasingly difficult for plaintiffs to show that the law was clearly established[251]—which some scholars argue may jeopardize the purpose of Section 1983 as a tool for allowing individuals to recover for constitutional violations.[252] Justice Sotomayor, dissenting in several cases in which the Court found officers were entitled to qualified immunity, expressed her disagreement with the modern approach, fearing its application essentially provides an absolute shield[253] for law enforcement officers and "renders the protections of the Fourth Amendment hollow."[254] Some statistics may support this hypothesis: according to one recent study, appellate courts have shown an increasing tendency to grant qualified immunity, particularly in excessive force cases.[255] From 2005 to 2007, for example, courts granted qualified immunity to police in 44 percent of excessive force cases. That number jumped to 57 percent in excessive force cases decided from 2017 to 2019.[256]

The modern doctrine of qualified immunity is not without its proponents, however. Throughout its qualified immunity jurisprudence involving the police, a majority of the Supreme Court has emphasized the important role the doctrine plays in allowing law enforcement the flexibility to make judgment calls in rapidly evolving situations.[257] According to one defender of the doctrine, law enforcement officers find it "comforting" to know the doctrine protects all but "the plainly incompetent or those who knowingly violate the law."[258] And, although a majority of jurisdictions may indemnify police officers, some do not—leaving officers at risk of personal financial liability.[259] Other scholars defend qualified immunity on stare decisis grounds (i.e., the doctrine that promotes maintaining long settled interpretations of the law—especially statutes—absent a special justification), while questioning both the historical and practical arguments against the doctrine.[260] Some studies, while perhaps also undermining the need for the doctrine, may refute

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[248] *See* Schwartz, *supra* note 246, at 1803.

[249] Richardson v. McKnight, 521 US 399, 411 (1997).

[250] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

[251] *See* Schwartz, supra note 246, at 1814.

[252] Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015).

[253] Kisela v. Hughes, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., dissenting).

[254] Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).

[255] Andrew Chung et. al., *Shielded*, REUTERS (May 8, 2020,) https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/ (last visited Sept. 11, 2020).

[256] *Id.*

[257] Scheuer v. Rhodes, 416 U.S. 232, 246 (1974).

[258] Richard G. Schott, *Qualified Immunity How it Protects Law Enforcement Officers*, FBI LAW ENFORCEMENT BULLETIN (Sept. 1, 2012), https://leb.fbi.gov/articles/legal-digest/legal-digest-qualified-immunity-how-it-protects-law-enforcement-officers (last visited Sept, 11, 2010).

[259] *See* Brief in Opposition to Petition for Writ of Certiorari at 24, Baxter v. Bracey, 140 S. Ct. 1862, (2019).

[260] Aaron L. Nielson & Christopher J. Walker, A Qualified Defense of Qualified Immunity, 93 NOTRE DAME L. REV. 1853, 1856 (2018) (noting, "[a]s the Supreme Court recently explained in *Kimble v. Marvel Entertainment*, when it comes to nonconstitutional holdings, 'stare decisis carries enhanced force' because those who think the judiciary got the issue wrong 'can take their objections across the street, and Congress can correct any mistake it sees.'").

the concern that qualified immunity is a significant barrier to recovery under Section 1983. For example, according to one study, "qualified immunity is rarely the formal reason that civil rights damages actions against law enforcement end."[261]

As the debate over qualified immunity continues, there is discussion over which branch of government should be responsible for reforming the doctrine.[262] Because qualified immunity is judicially created, the Supreme Court may, as it has in the past, choose to revise the doctrine.[263] As mentioned above, some justices—for varying reasons—believe the modern application of qualified immunity should be reexamined. And some observers suggest that the Court may be preparing to reconsider the doctrine.[264] Other scholars, however, express skepticism that the Roberts Court will reverse course on its expansion of the doctrine, pointing out that the Court is generally reluctant to overturn its interpretation of statutes.[265] Another group of scholars suggest that even if it does not completely repeal the doctrine, the Court may choose to revisit its prior precedent to "better align" qualified immunity with its originally intended role.[266] With a single noted dissent, the Court, however, recently rejected a number of petitions to review cases involving qualified immunity.[267]

Even without action from the Court, there may be a potential role for Congress in revising qualified immunity. Because qualified immunity is a product of statutory interpretation, Congress has wide authority to amend, expand, or even abolish the doctrine. Recent legislative proposals regarding qualified immunity that have been introduced in the 116th Congress are discussed in more depth later in this report.[268]

Grant Conditions and Data Collection

Beyond current laws imposing liability on law enforcement officers and agencies, the federal government currently has authority to regulate law enforcement through its financial support to state and local law enforcement in the form of grants. Two key sources of federal criminal justice funding are the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) Program[269] and the Community Oriented Policing Services (COPS) Program.[270] Federal grant programs may provide valuable assistance for state and local initiatives that Congress seeks to support. For instance, COPS grants have allowed law enforcement agencies hire additional officers, purchase new equipment, combat methamphetamine production, upgrade criminal records, and improve

[261] Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 8 (2017).

[262] Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2000 (2018).

[263] *Id.*

[264] Jay Schweikert & Clark Neily, *As Supreme Court Considers Several Qualified Immunity Cases, A New Ally Joins the Fight*, CATO AT LIBERTY (Jan. 17, 2020), https://www.cato.org/blog/supreme-court-considers-several-qualified-immunity-cases-new-ally-joins-fight (last visited Sept. 11, 2020).

[265] William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 80 (2018).

[266] *See* Schwartz, supra note 246, at 1833.

[267] Baxter v. Bracey, 140 S. Ct. 1862, (June 15, 2020) (Thomas, J., dissenting); Nick Sibilla, *Supreme Court Refuses to Hear Challenges to Qualified Immunity, Only Clarence Thomas Dissents*, FORBES (June 15, 2020), https://www.forbes.com/sites/nicksibilla/2020/06/15/supreme-court-refuses-to-hear-challenges-to-qualified-immunity-only-clarence-thomas-dissents/#3806f07f7fad (last visited Sept. 11, 2020).

[268] *See infra* "Qualified Immunity."

[269] *See* CRS In Focus IF10691, *The Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, by Nathan James (Jan. 20, 2020).

[270] *See* CRS In Focus IF10922, *Community Oriented Policing Services (COPS) Program*, by Nathan James (Jan. 30, 2020).

their forensic science capabilities.[271] Byrne JAG grants have been used to support a wide range of state and local criminal justice initiatives, including training officers on use of force and de-escalation of conflict.[272]

In addition, as discussed above, Congress may use its Spending Clause power to require states to enact certain policies to qualify for such funding.[273] As one example, among other conditions, states that receive Byrne JAG funding must certify compliance with the Death in Custody Reporting Act (DCRA).[274] The DCRA requires states to report to the Attorney General certain information regarding the deaths of individuals in the custody of law enforcement agencies.[275]

In addition to guiding state and local law enforcement policy through grant funding, federal government agencies independently collect information on topics related to police reform.[276] For instance, the Federal Bureau of Investigation (FBI) runs a Use-of-Force Data Collection program, gathering data on use-of-force incidents that result in the death or serious bodily injury.[277] The Use-of-Force Data Collection program and other federal data collection efforts[278] can help guide police reform and identify issues that may warrant legislative intervention. At this time, however, there is a lack of comprehensive and reliable data on law enforcement officers' use of force: existing data are incomplete and may not be publically available.[279] While individual states may collect certain law enforcement data, Congress can only require states to provide such data pursuant to its enumerated powers, for example by mandating data collection and submission as a condition of receiving federal funding.[280]

Considerations for Congress

Even before the high-profile events of spring and summer 2020, commentators and legislators had suggested numerous avenues for congressional reform and oversight of federal, state, and local law enforcement, and recent events have prompted additional proposals in this area. Some recent proposals advocate targeted reforms that would apply only to specific issues related to law

[271] *See id.*

[272] *See* Dep't of Justice, *Feature Stories*, https://bja.ojp.gov/feature-stories (last visited Sept. 11, 2020) (highlighting Byrne JAG projects that have shown promise in reducing crime and positively impacting communities); Dep't of Justice, *Use of Force and De-Escalation Training to Enhance Public and Officer Safety* (2019), https://bja.ojp.gov/funding/awards/2019-dj-bx-0309 (last visited Sept. 11, 2020).

[273] *See supra* "Spending Power and Regulating Law Enforcement." While Congress may place conditions on federal funding, several courts have held, in the context of sanctuary cities litigation, that the executive branch cannot place additional restriction on the receipt of Byrne JAG funds. *See* CRS Legal Sidebar LSB10386, *Immigration Enforcement & the Anti-Commandeering Doctrine: Recent Litigation on State Information-Sharing Restrictions*, by Kelsey Y. Santamaria (March 10, 2020).

[274] *See* Dep't of Justice, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program: Reporting Requirements*, https://bja.ojp.gov/program/jag/reporting-requirements (last visited Sept. 11, 2020).

[275] 34 U.S.C. § 60105.

[276] *See* CRS Report R46443, *Programs to Collect Data on Law Enforcement Activities: Overview and Issues*, by Nathan James and Kristin Finklea (July 6, 2020).

[277] Fed. Bureau of Investigation, *National Use-of-Force Data Collection*, https://www.fbi.gov/services/cjis/ucr/use-of-force (last visited Sept. 11, 2020).

[278] *See* CRS In Focus IF10572, *What Role Might the Federal Government Play in Law Enforcement Reform?*, by Nathan James and Ben Harrington (June 1, 2020).

[279] *See* "Data on Police Use of Force", CRS Report R43904, *Public Trust and Law Enforcement—A Discussion for Policymakers*, coordinated by Nathan James (July 13, 2020).

[280] *See supra* "Spending Power and Regulating Law Enforcement."

enforcement reform. In addition, the second session of the 116th Congress saw debate focus on two comprehensive police reform bills: the George Floyd Justice in Policing Act of 2020 (Justice in Policing Act)[281] and the Just and Unifying Solutions to Invigorate Communities Everywhere Act of 2020 (JUSTICE Act).[282] Both of these comprehensive proposals incorporate and expand on multiple previous targeted proposals, seeking to spur far-reaching reforms of American law enforcement. This section provides a sample of recent proposals related to police reform that may be of particular interest to Congress, first briefly comparing the Justice in Policing Act and the JUSTICE Act, and then discussing selected legal issues that have attracted legislative attention during the 116th Congress.

Comprehensive Proposals

At the center of debate in the 116th Congress has been two comprehensive police reform bills that would target numerous aspects of law enforcement oversight and regulation: the Justice in Policing Act[283] and the JUSTICE Act.[284] On June 8, 2020, Members of Congress led by the Congressional Black Caucus introduced the Justice in Policing Act.[285] An amended version of the bill passed the House on June 25, 2020, and, as of September 2020, the bill is pending in the Senate. Senate Republicans introduced the JUSTICE Act on June 17, 2020,[286] and as of September 2020 that bill is also currently pending before the Senate.[287]

Both the JUSTICE Act and the Justice in Policing Act would incorporate and build on numerous prior proposals, seeking to impose comprehensive reforms on federal, state and local policing. The two bills address certain common issues; however, even when they tackle similar issues, the two bills often take different approaches. As a general matter, the Justice in Policing Act would more often impose direct restrictions on federal law enforcement and invoke Congress's Spending Clause power to require federal funding recipients to enact laws placing restrictions on state and local law enforcement. By contrast, the JUSTICE Act would focus more on nonbinding measures, including funding voluntary initiatives by state and local law enforcement and gathering data on various law enforcement practices.

As an example, both bills contain provisions related to police use of force and specific tactics such as no-knock warrants and chokeholds. With respect to police use of force generally, the Justice in Policing Act would define "deadly force" and "less lethal force" and provide that federal agents may only use those types of force if certain conditions are met.[288] The bill would also condition certain federal grants to states, municipalities, and Indian Tribes on recipients' enacting laws to establish comparable use of force standards. Another provision of the Justice in Policing Act would require states and localities that receive federal funding to enact laws banning

[281] H.R. 7120 (116th Cong. 2020).

[282] S. 3985 (116th Cong. 2020).

[283] H.R. 7120 (116th Cong. 2020).

[284] S. 3985 (116th Cong. 2020).

[285] The Justice in Policing Act was also introduced in the Senate. *See* S. 3912 (116th Cong. 2020).

[286] The JUSTICE Act was also introduced in the House on June 18, 2020. *See* H.R. 7278 (116th Cong. 2020).

[287] This section provides an overview of the two proposals. For a more detailed comparison of the Justice in Policing Act and the JUSTICE Act, see CRS Legal Sidebar LSB10498, *Comparing Police Reform Bills: the Justice in Policing Act and the JUSTICE Act*, by Joanna R. Lampe (July 6, 2020). Certain provisions of each bill are also discussed along with related targeted proposals in the following section. *See infra* "Police Reform Proposals—Selected Legal Topics."

[288] H.R. 7120, § 364 (116th Cong. 2020).

the use of all chokeholds and carotid holds.[289] It would also directly prohibit federal law enforcement officers from using chokeholds or carotid holds unless the conditions for the use of deadly force are met.[290] Officers who failed to comply with the bill's requirements and were charged with homicide would be prohibited from arguing the homicide was justified.[291]

The JUSTICE Act does not contain provisions restricting the use of deadly or less-lethal force comparable to those in the Justice in Policing Act; however, the JUSTICE Act would require reporting of certain incidents involving law enforcement uses of force.[292] With respect to specific police tactics, the JUSTICE Act would require states and local governments that receive certain federal funding to develop law enforcement agency policies "prohibit[ing] the use of chokeholds except when deadly force is authorized."[293] It would also require the Attorney General to develop such a policy at the federal level for federal law enforcement agencies.[294] The JUSTICE Act would require enactment of policies (rather than laws) governing the use of chokeholds; the bill is silent on how those policies would be enforced. Similarly, both bills seek to address concerns related to the use of no-knock warrants, but the Justice in Policing Act would impose or incentivize direct legal limits on the practice,[295] while the JUSTICE Act would instead seek to gather data on the use of no-knock warrants.[296]

In addition, both bills would seek to expand the use of body cameras, but their relevant provisions vary in scope. The Justice in Policing Act would require certain federal law enforcement officers to wear body cameras and use such cameras in responding to any call for service, or at the initiation of any "law enforcement or investigative stop . . . between a Federal law enforcement officer and a member of the public," subject to certain exceptions.[297] Another section of the Justice in Policing Act, the Police CAMERA Act of 2020, would provide federal grants to expand the use of body cameras by state, local, and tribal law enforcement officers, subject to certain requirements related to safety, privacy, data retention, and reporting.[298] The JUSTICE Act would provide grants to state, local, and tribal government agencies to support the use of body-worn cameras by law enforcement officials. Funding recipients would be required to provide "assurances" that they have specified policies and procedures in place, including requiring certain training and imposing discipline on officers who fail to use cameras as required.[299] Unlike the Justice in Policing Act, however, the JUSTICE Act would not require the use of body cameras or cameras in patrol vehicles by federal law enforcement officers.

Both comprehensive police reform bills include provisions that would impose criminal liability when a person "acting under color of law, knowingly engages in a sexual act" with an individual

[289] *Id.*, § 363.

[290] *Id.*, § 364. As discussed further below, the Justice in Policing Act would also amend Section 242 to provide that a chokehold or carotid hold is a "punishment, pain, or penalty" that may not be imposed on a disparate basis based on race. *See infra* "Criminal Liability."

[291] H.R. 7120, § 364 (116th Cong. 2020).

[292] S. 3985, § 101 (116th Cong. 2020).

[293] *Id.*, § 105.

[294] *Id.*

[295] H.R. 7120, § 362 (116th Cong. 2020).

[296] S. 3985, § 102 (116th Cong. 2020).

[297] H.R. 7120, § 372 (116th Cong. 2020).

[298] *Id.*, § 382.

[299] S. 3985, § 201, 202 (116th Cong. 2020).

in federal custody.[300] A violation of either provision would be punishable by a fine and/or up to fifteen years in prison.[301] The Justice in Policing Act would also require recipients of certain federal funds to enact laws making it a criminal offense "for any person acting under color of law of the State or unit of local government to engage in a sexual act with an individual" in custody.[302] The JUSTICE Act would authorize the Attorney General to make grants to states, municipalities, and Indian Tribes that enact similar laws.[303]

Both the Justice in Policing Act and the JUSTICE Act also contain provisions designed to enhance law enforcement misconduct records,[304] establish best practices for law enforcement officers and train officers in areas such as use of force and racial bias,[305] facilitate federal data collection and oversight related to police reform,[306] and promote hiring of law enforcement officers who live in or demographically represent the communities they serve.[307]

In addition to the foregoing areas of common ground, each of the current comprehensive police reform bills includes certain provisions with no analogue in the other bill. For example, the Justice in Policing Act would amend Section 242 in several ways: changing the mental state required for conviction from "willfully" to the less stringent "knowingly or recklessly"; removing the possibility of a death sentence for violating Section 242; and providing that "the application of any pressure to the throat or windpipe, use of maneuvers that restrict blood or oxygen flow to the brain, or carotid artery restraints which prevent or hinder breathing or reduce intake of air" is a punishment that may not be imposed based on race.[308] The bill would also limit qualified immunity for state and local law enforcement officers in suits under Section 1983, and for federal law enforcement officers "in any action under any source of law," providing that it is not a defense to liability if a defendant believed in good faith that his or her conduct was lawful or that the rights the defendant allegedly infringed were not clearly established.[309] The Justice in Policing Act would also seek to enhance DOJ investigations under Section 12601 and state, local, and tribal investigations into uses of deadly force by law enforcement officers.[310]

The JUSTICE Act, for its part, would create a new criminal offense of "knowingly and willfully falsify[ing] a report . . . in furtherance of the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States where death or serious bodily injury . . . occurs."[311] The penalty for violating that provision would be a fine and/or imprisonment for up to twenty years.[312] The bill would also establish two commissions to investigate issues and propose reforms in areas related to law enforcement oversight: a Commission on the Social Status of Black Men and Boys[313] and a temporary National Criminal

[300] H.R. 7120, § 402 (116th Cong. 2020); S. 3985, § 1001 (116th Cong. 2020).

[301] *Id.*

[302] H.R. 7120, § 403 (116th Cong. 2020).

[303] S. 3985, § 1002 (116th Cong. 2020).

[304] H.R. 7120, §§ 201, 202 (116th Cong. 2020); S. 3985, Title III (116th Cong. 2020).

[305] H.R. 7120, §§ 111-118, 362 (116th Cong. 2020); S. 3985, § 601-602 (116th Cong. 2020).

[306] H.R. 7120, §§ 117, 118, 221-227 (116th Cong. 2020); S. 3985, §§ 101, 102 (116th Cong. 2020).

[307] H.R. 7120, § 366 (116th Cong. 2020); S. 3985, § 801 (116th Cong. 2020).

[308] H.R. 7120, §§ 101, 363 (116th Cong. 2020).

[309] *Id.*, § 102.

[310] *Id.*, § 103.

[311] S. 3985, § 106 (116th Cong. 2020).

[312] *Id.*

[313] *Id.*, Title V.

Justice Commission.[314] Also, the JUSTICE Act would create a new section of the federal criminal code entitled "Lynching," which would criminalize conspiring to violate certain federal civil rights or hate crime statutes.[315]

Police Reform Proposals—Selected Legal Topics

Certain issues related to police reform have attracted significant attention from commentators and legislators in recent years. This section analyzes a selection of those issues, including relevant reform proposals and related legal questions.

Qualified Immunity

Qualified immunity has been the subject of significant debate in recent years. A May 2020 report by Reuters found that "since 2005, the [federal appellate] courts have shown an increasing tendency to grant immunity in excessive force cases."[316] Critics of qualified immunity assert that the test the Supreme Court announced in *Pearson v. Callahan*[317] improperly hinders Section 1983 claims. Not only is it difficult for plaintiffs to overcome a claim of qualified immunity, these commentators assert, but furthermore courts often consider *only* whether a defendant violated clearly established law, without reaching the question of whether the defendant violated the plaintiff's rights—albeit in circumstances courts have not yet specifically assessed.[318] Legal commentators have argued that this limited inquiry prevents the development of clearly established law that could govern future Section 1983 cases.[319] Other commentators assert that the current doctrine of qualified immunity fails to protect law enforcement officers from suit.[320] Others defend the doctrine or favor limited judicial reforms, asserting the need to afford police officers some level of deference when making split-second decisions about the use of force, for example to subdue a fleeing or resisting suspect.[321]

The doctrine of qualified immunity arises from the Supreme Court's interpretation of Section 1983.[322] Thus, either the Court or Congress could modify the doctrine, and some legal scholars have called on both branches to address the issue.[323] The Court has considered multiple petitions

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[314] *Id.*, Title VII, IX.

[315] *Id.*, Title IV. The version of the Justice in Policing Act introduced in the House on June 8, 2020, included an anti-lynching provision substantively identical to the one in the JUSTICE Act. That provision, referred to as both the Justice for Victims of Lynching Act and the Emmett Till Anti-Lynching Act, was not included in the version of the Justice in Policing Act that passed the house on June 25, 2020. A standalone version of the Emmett Till Antilynching Act passed the House in February 2020. *See* H.R. 35 (116th Cong. 2019).

[316] Chung et al., *supra* note 255.

[317] Pearson v. Callahan, 555 U.S. 223, 236 (2009).

[318] Lawrence Hurley & Andrea Januta, *When Cops Kill, Redress is Rare - Except in Famous Cases*, REUTERS (May 29, 2020), https://www.reuters.com/article/uk-minneapolis-police-immunity-outliers/when-cops-kill-redress-is-rare-except-in-famous-cases-idUKKBN2352MZ (last visited Sept. 11, 2020).

[319] Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 N.D. L. REV. 1887, 1891 (2018).

[320] Schwartz, *supra* note 246.

[321] *See, e.g.*, Lawrence Rosenthal, *Defending Qualified Immunity* (July 6, 2020), S.C. L. REV., Forthcoming, https://ssrn.com/abstract=3559852 (last visited Sept. 11, 2020); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 N.D. L. REV. 1853 (2018).

[322] *See supra* "Qualified Immunity."

[323] *See, e.g.*, Almighty Supreme Born Allah v. Milling, No. 17-8654, Brief for Scholars of the Law of Qualified Immunity in Support of Petition for Writ of Certiorari (July 11, 2018); Ivan E. Bodensteiner, *Congress Needs to Repair the Court's Damage to § 1983*, 16 TX. J. ON CIVIL LIBERTIES AND CIVIL RIGHTS 29 (2010).

for certiorari raising challenges to qualified immunity,[324] and Justice Thomas and Justice Sotomayor have both expressed concerns about the doctrine.[325] However, the Supreme Court has so far declined to revisit the issue. On the legislative front, the Ending Qualified Immunity Act introduced in June 2020 would wholly "remove the defense of qualified immunity in the case of any action under [Section 1983],"[326] meaning that the proposal would extend beyond law enforcement to any government official currently afforded qualified immunity. The Justice in Policing Act contains a provision that would limit qualified immunity for state and local law enforcement officers in suits under 42 U.S.C. § 1983, and for federal law enforcement officers "in any action under any source of law," providing that it is not a defense to liability if a defendant believed in good faith that his or her conduct was lawful or that the rights the defendant allegedly infringed were not clearly established.[327]

Another proposal aimed at removing barriers to Section 1983 liability is the Reforming Qualified Immunity Act.[328] Unlike current law, which grants officials qualified immunity if the constitutional right alleged to have been violated is not "clearly established," this proposal would place the burden on Section 1983 defendants to affirmatively show with some particularity that the conduct at issue was authorized by law. Specifically, the proposal would seek to remove the existing doctrine of qualified immunity and instead provide that an individual defendant "shall not be liable" if the defendant reasonably believed that his or her conduct was lawful *and* either (1) the conduct at issue was "specifically authorized or required" by federal or state law, or (2) a federal or state court had issued a final decision holding that "the specific conduct alleged to be unlawful was consistent with the Constitution of the United States and Federal laws."[329] The Reforming Qualified Immunity Act would also revise the rule articulated in *Monell*[330] by providing that "a municipality or other unit of local government shall be liable for a violation [of Section 1983] by an agent or employee of the municipality or other unit of local government acting within the scope of his or her employment," in effect applying the doctrine of *respondeat superior* to such governmental entities.[331]

In contrast, instead of repealing or otherwise limiting the doctrine, the Qualified Immunity Act of 2020 would codify the doctrine for law enforcement officers by expressly providing immunity if an officer can show either the law was not clearly established at the time of the officer's conduct, or that at the time of the conduct, a court had affirmatively ruled that the conduct was constitutional.[332]

Criminal Liability

While changes to the doctrine of qualified immunity could alter *civil* liability for law enforcement officers, other proposals would aim to expand *criminal* liability for civil rights violations by

[324] John Elwood, *Relist Watch: Looking for the Living Among the Dead*, SCOTUSBLOG (May. 27, 2020), https://www.scotusblog.com/2020/05/relist-watch-looking-for-the-living-among-the-dead/ (last visited Sept. 11, 2020).

[325] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1870-72 (2017) (Thomas, J., concurring in part and concurring in the judgment); Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

[326] H.R. 7085 (116th Cong. 2020); S. 4142 (116th Cong. 2020).

[327] H.R. 7120, § 102 (116th Cong. 2020).

[328] S. 4036 (116th Cong. 2020).

[329] *Id.*, § 4.

[330] Monell v. Dept. of Social Servs. of New York, 436 U.S. 658, 690 (1978). *See also supra* "Section 1983."

[331] S. 4036, § 4 (116th Cong. 2020).

[332] H.R. 7951 (116th Cong. 2020).

officers. For example, the Police Accountability Act of 2020 would provide a federal criminal penalty for assault or homicide committed by certain state or local law enforcement officers.[333] And, as discussed below, more comprehensive police reform proposals have included provisions that would impose criminal liability when a person "acting under color of law, knowingly engages in a sexual act" with an individual in federal custody.[334]

Several recently introduced bills related to criminal penalties for police misconduct would amend Section 242. For instance, the Eric Garner Excessive Use of Force Prevention Act of 2019 would amend Section 242 to provide explicitly that "the application of any pressure to the throat or windpipe which may prevent or hinder breathing or reduce intake of air is a punishment" that may not be imposed on a racially disparate basis.[335] Some commentators also advocate revising the specific intent requirement for Sections 241 and 242 announced in *Screws* and *Guest*,[336] and recently proposed legislation would amend Section 242 to revise the willfulness requirement.[337]

Amendments to Section 242 may raise various legal questions. For example, as discussed above, DOJ generally does not bring charges under the "punishments, pains, or penalties" provision of the statute,[338] and proposed amendments to that provision raise the question of whether they capture conduct not already covered by the statute and whether DOJ would bring charges under the amended provision. In addition, amendments to Section 242 targeting specific conduct may raise the question of whether such legislation falls within the scope of Congress's enumerated powers.[339] Finally, amending Section 242 to use a less stringent mental state requirement might raise due process concerns. The Supreme Court plurality in *Screws* construed Section 242's willfulness requirement stringently to avoid such concerns but also noted, "If Congress desires to give the Act wider scope, it may find ways of doing so."[340] Nonetheless, a significantly less stringent mental state requirement might raise questions about whether potential Section 242 defendants have sufficient notice of the conduct the statute prohibits.[341]

No-Knock Warrants

Another area related to police reform that has received significant recent attention is the use of "no-knock" warrants—warrants that allow law enforcement officers to enter a home without first seeking consensual entry by announcing themselves and their purpose. As a default, law enforcement officers must comply with a common-law doctrine called the knock and announce rule, which generally requires officers to knock and announce their presence before entering a

[333] H.R. 5777 (116th Cong. 2020).

[334] H.R. 7120, § 402 (116th Cong. 2020); S. 3985, § 1001 (116th Cong. 2020).

[335] H.R. 4408 (116th Cong. 2019). This proposal is also included in the Justice in Policing Act. *See* H.R. 7120, § 363 (116th Cong. 2020).

[336] *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, REVISITING WHO IS GUARDING THE GUARDIANS? A REPORT ON POLICE PRACTICES AND CIVIL RIGHTS IN AMERICA, RECOMMENDATION 5.4 (Nov. 2000).

[337] *See, e.g.*, H.R. 7120, § 101 (116th Cong. 2020); H.R. 7131 (116th Cong. 2020) (bill that would amend Section 242 to apply specifically to offenses performed "recklessly" by law enforcement and corrections officers).

[338] *See supra* "Differential Punishment."

[339] *See supra* "Section 5 of the Fourteenth Amendment and Regulating Law Enforcement."

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

[341] *See, e.g.*, *id.* at 97-98 (stating that if Section 242 was construed only to require that a defendant intentionally took some action that was later deemed to be unconstitutional, "[t]hose who enforced local law today might not know for many months (and meanwhile could not find out) whether what they did deprived some one of due process of law. The enforcement of a criminal statute so construed would indeed cast law enforcement agencies loose at their own risk on a vast uncharted sea.").

home to execute a search warrant.[342] The Supreme Court has interpreted the Fourth Amendment's reasonableness requirement as generally mandating compliance with the knock and announce rule.[343] However, there are two exceptions to the knock and announce rule for (1) exigent circumstances where the "police have a 'reasonable suspicion' that knocking and announcing would be dangerous, futile, or destructive to the purposes of the investigation"[344] and (2) no-knock warrants, which provide explicit authority for judges to grant so-called "no-knock" entry in the warrant itself, upon a finding of certain factual predicates.[345]

A number of states have statutes that authorize magistrate judges to grant no-knock warrants in certain circumstances.[346] Under federal law, a statute previously authorized no-knock warrants for certain drug searches, but Congress repealed it.[347] As a result, the legal status of federal no-knock search warrants is unsettled,[348] although federal officers do sometimes employ no-knock warrants or act pursuant to no-knock warrants issued by state courts when serving on joint state-federal task forces.[349] Some courts have concluded that no-knock warrants shield officers from responsibility for independently assessing the existence of exigent circumstances at the time of entry.[350] To the extent that is true, no-knock warrants could permit no-knock entry where the exigent circumstances exception would not—for example, in an instance where the factors that justified the no-knock warrant are no longer present at the time of entry.

At least two bills introduced in the 116th Congress would change the legal landscape regarding unannounced home entry by law enforcement during execution of search warrants. The Justice in Policing Act would establish that search warrants issued in federal drug cases must "require that a law enforcement officer execute the search warrant only after providing notice of his or her authority and purpose." That bill would also require states and localities that receive certain federal funds to "have in effect a law that prohibits the issuance of a no-knock warrant in a drug case."[351] Legislation introduced in the Senate, the Justice for Breonna Taylor Act, would establish that federal law enforcement officers "may not execute a warrant" without providing notice of authority and purpose and would prohibit state and local law enforcement agencies receiving federal funds from executing warrants that do not "require" the serving officer to provide notice of authority and purpose prior to forcible entry.[352]

At least with respect to the requirement for states and localities in the Justice in Policing Act, it appears that unannounced entry would still be permitted in exigent circumstances. The more difficult question may be what effect the requirement for federal drug warrants in that bill would have. Under the bill's terms, all warrants authorized in federal drug cases would have to expressly

[342] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 589 (2006) ("The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one.").

[343] *See* Wilson v. Arkansas, 514 U.S. 927 (1995).

[344] United States v. Ramirez, 523 U.S. 65, 71 (1998).

[345] *See, e.g.*, United States v. Mattison, 153 F.3d 406, 409 (7th Cir. 1998).

[346] *See* Brian Dolan, *To Knock or Not to Knock? No-Knock Warrants and Confrontational Policing*, 93 ST. JOHN'S L. REV. 201, 214 (2019).

[347] *See* DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL, AUTHORITY OF FEDERAL JUDGES AND MAGISTRATES TO ISSUE "NO-KNOCK" WARRANTS, OPINIONS OF THE OFFICE OF LEGAL COUNSEL, Volume 26, 50 (June 12, 2002).

[348] *See id.* at 49.

[349] *See, e.g.*, *Ramirez*, 523 U.S. at 68.

[350] *See, e.g.*, United States v. Spry, 190 F.3d 829, 833 (7th Cir. 1999).

[351] H.R. 7120, § 362 (116th Cong. 2020). The JUSTICE Act, while not directly altering existing practices, would require reporting on the use of no-knock warrants. *See* S. 3985, § 102 (116th Cong. 2020).

[352] S. 3955 (116th Cong. 2020).

require that they be executed "only after" a law enforcement officer has provided notice of his or her authority and purpose.[353] As such, were the bill to become law, it could possibly create tension between the "exigent circumstances" exception to the knock and announce rule and the required terms of warrants under the new statute. That said, though warrants would require notice under the proposal, and officers who did not comply with that requirement would violate the terms of the warrant, it is not clear that no-knock entry in such a circumstance would lead to consequences like evidence exclusion.[354] Because the Justice for Breonna Taylor Act does not reference exigent circumstances or otherwise delineate exceptions, the bill raises similar questions regarding its relationship to current knock-and-announce doctrine.

Law Enforcement Identification

Recent events involving the deployment of federal law enforcement officers in response to protests in cities such as Portland, Oregon, have raised unique issues regarding law enforcement identification. Reports out of Portland suggested that unidentified federal law enforcement officers detained protestors and transported them in unmarked vehicles.[355] Although there is no generally applicable requirement in statute that federal law enforcement officers identify themselves or display identifying information on their person when acting in public,[356] recently introduced bills in response to the Portland protests,[357] as well as other recent legislative proposals, seek to impose new identification requirements on federal law enforcement officers. For example, the Police Exercising Absolute Care With Everyone Act of 2019 (PEACE) act would impose a limited requirement that federal law enforcement officers identify themselves as officers "[w]hen feasible" prior to using force against any person.[358] Separately, bills introduced in the House and Senate would require federal officers "engaged in any form of crowd control, riot control, or arrest or detainment of individuals engaged in an act of civil disobedience, demonstration, protest, or riot in the United States" to "at all times display identifying information in a clearly visible fashion," including each officer's agency, last name, and badge number.[359]

Racial Profiling

Another aspect of police reform that features in some recent legislative proposals is racial profiling. Building on prior proposed legislation related to racial and religious profiling by law

[353] H.R. 7120, § 362 (116th Cong. 2020).

[354] In other contexts where warrants have been executed in ways that exceed the warrants' terms, some courts have declined to suppress evidence in the absence of "extreme" violations or "flagrant disregard for the terms" at issue. The Supreme Court has taken this view of the federal statute that codifies the common-law knock-and-announce rule and has observed more generally that when a magistrate declines to authorize no-knock entry in advance, that decision "should not be interpreted to remove the officers' authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed."

[355] Jonathan Levinson et al., *Federal Officers Use Unmarked Vehicles to Grab People in Portland, DHS Confirms*, NPR (July 17, 2020), https://www.npr.org/2020/07/17/892277592/federal-officers-use-unmarked-vehicles-to-grab-protesters-in-portland (last visited Sept. 11, 2020).

[356] CRS Legal Sidebar LSB10499, *"No-Knock" Warrants and Other Law Enforcement Identification Considerations*, by Peter G. Berris and Michael A. Foster (June 23, 2020).

[357] S. 4220 (116th Cong. 2020); H.R. 7719 (116th Cong. 2020).

[358] H.R. 4359 (116th Cong. 2019). This provision was also incorporated into the Justice in Policing Act. *See* H.R. 7120, § 364 (116th Cong. 2020).

[359] S. 3909 (116th Cong. 2020); H.R. 7153 (116th Cong. 2020).

enforcement,[360] the Justice in Policing Act contains several provisions that would aim to address profiling by federal, state, and local police. The Justice in Police Act would define racial profiling as "a law enforcement agent or agency relying, to any degree, on actual or perceived race, ethnicity, national origin, religion, gender, gender identity, or sexual orientation" in planning law enforcement activities.[361] Even "spontaneous investigatory activities" would fall under the Act's purview if those activities have "a disparate impact" on a covered group.[362] The Justice in Police Act would impose civil liability for racial profiling, and DOJ or individual victims would be able to enforce the law by suing in either federal or state court.[363] In contrast to suits under existing law based on Equal Protection claims, individuals would not have to prove that law enforcement agents *intended* to treat victims of profiling differently based on their race. Instead, they could prevail by showing that a policing practice had an unjustified, discriminatory effect.[364] The Justice in Policing Act would require federal law enforcement agencies to revise policies to eliminate profiling.[365] It would also provide funding and training for state and local agencies to combat racial profiling[366] and require federally funded agencies to set up administrative complaint procedures to address profiling allegations.[367]

Limitations on Military-Grade Equipment

Under a federal program known as the 1033 Program, the federal government transfers certain excess military equipment to state and local law enforcement agencies.[368] Some commentators contend that this type of equipment contributes to militarization of police forces without increasing public safety and increases the risk of incidents of excessive force.[369] The 1033 Program is authorized by statute,[370] so Congress has the power to alter or discontinue the program. A recent proposal related to the 1033 Program, the Stop Militarizing Law Enforcement Act, would maintain the program but impose additional limitations and reporting requirements.[371]

Grants and Conditions on Federal Funds

Numerous bills currently before Congress would invoke the Spending Clause in an effort to regulate state and local law enforcement activities. Some would fund voluntary state and local measures, such as use of force and bias awareness training[372] or the expanded use of body

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[360] *See* End Racial and Religious Profiling Act of 2019, S. 2355 (116th Cong. 2019); End Racial Profiling Act of 2019, H.R. 4339 (116th Cong. 2019).

[361] H.R. 7120, § 302.

[362] *Id.* §§ 302, 312.

[363] *Id.* § 312.

[364] *Id.*

[365] *Id.* § 321.

[366] *Id.* § 361.

[367] H.R. 7120, § 331.

[368] *See, e.g.*, Defense Logistics Agency, 1033 Program FAQs, https://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement/ProgramFAQs.aspx.

[369] *See, e.g.*, Jonathan Mummolo, *Militarization Fails to Enhance Police Safety or Reduce Crime but May Harm Police Reputation*, PNAS (Sept. 11, 2018); Ryan Welch & Jack Mewhirter, *Does Military Equipment Lead Police Officers to be More Violent? We Did the Research*, WASH. POST (June 30, 2017).

[370] 10 U.S.C. § 2576a.

[371] H.R. 1714 (116th Cong 2019). This proposal was also incorporated into the Justice in Policing Act. *See* H.R. 7120, § 365 (116th Cong. 2020).

[372] S. 3063 (116th Cong. 2019).

cameras.[373] Other bills would require states to enact certain policies in exchange for federal grants. For instance, the Police Training and Independent Review Act of 2019 would fund training on cultural diversity and de-escalation tactics while requiring participating states to "enact laws requiring the independent investigation and prosecution of the use of deadly force by law enforcement officers."[374] The Preventing Tragedies Between Police and Communities Act of 2019 would oblige federal funding recipients to mandate training on ways to reduce the use of force.[375] The PEACE Act would require recipients of certain federal funds to enact laws limiting the use of lethal and less than lethal force by law enforcement.[376] The Next Step Act of 2019 would, among other things, direct certain federal grant recipients to submit quarterly reports to the Attorney General on officers' use of force.[377]

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[373] H.R. 120 (116th Cong. 2019). This provision was also incorporated into the Justice in Policing Act. *See* H.R. 7120, § 382 (116th Cong. 2020).

[374] S. 1938 (116th Cong. 2019).

[375] H.R. 2927 (116th Cong. 2019).

[376] H.R. 4359 (116th Cong. 2019). This provision was also incorporated into the Justice in Policing Act. *See* H.R. 7120, § 364 (116th Cong. 2020).

[377] S. 697 (116th Cong. 2019); H.R. 1893 (116th Cong. 2020).