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## **An Accountability Cometh: Amend 42 USC Section 1983 and 18 USC Sections 241, 242, Thereby Initiating a Path to Re-Imaging Peace Officers Acting Under the Color of State Law**

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**AN ACCOUNTABILITY COMETH:  
AMEND 42 USC SECTION 1983 AND 18 USC SECTIONS 241, 242,  
THEREBY INITIATING A PATH TO REIMAGINING PEACE OFFICERS  
ACTING UNDER THE COLOR OF STATE LAW©**

JAMES M. DURANT III\*

**I. INTRODUCTION**

An indispensable change in the law is respectfully requested, giving American citizens a fair chance of prevailing against the State for systemic and habitual police abuse, which in certain circumstances ultimately leads to unjustifiable homicide. This change in the law should send specific and general deterrence to *rogue peace officers* who harm American citizens, ensuring they will be held accountable both civilly and criminally, thus meeting with justice in our courts of law. Moreover, this change in the law will help elevate the reputation of state peace officers to the highest professional standards and help ensure the policies, custom, and practice of civilian engagement is always fair and balanced—and only lethal when clearly warranted by indisputable felonious conduct threatening the lives of others.

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**DISCLAIMER:** Comments by Mr. Durant herein this paper are his own personal comments and do not reflect the policies or opinions of the United States Department of Energy, the US Department of the Air Force or the US Department of Justice.

Law enforcement is one of the most stressful occupations in our country.<sup>1</sup> American citizens depend upon those sworn to protect and serve to honor their oath of office. Yet approximately 3 to 5% of law enforcement officers commit heinous crimes against American citizenry under the color of law.<sup>2</sup> Moreover, through their felonious criminal actions, low percent of rogue peace officers tarnish the reputations of the 95-98% of honorable peace officers. When the criminal actions of rogue officers are condoned and accepted by other peace officers and ratified by summary dismissals in the criminal justice system, the entire criminal justice system—and all peace officers—become criminally implicated warranting appropriate indictment.

Rogue peace officers are committing unjustifiable homicides at an alarming rate across the United States with an excessively disproportionate rate of deaths for African Americans.<sup>3</sup> A 2012 study showed a homicide rate of .48 per 100,000 for African Americans versus .17 per 100,000 for Caucasians,<sup>4</sup> and with only 16 states participating. Thus, for that reason alone, a change in the law with the goal of reimagining<sup>5</sup> the American peace officer is indeed needed, warranted, and respectfully requested.

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<sup>1</sup> Aimee Picchi, *9 Most Stressful American Jobs in 2018*, CBS NEWS (Jan. 11, 2018, 5:56 AM), <https://www.cbsnews.com/media/9-most-stressful-american-jobs-in-2018/#:~:text=Police%20officer%3A%20%2461%2C600&text=Police%20officers%20risk%20their%20lives,high%20blood%20pressure%20and%20insomnia>.

<sup>2</sup> “I would agree that the 3-5 percent average of rouge officers across the state is notable; however, I would strongly add that it is much larger when you factor-in other officers that idly stand by and watch rouge police officers commit violations of the law and violate a citizen’s Constitutional rights. This is what makes the problem larger in scope verses just the 3-5% alone—this is where the magnitude of the problem increases dramatically.” Interview with Detective Lieutenant Lewis Langham, Mich. State Police Retired and Law Professor Emeritus of L. at W. Mich. Univ., Cooley Sch. of L. (July 1, 2020).

<sup>3</sup> See Catherine Barber et.al., *Homicides by Police: Comparing Counts from the National Violent Death Reporting System, Vital Statistics, and Supplementary Homicide Reports*, 106(5) AM. J. PUB. HEALTH 922, (2016) (From 2005 to 2012 a study was conducted across 16 states where 1,552 police shootings resulting in death were statistically evaluated. In this study, the researchers discovered that African Americans accounted for 0.48 per 100,000; Hispanics accounted for 0.25 per 100,000; and Caucasians accounted for 0.17 per 100,000).

<sup>4</sup> *Id.*

<sup>5</sup> Reimagining is not the act of defunding police departments. It is the reallocation of municipal funding to entities that are better suited and equipped to manage community social and health functions. The dilemma concerns police units being over exposed and ill-equipped to manage these issues, which are better left to, for example, mental health professionals. And often times, peace officers are expected to deal with these matters with little to no training or experience, and unfortunately sometimes unintended circumstances result, including the death of a citizen by the responding officer.

Similarly, a change in the law is also respectfully requested to give the U.S. Attorney a fair chance to *zealously* represent the United States in criminal proceedings against rogue peace officers and those *criminally* responsible in the rogue peace officers' chain of authority, including but not limited to, the state's attorney. Over 150 years ago, Congress spoke to this issue with the passage of the 1866 Civil Rights Act,<sup>6</sup> the 1870 and 1871 Ku Klux Klan Acts,<sup>7</sup> and later as

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During an interview by Megan McCain on *The View*, Vice President-elect, Kamala Harris, discussed the concept of defunding the police, or as she termed it, "reimagining public safety." VP-elect Harris explained that her view is not to simply defund the police, but to better allocate community funds to social and mental health programs necessitating support. She explained that there are areas that police are basically ill-equipped to engage in as a matter of law enforcement and that some officers have told her that they do not want to engage in certain social or health matters. Seth Cohen, *Reimagine The Police? Kamala Harris's Optimistic View of The "Defund" Debate*, FORBES (June 8, 2020) <https://www.forbes.com/sites/sethcohen/2020/06/08/ragine-the-police-kamala-harris/>; *see also* Law Journal Editorial Board, *Reimagine the Role of Police*, NEW JERSEY LAW JOURNAL (June 8, 2020) <https://www.law.com/njlwjournal/2020/06/28/reimagine-the-role-of-police/> ("A gradual process of strategically reallocating resources, funding, and responsibility away from police toward community-based models of safety, support, and prevention will go a long way towards bettering our society").

<sup>6</sup> History, Art & Archives: U.S. House of Representatives, *The Civil Rights Bill of 1866*, Historical Highlights, <https://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Bill-of-1866/> (last visited Nov. 12, 2020).

<sup>7</sup> *See* U.S. SENATE, THE ENFORCEMENT ACTS OF 1870 AND 1871 (2020), <https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm> ("The adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution extended civil and legal protections to former slaves and prohibited states from disenfranchising voters 'on account of race, color, or previous condition of servitude.' Forces in some states were at work, however, to deny black citizens their legal rights. Members of the Ku Klux Klan, for example, terrorized black citizens for exercising their right to vote, running for public office, and serving on juries. In response, Congress passed a series of Enforcement Acts in 1870 and 1871 (also known as the Force Acts) to end such violence and empower the president to use military force to protect African Americans... While these committees were investigating southern attempts to impede Reconstruction, the Senate passed two more Force acts, also known as the Ku Klux Klan acts, designed to enforce the Fourteenth Amendment and the Civil Rights Act of 1866. The Second Force Act, which became law in February 1871, placed administration of national elections under the control of the federal government and empowered federal judges and United States marshals to supervise local polling places. The Third Force Act, dated April 1871, empowered the president to use the armed forces to combat those who conspired to deny equal protection of the laws and to suspend habeas corpus, if necessary, to enforce the act. While the Force acts and the publicity generated by the joint committee temporarily helped put an end to the violence and intimidation, the end of formal Reconstruction in 1877 allowed for a return of largescale disenfranchisement of African Americans").

amended, 42 U.S.C § 1983,<sup>8</sup> and 18 U.S.C § 241 and 242.<sup>9</sup> Yet every day, American citizens are subjected to arbitrary, offensive, abusive, and targeted discriminatory justice, including unjustifiable homicide by those cloaked in the *color of state law* who are sworn to uphold the law and protect citizens.

And what has been the response by our judicial system on police abuse matters properly brought before the bench since 1871? Abysmal, varied, inconsistent rulings, leading to abject miscarriages of justice. Such miscarriages call for indictments against judicial systems for rulings that violate the rights, privileges, and immunities of American citizens, in particular, African American citizens, as articulated in the Equal Protection Clause of the 14<sup>th</sup> Amendment of the U.S. Constitution. Too long our Republic has relied upon inconsistent, unprincipled and varied judicial interpretations of clearly established Congressional *legislative intent*.<sup>10</sup> Too many reversals, dismissals, and affirmations supporting political pressures, along with legal theories anchored in supposition and indeed academic conjecture, and, in many instances, outcomes that verge on the absurd in cases clearly warranting justice.

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<sup>8</sup> “‘Section 1983 Litigation’ refers to lawsuits brought under Section 1983 (Civil action for deprivation of rights) of Title 42 of the United States Code (42 U.S.C. § 1983). Section 1983 provides an individual the right to sue state government employees and others acting ‘under color of state law’ for civil rights violations. Section 1983 does not provide civil rights; it is a means to enforce civil rights that already exist.” *Civil Rights in the United States*, UNIVERSITY OF MINNESOTA LAW SCHOOL, <https://libguides.law.umn.edu/c.php?g=125765&p=2893387> (last visited Nov. 1, 2020).

<sup>9</sup> “Any person acting under the color of law who ‘willfully’ subjects any person to the deprivation of rights, privileges or immunities secured or protected by the Constitution or laws of the US, or to different punishments, pains, or penalties on account of the person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens.” Under Section 241 it is 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[.]” Joanna R. Lampe, *Federal Police Oversight: Criminal Civil Rights Violations Under 18 U.S.C. § 242*, Congressional Research Service: Legal Sidebar (June 15, 2020) <https://crsreports.congress.gov/product/pdf/LSB/LSB10495>.

<sup>10</sup> “Legislative intent, also referred to as legislative history or legislative purpose, is a relatively recent tool in statutory construction. Loosely defined as “the documents that contain the information considered by the legislature prior to reaching its decision to enact a law, the legislative history of a statute is consulted in order to better understand the reasons for the enactment of a statute. Since an act of the legislature is not always drafted with the most precise language, courts look to the intrinsic aids in determining the intent of a legislative body...Studying the background and events that led to a bill’s passage, as well as the social, economic, and political climate of the period may also be helpful in determining legislative intent.” *Legislative Intent: New York State Legislative Intent*, NEW YORK STATE LIBRARY (Aug. 26, 2020) <http://www.nysl.nysed.gov/legint.htm>.

Furthermore, the statutory requirement of 18 U.S.C §§ 241 and 242 requiring proof *beyond a reasonable doubt* that an officer “*intended*” to violate a citizen’s constitutional rights has been allowed to stall criminal cases worthy of a criminal indictment for crimes committed upon and against an American citizen.<sup>11</sup> We know, for example, that in most situations, the subject peace officer has little to no intention of violating a person’s civil rights while engaged in clear police abuse. For example, consider the events stemming up to an almost fatal shooting of an unarmed American in the back or the shooting of an American citizen sitting in his vehicle. In these circumstances and others, the peace officer is more than likely acting out of presumed fear, apprehension, rage, bias, racism, etc. It is exceptionally doubtful that in these circumstances rogue peace officers actually realize they are violating the Constitutional rights of American citizens; and sadly, their felonious acts characterize a marked departure from their sworn duty to protect and serve. Yet, these rogue peace officers’ rightfully earned appointment with justice is universally thwarted under the *specific intent to violate a citizen’s Constitutional rights* prong of 18 U.S.C §§ 241 and 242, again resulting in a paucity of criminal indictments for such crimes.

Our Legislative Representatives must amend the requisite statutes to strengthen the appropriate rule of law, thus reducing systemic state police abuse and helping ensure no other American citizens lose their lives at the hands of rogue state peace officers acting on their own accord under the color of *state* law. In addition, amending these statutes will ensure those responsible for hiring and managing rogue peace officers are equally held criminally and civilly accountable. The courts have failed the Republic in effectuating the *specific legislative intent* to “enforce the Fourteenth Amendment’s guarantees through ‘appropriate legislation.’”<sup>12</sup>

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<sup>11</sup> “The poor performance of federal prosecutors is due, in part, to the difficulties in prosecuting police officers generally (such as typically unsympathetic victims, witnesses who are not credible, the public’s predisposition to believe police officers) and by the added requirement, as interpreted by the courts, that prosecutors prove the accused officer’s ‘specific intent’ to deprive an individual of his or her civil rights. As a result of the ‘specific intent’ requirement and other stringent standards, federal prosecutors - who like their local counterparts are interested in winning cases, not merely trying them - may be less than eager to pursue cases against police officers. Human Rights Watch believes that it should be sufficient for federal criminal prosecution that a police officer intentionally and unjustifiably beat or killed a victim without the additional burden of having a specific intent to violate the victim’s civil rights.” Human Rights Watch, *Shielded from Justice: Police Brutality and Accountability in the United States*, Federal Passivity, <https://www.hrw.org/legacy/reports98/police/uspo33.htm>.

<sup>12</sup> Lampe, *supra* note 9, at 2.

*“My philosophy is very simple - when you see something that is not right, not fair, not just, say something, do something. Get in trouble, good trouble, necessary trouble.”*<sup>13</sup>

- The Great Late Representative John Lewis

We know the facts, the statistics, and the reality of police abuse across this nation and the inconvertible truth of the disproportionate injustices committed against Americans of African descent. Since 2015, African Americans account for 30 deaths per million (1,252 total) of Americans killed by peace officers, whereas Caucasian Americans account for only 12 deaths per million (2,385 total).<sup>14</sup> Bottom line, African Americans are 2.5 times more likely to be killed by peace officers than Caucasian Americans:<sup>15</sup>

Black Americans are disproportionately affected by police violence across the United States. The data refers specifically to police shootings and it relies primarily on news accounts, social media postings and police reports. Since January 01, 2015, 4,728 people have died in police shootings and around half, 2,385, were white. 1,252 were Black, 877 were Hispanic and 214 were from other racial groups. As a share of the population, however, things are very different. Black Americans account for less than 13% [however, most people killed are African American males who constitute less than 7% of the U.S. population]<sup>16</sup> of the U.S. population but the rate

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<sup>13</sup> *Documentary Honors Civil Rights Leader Rep. John Lewis*, NPR: Morning Edition (July 20, 2020) <https://www.npr.org/2020/07/20/892943749/documentary-honors-civil-rights-leader-rep-john-lewis>.

<sup>14</sup> Wesley Lowery, *Aren't more white people than black people killed by police? Yes, but no*, THE WASHINGTON POST, (July 11, 2016) <https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/>.

<sup>15</sup> *Id.*

<sup>16</sup> 2010 Census Briefs, “The Black Population,” U.S. Census Bureau, Quick Facts United States, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Oct. 31, 2020); *See also* Ashley Nellis, Ph.D., *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (Jun. 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> (“African Americans are incarcerated in state prisons at a rate that is 5.1 times the imprisonment of whites. In five states (Iowa, Minnesota, New Jersey, Vermont, and Wisconsin), the disparity is more than 10 to 1; In twelve states, more than half of the prison population is black: Alabama, Delaware, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, South Carolina, and Virginia. Maryland, whose prison population is 72% African American, tops the nation. In eleven states, at least 1 in 20 adult black males is in prison. In Oklahoma, the state with the highest overall black

at which they are shot and killed by police is more than twice as high as the rate for white Americans.<sup>17</sup>

We also know that our country was conceived with a birth defect, or race dysfunction, as far back as 1619 with the institution of slavery, mass genocide, high crimes against Native Persons,<sup>18</sup> segregation backed by law against Americans of African descent,<sup>19</sup> inhumane medical testing of non-willing African American citizens spanning over 40 years (1932-1972),<sup>20</sup> mass incarceration of African

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incarceration rate, 1 in 15 black males ages 18 and older is in prison. States exhibit substantial variation in the range of racial disparity, from a black/white ratio of 12.2:1 in New Jersey to 2.4:1 in Hawaii. Latinos are imprisoned at a rate that is 1.4 times the rate of whites. Hispanic/white ethnic disparities are particularly high in states such as Massachusetts (4.3:1), Connecticut (3.9:1), Pennsylvania (3.3:1), and New York (3.1:1).”

<sup>17</sup> Niall McCarthy, *Police Shootings: Black Americans Disproportionately Affected [Infographic]*, Forbes (May 28, 2020, 6:03 a.m.), <https://www.forbes.com/sites/niallmccarthy/2020/05/28/police-shootings-black-americans-disproportionately-affected-infographic/?sh=719fd6cb59f7>.

<sup>18</sup> “On September 8, 2000, the head of the Bureau of Indian Affairs (BIA) formally apologized for the agency's participation in the ‘ethnic cleansing’ of Western tribes. From the forced relocation and assimilation of the ‘[savaged]’ to the white man's way of life to the forced sterilization of Native Americans, the BIA set out to ‘destroy all things Indian.’ Through the exploration of the United States' Federal Indian policy, it is evident that this policy intended to ‘destroy, in whole or in part,’ the Native American population. The extreme disparity in the number of Native American people living within the United States' borders at the time Columbus arrived, approximately ten million compared to the approximate 2.4 million Indians and Eskimos alive in the United States today, is but one factor that illustrates the success of the government's plan of ‘Manifest Destiny.’” Lindsay Glauner, *The Need for Accountability and Reparation: 1830-1976 the United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 911-12 (2002).

<sup>19</sup> See Richard Rothstein, *What Have We – De Facto Racial Isolation or De Jure Segregation?*, AMERICAN BAR ASSOCIATION: CIVIL RIGHTS AND SOCIAL JUSTICE, (July 1, 2014) [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/2014\\_vol\\_40/vol\\_40\\_no\\_3\\_poverty/racial\\_isolation\\_or\\_segregation/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_3_poverty/racial_isolation_or_segregation/).

<sup>20</sup> “The intent of the study was to record the natural history of syphilis in [600 Black men]. The study was called the ‘Tuskegee Study of Untreated Syphilis in the Negro Male.’ When the study was initiated there were no proven treatments for the disease. Researchers told the men participating in the study that they were to be treated for ‘bad blood.’ This term was used locally by people to describe a host of diagnosable ailments including but not limited to anemia, fatigue, and syphilis...A total of 600 men were enrolled in the study. Of this group 399, who had syphilis were a part of the experimental group and 201 were control subjects. Most of the men were poor and illiterate sharecroppers from the county.” In exchange for their participation, “[t]he men were offered what most Negroes could only dream of in terms of medical care and survivors insurance. They were enticed and enrolled in the study with incentives including: medical exams, rides to and from the clinics, meals on examination days, free treatment for minor ailments and guarantees that provisions would be made after their deaths in terms of burial stipends paid to their survivors.” *About the USPHS Syphilis Study*, TUSKEGEE UNIVERSITY, <https://www.tuskegee.edu/about->

Americans,<sup>21</sup> state enforced deprivation of property, and mass detainment of Americans of Japanese descent without any due process under the 5<sup>th</sup> nor 14<sup>th</sup> Amendment of the U.S. Constitution,<sup>22</sup> etc. As a republic, however, we must right some of these wrongs. Such efforts have often been limited by the *with all deliberate speed* formula.<sup>23</sup> Bottom line, effectuating the principles of *equal justice under law* takes strong community action and appropriate legislation as enunciated in the 14<sup>th</sup> Amendment. This is our social justice agenda, or more appropriately stated, our social justice journey, a path traveled by the *few* but impacts the *many*.

Unfortunately, this journey continues to be challenged by those who view oppression, discrimination, racism, and animus bias, as a normative core value set supported by evangelical notions of racial supremacy and grandeur. This perspective ignores the common fundamental principles of justice and fairness rooted in the American fabric of a Republic For and By the People. Again, the results include but are not limited to egregious and disproportionate incarceration

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us/centers-of-excellence/bioethics-center/about-the-usphs-syphilis-study (last visited Sept. 6, 2020).

<sup>21</sup> “Nationally, according to the U.S. Census, Blacks are incarcerated five times more than Whites are, and Hispanics are nearly twice as likely to be incarcerated as Whites.” Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POLICY INITIATIVE (May 28, 2014),

[https://www.prisonpolicy.org/reports/rates.html?c=pie&gclid=CjwKCAjwNf6BRAwEiwAkt6UQumH\\_DVUN4BnbcLDbGci-Pma2CAYh7\\_nMPdVUi4ROkfw379gFDV6bBoCLnQQA\\_vD\\_BwE](https://www.prisonpolicy.org/reports/rates.html?c=pie&gclid=CjwKCAjwNf6BRAwEiwAkt6UQumH_DVUN4BnbcLDbGci-Pma2CAYh7_nMPdVUi4ROkfw379gFDV6bBoCLnQQA_vD_BwE).

<sup>22</sup> “During World War II, President Franklin Roosevelt signed Executive Order 9066 which called for more than 120,000 individuals of Japanese ancestry to be held without trial in detention sites throughout U.S. Over two-thirds of those imprisoned were U.S. citizens” Kara Matsuzawa, *Japanese American Internment Camps*, MOUNT HOLYOKE COLL., (Spring 2009)

<https://www.mtholyoke.edu/~matsu22k/classweb/>.

<sup>23</sup> Jim Chen, *With All Deliberate Speed: Brown II and Desegregation's Children*, 24 L. & INEQ. 1, 3 (2006) (“The infamous ‘all deliberate speed’ formula and the South's massive resistance to desegregation arguably dissipated much of Brown I’s promise. At a minimum, Brown II’s ‘all deliberate speed’ formula enabled public school districts in the South to delay desegregation for more than a decade. Nine years after Brown II, an exasperated Supreme Court finally declared that ‘[t]he time for mere ‘deliberate speed’ has run out.’”); *see also* Griffin v. County Sch. Bd., 375 U.S. 391, 392 (1964), *cert. granted* (“In view of the long delay in the case since our decision in the Brown [1954/1955] case and the importance of the questions presented, we grant certiorari and put the case down for argument March 30, 1964, on the merits, as we have done in other comparable situations without waiting for final action by the Court of Appeals.”).

rates,<sup>24</sup> abysmal access to health care,<sup>25</sup> minimal access to justice,<sup>26</sup> widely disproportionate accumulation of wealth,<sup>27</sup> massively unequal employment rates,<sup>28</sup> mass separation of detained undocumented immigrant children from their parents,<sup>29</sup>

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<sup>24</sup> Sakala , *supra* note 21.

<sup>25</sup> See Vann R. Newkirk II, *America's Health Segregation Problem Has the country done enough to overcome its Jim Crow health care history*, THE ATLANTIC (May 18, 2016) <https://www.theatlantic.com/politics/archive/2016/05/americas-health-segregation-problem/483219/>; See also Robin Osborn et. al., *In new survey of 11 Countries, US Adults Still Struggle with Access to and Affordability to Health Care*, THE COMMONWEALTH FUND (Nov. 16, 2016) <https://www.commonwealthfund.org/publications/journal-article/2016/nov/new-survey-11-countries-us-adults-still-struggle-access-and>.

<sup>26</sup> See U.S. Department of Justice Office for Access to Justice, <https://www.justice.gov/archives/atj> (“Department of Justice established the Office for Access to Justice (ATJ) in Mar. 2010 to address the access-to-justice crisis in the criminal and civil justice system. ATJ’s mission is to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status. ATJ staff works within the Department of Justice, across federal agencies, and with state, local, and tribal justice system stakeholders to increase access to counsel and legal assistance and to improve the justice delivery systems that serve people who are unable to afford lawyers.”); see also statement by immediate past president of the American Bar Association, Judy. Perry Martinez. “For too long, African Americans have borne the brunt of racism through laws that unjustly and disproportionately impact people of color. Through efforts like this website, we want to make it easier for lawyers to access information and become more involved in reforming our laws and improving the justice system.” American Bar Association Launches New Racial Justice Resource (June 15, 2020).

<sup>27</sup> “A close examination of wealth in the U.S. finds evidence of staggering racial disparities. At \$171,000, the net worth of a typical white family is nearly ten times greater than that of a Black family (\$17,150) in 2016. Gaps in wealth between Black and white households reveal the effects of accumulated inequality and discrimination, as well as differences in power and opportunity that can be traced back to this nation’s inception. The Black-white wealth gap reflects a society that has not and does not afford equality of opportunity to all its citizens” Kriston McIntosh et. al., *Examining the Black-white wealth Gap*, BROOKINGS, (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/>.

<sup>28</sup> “In 2018, the overall unemployment rate (jobless rate) for the United States was 3.9 percent; however, the rate varied across race and ethnicity groups. Among the race groups, jobless rates were higher than the national rate for American Indians and Alaska Natives (6.6 percent), Blacks or African Americans (6.5 percent), people categorized as being of Two or More Races (5.5 percent), and Native Hawaiians and Other Pacific Islanders (5.3 percent). Jobless rates were lower than the national rate for Asians (3.0 percent) and Whites (3.5 percent). The rate for people of Hispanic or Latino ethnicity, at 4.7 percent, was higher than the rate of 3.7 percent for non-Hispanics.” *Labor Force Characteristics by Race and Ethnicity, 2018*, BUREAU OF LABOR AND STATISTICS AND REPORTS (Oct. 2019), <https://www.bls.gov/opub/reports/race-and-ethnicity/2018/home.htm>.

<sup>29</sup> “Approximately 5,500 migrant children have been separated from their parents by the Trump Administration — not 2,800 as originally estimated — according to the ACLU who received a court-ordered accounting of each of the families by the government on Thursday. The accounting shows an additional 1,556 children were separated and approximately 1,000 children have been

federal immigration religious intolerance,<sup>30</sup> and for the purpose of this thesis, systemic and universal police abuse against American citizens of African descent by sworn *peace* officers of the law. Furthermore, out of Reconstruction and the Amendments (specifically the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup>) over two million new American Citizens (former enslaved Africans) were brought into our republic. Despite the Amendments, and the statutes promulgated by Congress into law effectuating the promises of the 14<sup>th</sup> Amendment's Equal Protection Clause, courts have diminished and or ignored Congress's specific *legislative intent*.<sup>31</sup> In consequence, millions of American citizens are segregated, oppressed, harassed, disproportionately incarcerated and ultimately murdered by those presumptively acting under the color of law. Importantly, in several cases, justices interpreted and re-interpreted facts resulting in the arguable antithesis of the primary purpose of legislation stemming from the Reconstruction Amendments to the U.S. Constitution.

One example is a criminal measure under 18 U.S.C § 242 (and 241). This statute originated from § 2 of the Civil Rights Act of 1866 and was expanded in 1874 to enforce the protections of the 14<sup>th</sup> Amendment for the Constitution by “appropriate

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separated from their parents since the practice was declared over by the Trump Administration in June 2018.” Jasmine Aguilera, *Here's What to Know About the Status of Family Separation at the U.S. Border, Which Isn't Nearly Over*, TIME (Oct. 25, 2019), <https://time.com/5678313/trump-administration-family-separation-lawsuits/>.

<sup>30</sup> See *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 250, 272 (4th Cir. 2018) (“On January 27, 2017—seven days after taking the oath of office—President Donald J. Trump signed Executive Order 13,769, ‘Protecting the Nation From Foreign Terrorist Entry Into the United States’ (‘EO-1’), 82 Fed. Reg. 8977 (Jan. 27, 2017). Invoking his authority under 8 U.S.C. § 1182(f), President Trump immediately suspended for ninety days the immigrant and nonimmigrant entry of foreign aliens from seven predominantly Muslim countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen...On a fundamental level, the Proclamation second-guesses our nation’s dedication to religious freedom and tolerance. The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.”).

<sup>31</sup> “In 1883, the U.S. Supreme Court unanimously held that it was unconstitutional for the federal government to penalize crimes such as assault and murder. It declared that the local governments have the power to penalize these crimes. In *United States v. Harris*, also known as the Ku Klux case, four men were removed from a Crockett County, Tenn., jail by a KKK-affiliated group led by County Sheriff R.G. Harris. They were beaten and one of them was killed. A deputy sheriff tried, but failed, to prevent what occurred. The court ruled that an act to enforce the Constitution’s Equal Protection Clause applied only to state action and not to state inaction. Under this thinking, the 14th Amendment authorized the federal government to take remedial action only when state actions, not those of individuals, violated the amendment”). Andrew Glass, *Grant signs KKK Act into law, Apr. 20, 1871*, POLITICO (Apr. 20, 2019), <https://www.politico.com/story/2019/04/20/this-day-in-politics-april-20-1279376>.

legislation.”<sup>32</sup> Section 242 implicitly outlines measures by the U.S. Attorney to criminally punish those persons who subjects any person to:

A deprivation of rights, privileges or immunities secured or protected by the Constitution or laws of the United States, or who execute 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.<sup>33</sup>

As case law and facts hold, however, the efficacy of § 242 has been diminished by judicial fiat and the failure to exercise § 242 by those empowered to use it to ensure justice for all American Citizens, i.e., the United States Department of Justice. Even worse, as will be discussed later, excuses not to prosecute state actors who clearly violate § 242 include a “lack of resources.”

Similarly, for civil actions against those acting under the color of law violating a citizen’s rights under the U.S. Constitution, 42 U.S.C § 1983 is rooted in the 1871 Ku Klux Klan Act, § 1979. However, § 1979 was not effectively used until 1961 with *Monroe et al. v. Pape et al.*<sup>34</sup> In this case, Mr. Monroe asserted federal jurisdiction under section R.S. 1979 for 13 officers in Chicago who entered his home without a search warrant or an arrest warrant and searched his home for a two day old murder without ever approaching a magistrate. In the complaint, it is alleged that:

[Thirteen] Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further alleges that Mr. Monroe was then taken to the police station and detained on “open” charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate, though one was accessible, that he was not permitted to call his family or attorney, that he was subsequently released without criminal charges being preferred against him. It is alleged that the officers had no search warrant and no arrest warrant and that they acted “under color of the statutes, ordinances, regulations, customs and usages” of Illinois and of the City of Chicago. Federal jurisdiction was asserted under R. S. §

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<sup>32</sup> Lampe, *supra* note 9, at 1.

<sup>33</sup> 18 U.S.C. § 242 (West 2020).

<sup>34</sup> 365 U.S. 167 (1961).

1979, which we have set out above, and 28 U. S. C. § 1343 and 28 U. S. C. § 1331.<sup>35</sup>

Mr. Monroe filed in District Court, which dismissed his complaint, and the Court of Appeals affirmed. Writing for the Supreme Court, Justice Douglas reversed the Court of Appeals ruling, stating that § 1979 sought to give plaintiffs a federal remedy for abuse where state law did not provide a remedy and to override certain state laws that violated a citizen's constitutional rights.<sup>36</sup>

The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include them. Accordingly we hold that the motion to dismiss the complaint against the City of Chicago was properly granted. But since the complaint should not have been dismissed against the officials the judgment must be and is *Reversed*.<sup>37</sup>

Thus, for reasons discussed, we call upon our elected officials to enact legislation to remedy the contemporary societal ills affecting Americans of African descent who are universally plagued at the hands of a select minority of peace officers, who effectuate selective racially motivated justice against this group of Americans citizens. Through this change in the law, we hope to ensure in the clearest sense, the privileges immunities first articulated in the Equal Protection clause of the U.S. Constitution and to account and correct for the wrongs embraced and supported by our criminal justice system. In essence, a reimagining of the term *Peace Officer* needs to be communicated to ensure viable change, *real substantial change*.

Moreover, this change in the law, and for this thesis, is merely a starting point for a long overdue social justice journey down the *Avenue of Monumental Change*. It is also a call to send a clear message to the minority of peace officers to critically think before denying a citizen his or her civil rights or using lethal force, especially in those situations where the officer's training *should* dictate a response involving something *less* than deadly force. Michigan State Police Officer, Lt. Arden Bow (Ret.) termed this a "force continuum," whereby the level of the suspected offense

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<sup>35</sup> *Id.* at 169.

<sup>36</sup> *Id.* at 172, 187.

<sup>37</sup> *Id.* at 191-92.

dictates whether “*guns come out.*”<sup>38</sup> Sadly, as is reported almost weekly, in most cases where an American of African descent is executed by a peace officer, the primary offense was a misdemeanor, and yet “guns came out.”

The concept of “guns out” is a response to the situation the officer finds himself in and what logical actions he needs to take to limit loss of life of others and himself. Recall the case where Charles Kinsey, a mental health care worker, who was assisting his mental patient, clearly not a threat to others in the immediate area, and a peace officer, Jonathan Aledda, shot Mr. Kinsey while aiming at his patient who had a toy truck in his hand. When Peace Officer Aledda arrived at the scene, which was already occupied and controlled by other officers, he was over 50 feet away. Nevertheless, he discharged his weapon, striking Charles Kinsey in the leg. The jury was deadlocked on the attempted felony manslaughter charges but acquitted Officer Aledda of a misdemeanor culpable negligence charge. In the Aledda case:

State Attorney Katherine Fernandez Rundle said in a statement after the mistrial that the case demonstrated how difficult it is to get a conviction in officer-involved shootings because Florida law gives wide leeway to police officers in such cases. Rundles said her prosecution team will discuss the option of retrying the officer on the felony counts.<sup>39</sup>

At the time of the shooting, Peace Officer Aledda, did not know that Mr. Kinsey, who was African American, was a health care worker and had the matter under control with his patient; in fact, Mr. Kinsey had his hands raised and told Officer Aledda not to shoot. Yet, guns came out and he shot Mr. Kinsey. Peace Officer Aledda’s apparent view of Mr. Kensey exhibited an implicit bias. Again, implicit bias training is often not effective because: 1) it is often taught by Americans of

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<sup>38</sup> Telephone interview with Lieutenant Arden Bow, Retired., Mich. State Police former Post Commander for Michigan State Police Post Monroe #28 (July 14, 2020). Lieutenant Bow is a graduate of Washtenaw Community College and Wayne State University and 25-year veteran of the Michigan State Police Department. During his 25 years, he served at the Michigan State Police Battle Creek Post #46, Michigan State Police Detroit Freeway Post #29, Michigan State Police Training Academy (temporary staff), Ypsilanti Michigan State Police Post #26, and Saint Clair Post # 23. With a promotion to Lieutenant in 1988, he was assigned at the East Lansing State Police Headquarters, he later was assigned to Detective Lieutenant. He then became the Technical Unit Commander, later returning to the Detroit Freeway Post #29 as the Assistant Post Commander. His last promotion was First Lieutenant where he served as the Post Commander of Monroe Post #28.

<sup>39</sup> Clyde Hughes, *Mistrial Declared in Trial of Florida Officer who Shot Mental Health Worker*, UPI (Mar. 16, 2019), [https://www.upi.com/Top\\_News/US/2019/03/16/Mistrial-declared-in-trial-of-Florida-officer-who-shot-mental-health-worker/3811552748061/](https://www.upi.com/Top_News/US/2019/03/16/Mistrial-declared-in-trial-of-Florida-officer-who-shot-mental-health-worker/3811552748061/).

African Descent, 2) Peace officers do not perceive they need implicit bias training, and 3) it is a reactionary effort to an event.<sup>40</sup> Thus, where is the accountability for this poor training? In June 2019, Peace Officer Aledda was finally convicted of this crime, but a jury *only* found him guilty of culpable negligence.<sup>41</sup>

We request amending 42 U.S.C § 1983 and 18 U.S.C §§ 241 and 242 to roll back historical judicial misinterpretations of Congress's *clearest intent* with those statues stemming from the 14<sup>th</sup> Amendment of the U.S. Constitution to enact *appropriate legislation*. With the recent indictment of four peace officers in Minneapolis, Minnesota,<sup>42</sup> in May of 2020, who allegedly [sic] murdered Mr. George Floyd for the possession of an assumed \$20 counterfeit note, a 2013

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<sup>40</sup> See Interview with Michigan State Police Lieutenant Arden Bow, Ret., *supra* note 38.

<sup>41</sup> “The officer, Jonathan Aledda, was found not guilty of two counts of attempted manslaughter Monday in the shooting of Charles Kinsey, the caretaker for Arnaldo Rios Soto. The officer was convicted of exposing another person to personal injury, a misdemeanor with a penalty of one year in prison.” Elinor Aspegren, *Police Officer who Shot Caregiver of Man with Autism found Guilty of Negligence*, USA TODAY (June 18, 2019, 3:15 PM), <https://www.usatoday.com/story/news/nation/2019/06/18/florida-police-man-autism-caretaker-shot-shooting/1485955001/>.

<sup>42</sup> “Attorney General Ellison charges Derek Chauvin with 2nd-degree murder of George Floyd, three former officers with aiding and abetting 2nd-degree murder,” The Office of Minnesota’s Attorney General’s Keith Ellison (June 3, 2020), [https://www.ag.state.mn.us/Office/Communications/2020/06/03\\_GeorgeFloyd.asp](https://www.ag.state.mn.us/Office/Communications/2020/06/03_GeorgeFloyd.asp). (“I want to begin with a reminder of why we’re here today. We’re here today because George Floyd is not here. He should be here. He should be alive. But he is not. About nine days ago, the world watched Floyd utter his last words, ‘I can’t breathe,’ as he pleaded for his life. The world heard Floyd call out for his mama and cry out, ‘Don’t kill me.’ Just two days ago, when I became the lead prosecutor in the murder of Mr. Floyd, I asked for time to thoroughly review all the evidence in this case that’s available so far, even while the investigation is ongoing. I also said that that I know it’s a lot to ask people and communities who have suffered decades and centuries of injustice to be patient and to wait longer for justice. I thank you for the patience you’ve show me in the pursuit of justice so far. I am here today to make some announcements in the prosecution of the murder of George Floyd. First, today, I filed an amended complaint that charges former Minneapolis police officer Derek Chauvin with murder in the second degree for the death of George Floyd. I believe the evidence available to us now supports the stronger charge of second-degree murder. Second, today, arrest warrants were issued for former Minneapolis police officers J.A. Kueng, Thomas Lane, and Tou Thao. Finally, today, Hennepin County Attorney Mike Freeman joined me in filing a complaint that charges former police officers Kueng, Lane, and Thao with aiding and abetting murder in the second degree, a felony offense. I strongly believe that these developments are in the interests of justice for Mr. Floyd, his family, our community, and our state. I’m the lead prosecutor on the State’s case and I will be speaking for it — and this is absolutely a team effort. I’ve assembled a strong team. We have one goal and one goal only: justice for George Floyd.”).

movement appropriately entitled *Black Lives Matter*<sup>43</sup> was revitalized, and earned universal respect, across the United States and the globe. Millions of people in industrialized nations engaged in civil demonstrations in support of the slogan, Black Lives Matter (“BLM”), a response to the question of whether the Equal Protection Clause of the 14<sup>th</sup> Amendment of the U.S. Constitution is applicable to Americans of African descent. African Americans are citizens too, vested equally with all rights and privileges of being a citizen of the United States. The irony of BLM is that it originated in a country whose very preamble to its constitution begins, “We The People.” Importantly, the BLM movement has garnered support across racial and international divisions, as many supporters are of European descent, or Caucasian—the “current” majority population in the United States.<sup>44</sup>

**Every** person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.<sup>45</sup>

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<sup>43</sup> “#BlackLivesMatter was founded in 2013 in response to the acquittal of Trayvon Martin’s murderer. Black Lives Matter Foundation, Inc is a global organization in the US, UK, and Canada, whose mission is to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes. By combating and countering acts of violence, creating space for Black imagination and innovation, and centering Black joy, we are winning immediate improvements in our lives”). BLACK LIVES MATTER, *About*, <https://blacklivesmatter.com/about/> (last visited Sept. 1, 2020).

<sup>44</sup> A recent survey reported that 67% of Americans “strongly support” Black Lives Matters. Of that figure, 31% of White Americans compared to 71% of Americans of African descent strongly supported BLM. Kim Parker, et al., *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement: Deep partisan divides over factors underlying George Floyd demonstrations*, PEW RESEARCH CENTER (June 12, 2020).

<sup>45</sup> SWORD & SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION (Mary Massaron & Edwin P. Voss, Jr. eds., 4th ed. 2015).

One of the fundamental flaws with § 1983 actions, when proceeding against a municipality from a corporate approach, is the Plaintiff's burden of proof. The current standard is "*Deliberate Indifference*," which was judicially imposed. With *Deliberate Indifference*, a plaintiff must prove by a preponderance of the evidence that the government official denied the plaintiff her Constitutional rights. *Deliberate Indifference* goes beyond simple negligence;<sup>46</sup> it speaks to a conscious disregard for a knowledgeable and substantial risk of harm.<sup>47</sup>

Another problem with § 1983 actions is that even in the most egregious circumstances, for example, when a peace officer's actions result in the senseless death of a citizen, the peace officer is shielded from personal accountability by *Qualified Immunity*. "*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."<sup>48</sup>

In addition to *Qualified Immunity*, the officer is also protected by a long history of iron-clad bargaining agreements defended by labor unions, making it next to impossible for the officer to be subjected to an "appropriate" disciplinary action. The usual circumstance in these cases results in the peace officer being placed on administrative leave with pay or relegated to "other assigned duties" not necessarily involving dealing with citizens.

Venturing beyond the civil perspective of fairness in the criminal justice system, the criminal perspective is also flawed, resulting in a paucity of criminal indictments for clear police abuse. The prosecutorial burden makes it next to impossible to prove a specification of a criminal charge beyond a reasonable doubt. Under 18 U.S.C § 242, prosecutors can proceed against peace officers criminally under limited circumstances. However, this type of prosecution is rarely used. One of the reasons, beyond the obvious political considerations warranting guarded

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<sup>46</sup> See *What is deliberate indifference according to 42 U.S.C. 1983?*, NOLL LAW, <https://www.noll-law.com/deliberate-indifference-according-42-u-s-c-1983/> (last visited Oct. 24, 2020); see also *Haley v. Gross*, 86 F.3d 630 (1996).

<sup>47</sup> See *Proffitt v. Ridgeway*, 279 F3d 503, 506 (7<sup>th</sup> Cir 2002).

<sup>48</sup> "...[T]his court mandated a two-step sequence for resolving government officials' qualified immunity claims. First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct. Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." (internal citations omitted). *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

judicial restraint, is the burden of proof that the peace officer acted with *specific intent*.<sup>49</sup>

This statute requires the prosecutor to prove beyond a reasonable doubt that the suspect peace officer acted with specific intent to violate a Constitutional Right in the commission of the felony offense against the citizen. Section 242 has three essential elements that must be met: “first, the defendant [sic] peace officer acted ‘under color of law’; second, the defendant acted ‘willfully’; and third, 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.”<sup>50</sup> This “willfully” requirement differs from a standard punitive measure only requiring the act, or in the case of, for example, murder one, “the intent” prong is necessary to prove the charge; without it, the charge is reduced to a lesser form of homicide, e.g., manslaughter or murder in the heat of passion. The 18 U.S.C § 242, *the criminal prong of a 1983 action*, states:

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

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<sup>49</sup> Lampe, *supra* note 9, at 3. (“By its text, Section 242 applies only to violations that are committed ‘willfully’. The Supreme Court stringently construed the willfulness standard in the 1945 case *Screws v. United States* (the main opinion in *Screws* was joined by only four justices, but binding opinions of the Supreme Court have since adopted its analysis). 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. 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.’”).

<sup>50</sup> *Id.* at p. 2.

including kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to DEATH.<sup>51</sup>

In sum, the “*specific intent*” statutory requirement of § 242, or *mens rea*, is inherently an impediment to an effective and fair prosecution of a state actor alleged to have committed a wrong under § 242:

In criminal law, mens rea and actus reus are two distinguishing elements of most charges. Mens rea regards a guilty mind and actus reus regards a guilty act. “Mens Rea,” or “guilty mind,” marks a central distinguishing feature of criminal law. An injury caused without mens rea might be grounds for civil liability but typically not for criminal. Criminal liability requires not only causing a prohibited harm or evil -- the “actus reus” of an offense -- but also a particular state of mind with regard to causing that harm or evil. ... Mens rea describes the state of mind or inattention.<sup>52</sup>

Proving specific intent *beyond a reasonable doubt* is a tall order for what normally could be charged as an actus reus offense, again, such as manslaughter or negligent homicide. In fact, along with lack of resources, etc., this “statutorily imposed”

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<sup>51</sup> Department of Justice, *Deprivation of Rights Under Color of Law: Summary of 18 U.S.C. 242*, <https://www.justice.gov/crt/deprivation-rights-under-color-law> (last visited July 1, 2020) (“Section 242 of Title 18 makes it a crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States. For the purpose of Section 242, acts under ‘color of law’ include acts not only done by federal, state, or local officials within their lawful authority, but also acts done beyond the bounds of that official’s lawful authority, if the acts are done while the official is purporting to or pretending to act in the performance of his/her official duties. Persons acting under color of law within the meaning of this statute include police officers, prison guards and other law enforcement officials, as well as judges, care providers in public health facilities, and others who are acting as public officials. It is not necessary that the crime be motivated by animus toward the race, color, religion, sex, handicap, familial status or national origin of the victim. The offense is punishable by a range of imprisonment up to a life term, or the death penalty, depending upon the circumstances of the crime, and the resulting injury, if any.”).

<sup>52</sup> Paul H. Robinson, *Mens Rea*, 34 FAC. SCHOLARSHIP AT PENN L. 995, 995 (2002), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1033&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1033&context=faculty_scholarship) (last visited Nov. 20, 2020).

requirement has presumptively stalled the prosecution of alleged state actors, resulting in very few cases<sup>53</sup> being tried under § 242:

Do all acts necessary and proper to hold the police department, officers responsible and others in the direct chain of command, including the local district attorney accountable for the unlawful deprivation of rights secured by the United States Constitution for unlawful acts against a person subject to the U.S. Constitution. Specifically, 1) Under 42 USC § 1983, eradicate the “deliberate indifference” standard<sup>54</sup> for civil liability cases brought against a municipality; 2) Under 42 U.S.C. § 1983, eradicate the qualified immunity protection; and 3) Under 18 USC § 241 and 242, eradicate the specific intent or “willful” burden of proof for criminal cases.<sup>55</sup>

To better understand the true gravity of this issue, consider the following personal narrative of an actual account, which occurred 34 years ago, given by the author of this paper:

The year was 1984 and I was 19, an African American scholarship student at Howard University and a cadet in Howard's Air Force ROTC program. It was a cool but bright Saturday morning about nine am, I was traveling southbound on I-95 adjacent to the Pentagon and I found myself lost in the rear of a clump of cars. I was returning a luxury blue Buick sedan with crush blue velvet seats and a stereo cassette player, the latest in audio technology. This Buick belonged to my Uncle, an Army pilot, who allowed me to use it the night before for a military ball to impress my date and to travel a fellow cadet with his date. It was a sensational event, in fact, I received a cadet accolade for excellence. An absolute high point for me, as I was the highest ranking cadet in my class. The following day, I set off to return to my Uncle his Buick as promised, on time. With a road map folded in a tiny square held up on my steering wheel by my thumbs, I attempted to navigate among a morass of vehicles in the DC Maryland and Virginia Tristate area while simultaneously reading the map. Just then, I noticed a large red light on top of a blue Virginia State trooper's car directly behind me. Before I knew it, this Virginia State trooper was pulling me over.

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<sup>53</sup> U.S. Commission on Civil Rights, *Revisiting Who Is Guarding the Guardians? A Report on Police Practices and Civil Rights in America* (Nov. 2000), <https://www.ncjrs.gov/pdffiles1/bja/249021.pdf> [hereinafter *Guardians*].

<sup>54</sup> *Id.* at 66.

<sup>55</sup> *Id.* at 67.

Surprisingly, I could not understand why I was the object of this trooper's intent. I wasn't traveling faster than the other cars, had not changed lanes, nor was I weaving in my lane, I was simply in the rear of the clump of cars. My only inclination was that I was being pulled over for inattentive driving because of my map, which I did not really believe to be the case. But then there was speed, all of us were exceeding the posted speed limit of 55 MPH by about ten miles, a usual rate of travel on the I-95, as most would attest. Certainly, speed could not have been the issue? But, unbeknownst to me, this trooper thought that I stole the Buick. Once pulled over, and over his vehicle's PA system he shouted incredible and shocking accusations that I shall never forget. This Virginia State trooper, a presumed peace officer, shouted, "Driver get the f\*%k out of the car, now God D\*\*t, I don't know if you stole that car, get out now God D\*\*t." Once I got out of the car, he aggressively instructed me to put my hands on the hood of the car and to not move. That is when I noticed he had his weapon drawn and aimed at me. He then repeated over and over again that he did not know if I stole the car. He also reiterated to me to not move. An absolutely horrific setting, certainly shocking to anyone's consciousness; well, as you can imagine, I froze in place completely unable to move out of pure unmitigated apprehension of being killed by this Virginia State trooper.

As the Virginia State trooper approached me, weapon still drawn, he viciously kicked my legs open while aggressively patting me down to search for weapons. I was wearing sweats and an Air Force unit T-shirt. Again, I did not move out of pure fear. He then holstered his weapon and told me to get my "f\*#king Ass" in his cruiser and to shut the "f\*#k-up." I followed his every instruction. At this point I was numb and simply shocked. Once in his cruiser, he demanded my driver license. Shaking, I handed it to him and told him that I never received a ticket. He called me a liar and again told me to "shut the f\*&k up." He never asked me for proof of registration and insurance. After running my driver's license, he seemed to have drawn down his anger a notch or two commenting to me that "you really never had a ticket, your record is clean???" He expressed shocking surprise that my record was clean and that I had actually told him the truth. And that is when he finally allowed me to speak. Gaining internal strength and moral courage to simply

speak for myself, I told him that I was an honor student at Howard University on a full trustee's scholarship and that I was studying to be a pilot in the Air Force. I then told him that my Uncle, an Army pilot, let me use his car to take my date to our ROTC military ball the night before and that I had to return it to him this morning due to his having to fly a military mission today to New York. This trooper said that he did not give a "f\*^k about that"; instead, he said that he was going to write me a ticket for reckless driving to make sure my "ass" comes to court. He then commented that "if I did not come to court, he was going to come up to Howard University and pull my black ass out of class and haul me into court." He also commented that I should feel lucky because my Uncle is a Mason, and that is why I was not being locked up right then and there, and that I should be thankful. My Uncle had a silver Masonic icon affixed on the rear of his car indicating his membership in the Masonic Lodge. I wondered however, why he insisted that I deserved a reckless charge when I was at the back end of a clump of cars simply traveling on I-95 near the Pentagon, a stretch of road that is most often congested and clogged with numerous vehicles.

Well, with ticket in hand and body still shaking, I gingerly walked to my car and sat there; admittedly, I cried. After some time, and some mental regrouping, I somehow traveled to my Uncle's home, which was in the opposite direction. Frankly, I don't remember specifics between getting the ticket and traveling to my Uncle's home, it was all simply a blur, but somehow, I just got there. Interestingly, however, I did not tell my Uncle about this State trooper. I was too embarrassed and still under a high degree of shock, humiliation, and fear. I only told him that I got a speeding ticket and that I would handle it.

About a month later, after emptying my student bank account, a sum of about \$150, I found myself in a small courtroom in some small town in Virginia near the end of the Yellow Metro Line. Sitting in this room, I heard several defendants plead something called *nolo contendere*,<sup>56</sup> Latin for I do not contend the charge, but I am not

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<sup>56</sup> *Nolo Contendere* is Latin for "no contest" and "in a criminal proceeding, a defendant may enter a plea of *nolo contendere*, in which the defendant does not accept or deny responsibility for the charges but agrees to accept punishment. The plea differs from a guilty plea because a 'no contest'

pleading guilty. This judge allowed defendants to proceed this way with an explanation. After about two hours, my name was called. Armed with my \$150, and dressed in my new penny loafers, dress corduroys, salmon button-down long sleeve shirt and argyle vest, I approached the bench and plead *nolo contendere*. The judge accepted my plea. As I began giving an explanation, I was rudely interrupted by the same State trooper who pulled me over. Surprisingly this trooper's tone and professionalism was 180 degrees opposite from his absurdly abusive and demining character that cool but bright Saturday morning. He began his comments to the Judge by stating that I was a fine young man and an honor student at Howard University. He then testified about my Uncle and that he had verified that I was returning his car following a military ball, all of which obviously fabricated and thus amounting to perjury. Once he ended his prevaricative diatribe, and to my surprise, he asked the judge to reduce the rate of speed alleged in my citation. The judge asked me if I was okay with a speed reduction in the citation; of course, I agreed. The Judge then said that my fine was only \$33. A \$33 fine from an allegation of reckless driving? How did that happen? Obviously pleased and vary thankful to that judge and trooper, I departed the courtroom with a notion that I had won something. I paid my fine and proceeded back to Howard University.

The truth of the matter is that my life could have abruptly ended that cool but bright Saturday morning, and for only driving ten miles over the posted speed limit on I-95 adjacent to the Pentagon. For me, I lived and 12-years later, I actually served in the Pentagon as a Judge Advocate in the Air Force Judge Advocate General's Department at the rank of Captain, USAF. I had also serve two collateral assignments as a Special Assistant United States Attorney. At the Pentagon, I was the first African American in the history of the Air Force to serve as the Air Force Chief of JAG Accessions, a lawyer myself, I hired lawyers for the Air Force. However, and regardless of this sensational military assignment, it was indeed painful to me to have to drive by the very site of my horrific experience every day. A nightmare that played in my mine every

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plea cannot be used against the defendant in another cause of action.” *Nolo contendere*, CORNELL LAW SCHOOL, [https://www.law.cornell.edu/wex/nolo\\_contendere](https://www.law.cornell.edu/wex/nolo_contendere) (last visited Oct. 24, 2020).

day I arrived and departed the Pentagon, simply having to pass the very spot where I was pulled over on that *cool but bright Saturday morning*, that shocking morning when a sworn peace officer aimed his weapon at me viciously alleging without probable cause that I committed grand theft auto, a felony. Lastly, this Virginia State Trooper, a sworn officer of the peace, was African American.

Unfortunately, this narrative often fails to end with the citizen being able to tell his or her story. All too often the end result is a summary execution under the color of state law with the absolute privilege of qualified immunity<sup>57</sup> for the offending officer without substantial repercussions or actions amounting to justice. For example, consider the case of Timothy Russell and Melissa Williams in Cleveland, Ohio in 2012, where the subject peace officer, Officer Michael Brelo, who after a 22-mile chase, jumped on to the hood of their car and shot 15 times directly into the front seat of the car striking both Mr. Russell and Ms. Williams, who were unarmed. The other five officers involved fired over 100 rounds, all aimed at Ms. Williams and Mr. Russell. Officer Brelo was the only officer tried in a court of law for two counts of voluntary manslaughter, and he was acquitted. Furthermore, although he and five other officers were terminated from the police department, five were later reinstated as part of an arbitration. In addition, a police supervisor was terminated, two supervisors were demoted, and nine other supervisors were suspended for 30 days.<sup>58</sup> Fortunately, the families of Mr. Russel and Ms. Williams received \$3M in a civil settlement, but no substantial accountability against the other officers, including Officer Brelo for shooting over 100 times into a car with two unarmed American citizens, whose apparent crime was leading a police chase for 22 miles.

Usually, however, the state fails to bring charges in such situations against the officer or the unit or those in the officer's chain of command or authority, including the District Attorney, who elects not to proceed for reasons not made public. All

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<sup>57</sup> Qualified Immunity “often shields police officers and other government officials from being sued by victims and their families, even if the officers violated their civil rights. And since prosecutors are loath to file criminal charges against government agents, suing rogue officers for damages in civil court is often the only recourse available to victims of government abuse.” Nick Sibilla, *New Bill Would Abolish Qualified Immunity, Make It Easier To Sue Cops Who Violate Civil Rights*, FORBES (June 3, 2020, 2:20 PM), <https://www.forbes.com/sites/nicksibilla/2020/06/03/new-bill-would-abolish-qualified-immunity-make-it-easier-to-sue-cops-who-violate-civil-rights/#7982a4136fbc>.

<sup>58</sup> See Elliott C. McLaughlin, *6 Cleveland Police Officers Fired for Actions in Fatal 2012 Chase*, CNN (Jan. 26, 2016), <https://www.cnn.com/2016/01/26/us/cleveland-police-officers-fired-chase/index.html>.

too often, officers are shielded, and nothing is done to deter them from committing the same type of offense again. Moreover, such rogue peace officers are often protected from accountability by their “blue line,” which then makes clear this blue line is worthy of indictment under 18 U.S.C § 241. Criminal offenses under the color of law amount to miscarriages of justice. Unfortunately, such felonious actions are not deterred by training<sup>59</sup> or the suspension with pay.<sup>60</sup>

Moreover, police unions and bargaining units usually fail to support sanctions such as an immediate suspension without pay for roque peace officers. Unfortunately, in many cases, there are no specific measures designed to deter law enforcement personnel from exceeding regulatory and statutory service expectations and committing homicide.

In fact, direct actions against police officers, according to Michigan State Police Detective Lieutenant Luis Langham (retired), will meet great resistance by police unions. In particular, police unions carefully scrutinize any actions that will reduce police officers’ pay or benefits. According to a recent article in the American Bar Journal, July 1, 2020, police unions may inhibit proposed reform. The author, Stephanie Francis Ward, reports that:

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<sup>59</sup> “Cultural awareness training and attempts to educate police officers to be more sensitive to different ethnic groups, races, and lifestyles, began to proliferate in the mid 1960’s and early 1970’s during and after the strong emphasis on civil rights, particularly for those rights long denied African –American citizens. The usual setting for this training was a panel presentation by trainers(s), the vast majority being racial or ethnic minorities. The courses were typically marked by a strident and emotional challenge to participants which could, and often did, result in deep anger and resentment on the part of the participants (Work, 1989). This interest in cultural awareness and sensitivity training intensified after the Rodney King incident in Los Angeles in the early 1990’s.” Stephen M. Hennessy, *Cultural Awareness Training for Police in the United States*, PHOENIX POLICE TRAINING ACADEMY, p. 3, <http://www2.minneapolismn.gov/www/groups/public/@civilrights/documents/webcontent/wcms1p-149102.pdf> (last visited Nov. 8, 2020).

<sup>60</sup> “These news accounts, and others from past few years, clearly reflect widespread concern with the processes used by police to discipline errant officers. The disciplinary process is supposed to help address police misconduct while supporting officers who have exercised their discretion appropriately and within the framework of law and policy. Unfortunately, the approaches police generally use fall well short of achieving their primary purpose and leave the department, employees and the community with concerns. There is significant dissatisfaction with the discipline approach; it is predominately punishment oriented, it takes an excessive amount of time, many decisions are overturned on appeal, and the entire process leaves one with a sense that there should be a better way to help officers stay within the boundaries of acceptable behavior and learn from the mistakes made in an increasingly difficult and challenging job.” Darrel W. Stephens, *Police Discipline: A Case for Change*, NAT’L INST. OF JUST. (June 2011), <https://www.ncjrs.gov/pdffiles1/nij/234052.pdf>.

The job of being a police officer comes with significant union protections. Work contracts often prevent municipalities from investigating internal discipline charges without affidavits, and it's also common for the agreements to restrict access to officers' employment files if they're charged with a crime. Additionally, police unions and municipalities have negotiated to throw out misconduct complaints after a certain time period. And if an officer shoots someone, the contract likely gives him what's known as a "cooling off" period, which prevents management from questioning the individual and witnessing officers about the incident within a certain time period, usually 48 hours. Also, some states give additional layers of protections for officers, with laws generally known as police officers' bills of rights. In fact, few, if any unions have as much power in bargaining for discipline, internal investigation stipulations and conditions of employment as police do.<sup>61</sup>

Thus, how is society to hold accountable rogue officers who engage in *Wyatt Earp* law enforcement, if training, suspension without pay, or other corrective actions can be stymied by union agreements? We suggest the answer lies in holding accountable those responsible for the greater enterprise, that is, the chain of command or authority through a § 241 prosecution. In a minority of cases, those in the chain of command, including police chiefs, district attorneys or mayors, voluntarily resign in the face of official misconduct, usually driven by political interests. However, these resignations are ineffective in changing attitudes and mindsets of officers within the subject police department. The attitudes and mindsets of the minority rogue "*Wyatt Earp*" officers remains unchanged, and the onslaught against American citizens while acting under the color of law continues unabated—and are often validated by the court.

We have seen numerous cases where the court ratifies obvious police abuse against American citizens by interpreting the evidence in the best light for the police officer, especially in politically charged cases. Recall the 1991 Rodney King matter involving four peace officers who beat Mr. King after a vehicular chase in an exclusive part of town where African Americans seldom visit.<sup>62</sup> The facts were

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<sup>61</sup> Stephanie Francis Ward, *Do police union contracts inhibit reform?*, ABA JOURNAL (July 1, 2020), <https://www.abajournal.com/web/article/does-collective-bargaining-in-police-contracts-prohibit-police-reform>.

<sup>62</sup> "A jury in the Los Angeles suburb of Simi Valley acquits four police officers who had been charged with using excessive force in arresting black motorist Rodney King a year earlier... The acquitted police officers were later convicted of violating Rodney King's civil rights in a federal

unconvertable, as the incident was filmed. Yet, an American jury found these officers innocent in a criminal trial, although two were convicted in a subsequent federal trial.

And what about the greater enterprise accountability? The Laquan McDonald case in Chicago is a prime example of a police department and district attorney *allegedly* suppressing evidence to presumptively stall charges being levied against former police officer Van Dyke et. al.<sup>63</sup>

McDonald was shot and killed on October 20, 2014 by Chicago Police Department (CPD) Officer Jason Van Dyke. Responding to a call for backup, Van Dyke stepped out of his police cruiser, and prosecutors allege that seconds later, he fired sixteen shots. In a much later (months) publicly-released police video of the incident, it appears that McDonald was shot several times after he had fallen to the ground, where he posed no threat to the safety of the officers. The entire encounter was captured on police dashboard cameras without audio, raising questions as to “whether officers were careless with the recording equipment or, worse, attempting a cover-up.”<sup>64</sup>

On October 20, 2014, Laquan McDonald, a 17-year-old American citizen was surrounded by law enforcement on a desolate road in Chicago as he wielded a knife. He was no immediate threat to others. When former police officer Van Dyke arrived at the scene, and in a “*Wyatt Earp*” fashion, he fired 16 bullets into Laquan

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court trial [a Section 1983 case].” *Rodney King Trial Verdict Announced*, HISTORY (Nov. 13, 2009), <https://www.history.com/this-day-in-history/rodney-king-trial-verdict-announced>.

<sup>63</sup> Craig Futterman, civil rights attorney and professor at University of Chicago Law School says, “[Systemic perjury by Chicago police] is a systematic problem. When there’s a police shooting, or when there’s an allegation of misconduct or brutality, the institutional response is to circle the wagons, denial, and cover up. And it’s throughout the entire organization. It’s not just sort of a code of silence [amongst officers but] really a phenomenon of narrative control and lying [from the top down].”. *Roundup: Craig Futterman on the Laquan McDonald Shooting Video*, UNIV. OF CHI. L. SCH. (Nov. 24, 2015), <https://www.law.uchicago.edu/news/roundup-craig-futterman-laquan-mcdonald-shooting-video>.

<sup>64</sup> Donald F. Tibbs & Tyron P. Woods, *Requiem for Laquan McDonald: Policing as Punishment and—Abolishing Reasonable Suspicion*, 89 TEMPLE L. REV. 763, 774-75 (2017); See also Wayne Drash, *The Killing of Laquan McDonald: The Dashcam Video vs. Police Accounts*, CNN (Dec. 19, 2015, 12:32 AM), <http://www.cnn.com/2015/12/17/us/laquan-mcdonald-video-records-comparison/>. For a summary of how CPD attempted to minimize culpability for McDonald’s shooting; Curtis Black, *How Chicago Tried to Cover Up a Police Execution*, CHI. REP. (Nov. 24, 2015), <http://chicagoreporter.com/how-chicago-tried-to-cover-up-a-police-execution/>.

McDonald, killing him instantly. Unbeknownst to anyone at the time, Mr. McDonald's killing was recorded, and the video was finally released several months later through a Freedom of Information Act request. The Laquan McDonald case amounts to manifest enterprise accountability. However, it took an election to remove the district attorney and the CPD Chief did not resign until three years later.

## **II. UNDER 18 U.S.C SECTIONS 241 AND 242, ERADICATE THE SPECIFIC INTENT OR "WILLFUL" BURDEN OF PROOF FOR CRIMINAL CASES**

18 U.S.C § 241 gives the U.S. Attorney the tools to hold accountable all who are connected with the crime committed. Holding a person or persons accountable for a crime committed by the principal actor when that person aids and abets the principal actor is a long standing legal premise in our American jurisprudence system.<sup>65</sup> In the circumstance where a peace officer allegedly commits a felony murder or vicious assault against a citizen—and others, with knowledge, suppress evidence or fail to hold the officer accountable, these “others” could be viewed or considered as accessories after the fact:

Since the modern police organization has assumed major responsibility for the apprehension of criminals, prosecutions for misprision of felony are almost unknown. According to Blackstone, the crime at common law consists merely in the “concealment of a felony which a man knows, but never assented to; for if he assented this makes him either principal or accessory.” Thus a positive duty is placed on the citizen to reveal his knowledge of the commission of a crime to the proper authorities and otherwise to aid in bringing the felon to justice, and failure to do so constitutes the crime of misprision of felony. In *State v. Wilson*, however, it was stated that mere neglect to inform the proper authorities of the commission of a crime and the identity of the felon is not in itself an offense, but such conduct becomes indictable only where the failure to report is coupled with an “evil motive” to obstruct justice...*The federal*

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<sup>65</sup> 18 U.S.C. § 3 (West 2020). (“Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact. Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years”).

*criminal code declares that whoever has knowledge of a crime cognizable by the courts of the United States and "conceals and does not as soon as may be disclose" to the proper authorities shall be subject to fine and imprisonment. (emphasis added).*<sup>66</sup>

The primary issue here is whether the U.S. Attorney's office is properly poised under law to take appropriate actions against those, acting under the color of state law, who would deny a person subject to the U.S. Constitution his civil rights. The fundamental problem with a § 241 action is that, similar to a § 242 action, the element of willfulness, or specific intent has to be proven beyond a reasonable doubt. Put in into perspective, imagine the difficulty an AUSA has proving that rogue state police officers specifically intended to deny an American citizen his rights under the U.S. Constitution. When a rogue police officer defends himself by stating that he used deadly force to protect himself or others, how does the AUSA overcome that defense in a § 242 action? How does the AUSA overcome that defense against the subject police unit in a § 241 Action?

The AUSA has the burden of proving the charge and specification beyond a reasonable doubt, but specifically, under §§ 241 and 242, must prove that the peace officer intended to specifically and willfully violate a person's Constitutional rights. The court in the 1945 case, *Screws v. United States*, addressed this "willful" standard.<sup>67</sup> In *Screws*, the U.S. Supreme Court reversed the lower courts' rulings, stating that the government's burden was to show that the 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."<sup>68</sup> Again, the Court pointed out the difference between a *mens rea* offense and an *actus reus* offense by stating, "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."<sup>69</sup>

This case involves a shocking and revolting episode in law enforcement. Petitioner Screws was sheriff of Baker County, Georgia...The arrest was made late at night at Hall's home on a

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<sup>66</sup> *Recent Cases: Criminal Law. Accessory after the Fact. Misprision of Felony*, 8 UNIV. OF CHI. L. REV. 338, 339 (1941), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1856&context=uclrev>.

<sup>67</sup> 325 U.S. 91 (1945).

<sup>68</sup> Lampe, *supra* note 9, at 3.

<sup>69</sup> *Id.*

warrant charging Hall with theft of a tire. Hall, a young [N]egro about thirty years of age, was handcuffed and taken by [patrol] car to the court house. As Hall alighted from the car at the court-house square, the three petitioners [Screws et. al] began beating him with their fists and with a solid-bar blackjack about eight inches long and weighing two pounds. They claimed Hall had reached for a gun and had used insulting language as he alighted from the car. But after Hall, still handcuffed, had been knocked to the ground they continued to beat him from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the court-house yard into the jail and thrown upon the floor dying. An ambulance was called and Hall was removed to a hospital where he died within the hour... There was evidence that Screws held a grudge against Hall and had threatened to “get” him... We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.<sup>70</sup>

Fortunately for some lower courts, *Screws* has not been exactly controlling. For example, the U.S. Court of Appeals for 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 that he had no real familiarity with the Constitution or with the particular Constitutional right involved.’”<sup>71</sup> Thus, compare the *willfulness standard* to the narrative discussed earlier involving Colonel James Durant and the Virginia State Trooper who had no probable cause<sup>72</sup> to believe that the college student he pulled over for allegedly speeding stole the vehicle he was operating. Did the State Trooper “intend” to violate the college student’s Constitutional rights, specifically

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<sup>70</sup> *Screws*, 325 U.S. at 92-93, 103.

<sup>71</sup> Lampe, *supra* note 9, at 4.

<sup>72</sup> “Probable cause is a requirement found in the Fourth Amendment that must usually be met before police make an arrest, conduct a search, or receive a warrant. Courts usually find probable cause when there is a reasonable basis for believing that a crime may have been committed (for an arrest) or when evidence of the crime is present in the place to be searched (for a search). Under exigent circumstances, probable cause can also justify a warrantless search or seizure. Persons arrested without a warrant are required to be brought before a competent authority shortly after the arrest for a prompt judicial determination of probable cause.” *Probable Cause*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/probable\\_cause](https://www.law.cornell.edu/wex/probable_cause) (last visited Oct. 24, 2020).

his 4<sup>th</sup> Amendment Right against unreasonable search and seizures? The Virginia State Trooper did have probable cause to detain the college student for speeding [albeit technically]; however, when the Virginia State Trooper stated several times that “he did not know if the college student stole the car” and accorded himself in a protocol akin to a felony stop, the collective or totality of circumstances, describes a peace officer who is following what some officers call a *hunch* and is departing from his training and policy. However, there is no mention in the 4<sup>th</sup> Amendment of the U.S. Constitution of the term, *hunch*.

In that narrative, on the issue of probable cause specifically, the state trooper had no reason to believe the college student was driving a stolen vehicle; so why did he engage in a felony stop with GUNS OUT? As such, are these facts alone strong enough for a § 242 case to proceed to verdict? Suppose the State Trooper used deadly force because the college student flinched or failed to obey a specific command, such as to “get out of the f\*&king car.” Could an AUSA successfully pursue a § 242 case against the Virginia State Trooper, proving beyond a reasonable doubt that the Virginia State Trooper intended to deny the college student a specific right under the U.S. Constitution? Again, this is a tall order and makes the burden of proof simply too high; and assuming somehow the AUSA can get beyond the specific intent element of a § 241 or 242 case, what about the lack of trial resources needed to successfully try the case and the political pressures opposing indictment?

Suffice it to say, Congress’s intent in promulgating laws to strengthen the Equal Protection Clause of the 14<sup>th</sup> Amendment brings into question whether their specific intent is indeed viable in actions brought under 42 U.S.C § 1983, and 18 U.S.C §§ 241 and 242. Unfortunately, the bottom line in that inquiry concerns the deprivation of civil rights. But perhaps now is the time to amend 42 U.S.C § 1983, giving plaintiffs a fair opportunity for redress against the state for wrongs committed by state actors acting under the color of law. And with regards to the U.S. Attorney’s office, and 18 U.S.C § 242 (and 241 respectively), now is the time to support the U.S. Attorney to proceed *fairly* in a criminal proceeding against a municipality for criminal actions without the unreasonable statutory requirement of *mens rea*, or specific intent. Perhaps narrowly defined language for a specific set of circumstances giving rise to such an action will provide the U.S. Attorney with clear authority to proceed accordingly, thus reversing the statutorily imposed specific intent standard.

Thus, in the situation where an unarmed citizen, of a protected class, is killed or wounded by an officer acting under the color of state law where the officer exercised a clear abuse of discretion, three legal actions should naturally proceed: 1) criminal charges ensuing by the cognizant state attorney, 2) a criminal case proceeding under 18 U.S.C §§ 242 and or 241 by the cognizant U.S. Attorney’s office if applicable, and 3) a civil case initiated by a plaintiff under 42 U.S.C §

1983. On the administrative front would follow suspension with or without pay along with assignment to “other duties” as appropriate. Due to iron clad bargaining agreements, suspension without pay oftentimes does not occur; however, suspension with pay occurs often. This response should be commonplace if any change or general deterrence is expected to ensue across the country, and if the United States is to begin reimagining peace officers and ensuring accountability.

Can officers distinguish clearly between intentional and unintentional deprivation of a citizen’s Constitutional rights? Moreover, should the courts therefore be left to interpret a §§ 241 and 242 matter on the question of whether the subject peace officer specifically intended to deny a citizen his Constitutional Rights? Police training, according to Lt. Arden Bow, provides specific lessons on dealing with the general public. The problem, according to Lt. Bow is that once in a non-training environment, the officer acts with instinct along with his or her training. Sadly, this concept of instinct could dictate the officer’s primary actions, which could include justifiable homicide.

Additionally, should the specific police unit responsible under § 241 for providing the environment, equipment, and training that allowed the officer to take the felonious actions against the citizen be held accountable? The officers in these circumstances, the Wyatt Earps, feel emboldened given the unlikelihood they will face reprisal or disciplines.

We are at this point in American history because of the number of rogue peace officers who have violated their training, policy and custom, and instead execute law enforcement engagements with civilians based upon their own ill-conceived notions of grandeur, supremacy and bias—which often results in the senseless death of American citizens.

So how do we best deter law enforcement officers from committing criminal offenses? What constitutes a sufficient deterrence, rehabilitation, punishment, extra training, specific deterrence, general deterrence, etc.? Retired Michigan State Police Lieutenant, Arden Bow believes the answer lies with the societal selection pool. He states that “law enforcement is a sample of the general public” and that the selection pool reflects societal ills. He indicated that about 60% of police academy cadets in Michigan graduate, but that graduation rate does not identify those who would engage in abusive law enforcement.<sup>73</sup> Similarly Detective

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<sup>73</sup> “The Michigan State Police started in 1917 and it wasn’t until 1967 when it hired its first officer of African descent. Training for racial bias is not the answer. We tried diversity training and the response in part is usually complaints by the officers trained and the trainees are usually African American. We do engage in respect training for dealing with the public, but this is different from use of force. Respect training involves how to speak to citizens, e.g., yes sir, yes ma’am, etc. The training we receive for use of force is based upon a ‘Force Continuum Graph.’ This Force Continuum Graph depicts when to use deadly force, i.e., when your life or the life of another is

Lieutenant Lewis Langham,<sup>74</sup> another retired Michigan State Police officer, said that some of the officers who unlawfully kill citizens under the color of law do so based upon escalating circumstances that they cannot control. These escalating circumstances stem from the officer issuing an illegal order and the citizen knowing it is an illegal order and therefore choosing not to follow it. Like Lieutenant Bow, Detective Lieutenant Langham emphasized recruitment and hiring as a root cause, and that character is key. Unfortunately, as Detective Lieutenant Langham mentioned, local police departments do not do complete background investigations on new recruits, similar to the type used by the Federal government for security clearances. Thus, there is a definite need to conduct a sufficient background checks to root-out potential rogue officers.<sup>75</sup>

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threaten. For example, if an officer is dealing with a high risk felon, then the use of deadly force is an option, i.e., the ‘guns come out.’ But, if you are dealing with a simple misdemeanor, use of deadly force is not a reasonable option. This is the issue.” Interview with Lieutenant Arden Bow, *supra* note 38.

<sup>74</sup> Interview with Detective Lieutenant Lewis Langham, *supra* note 2. “[I]n 2007, Professor Langham served as deputy legal counsel and policy adviser for the office of Michigan Governor Jennifer M. Granholm. He assisted the governor's legal counsel on legal issues related to criminal justice, prisons, homeland security, and civil rights. He also served as a liaison between the governor and various interest groups and advised the governor on all policy or departmental issues related to the Michigan State Police, Department of Corrections, Homeland Security, Military & Veterans Affairs, and Civil Rights. Professor Langham formerly worked as an assistant public defender in the Washtenaw County Office of Public Defender in Ann Arbor, Michigan. He also worked as a solo practitioner in Southfield, Michigan, focusing on criminal defense, estate planning, and divorce. Before he entered the legal profession, Professor Langham was a career law enforcement officer. He served 25 years with the Michigan State Police, beginning as a uniformed road trooper and moving up through the department as a Detective Specialist in the Criminal Investigation Division, Narcotics Section; a Detective Sergeant, Southeastern Criminal Investigation Division, Diversion Unit; a Detective Lieutenant, Oakland County Narcotics Enforcement Team; and Detective Lieutenant, Tobacco Products Tax Fraud Team. He was also the liaison to the United States Secret Service where he handled Presidential and Dignitary Protection Detail Assignments.” W. Mich. Univ. Cooley L. Sch., <https://www.cooley.edu/faculty/lewis-langham>.

<sup>75</sup> Interview with Larkland Taepe, Retired Ill. Special Agent (June 2020). “Law enforcement officials with the Illinois State Police on average, are not the topic of sufficient background investigations. What is normally accomplished for the background search is a verification of ‘references’ the law enforcement applicant puts on his/her application. A sufficient background investigation similar to a federal security clearance could possibly weed-out persons with character flaws before arming such persons with the singular authority to stop an alleged felon. We have a number of officers who maintain a ‘Wyatt Earp’ persona departing sufficiently from their training and instead going rogue. And some of these officials have character flaws that ‘in their minds’ justify the killing of African Americans at an alarming rate per capita, you can call them racists; we just can’t afford to have them on the force with a lethal weapon dealing with citizens; they are a danger to society, the force and themselves. A sufficient background review,

Clearly, a key remedy for preventing rogue officers from committing felonious assaults on American citizens requires turning again to enterprise accountability. To this end, we believe possible steps might include:

- Curtailing a police department's or district attorney's office's fiscal year budget if required to pay fines for violating citizens' rights.
- Amending 18 U.S.C § 241 quashing the specific intent element to give the U.S. Attorney a fair opportunity to represent the United States in such cases, thus holding the enterprise accountable. Police departments would then be adequately motivated to engage in, sufficient background checks that could help root-out potential rogue officers.
- Imposing a substantial sentence on departmental officials of concern under 18 U.S.C § 241 or in the case of an individual, § 242, and with the specific intent to deny a person's Constitutional rights, versus a simple actus reus action deleted as a requirement of 18 U.S.C §§ 241/242.

### III. UNDER 42 USC SECTION 1983, ERADICATE THE QUALIFIED IMMUNITY PROTECTION

That the American Bar Association urges federal, state, local tribal, and territorial governments to enact legislation to eliminate or substantially curtail the defense of qualified immunity in civil actions brought against law enforcement officers under 42 USC 1983 [sic] to redress deprivations of rights, privileges, and immunities secured by the Constitution and Laws of the United States or Territory.<sup>76</sup>

On August 4, 2020, the American Bar Association (ABA) House of Delegates voted as policy on ABA Resolution 301c concerning the elimination or curtailment of the defense of qualified immunity under 42 U.S.C 1983. This august body, representing over 420,000 lawyers and judges across the nation collectively said that *Qualified Immunity* needs to be eliminated or curtailed. According to the ABA:

- 1) [*Q*ualified immunity is not grounded in history or precedent, 2) *qualified immunity* [sic] has made it virtually impossible for victims of police brutality [sic] to recover, 3) *qualified immunity* [sic] defenses wastes scarce judicial resources, 4) *qualified immunity*

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along with a psychological inquiry could enable police departments to better discover these future 'rogue' officers at the hiring process."

<sup>76</sup> *Resolution 301a*, ABA (Aug. 4, 2020),

<https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/301a-annual-2020.pdf>.

defenses have been difficult to apply in a consistent manner, and 5) qualified immunity defense has left constitutional rights effectively *un-remedied* in many circumstances.<sup>77</sup>

Again, refer to the college student narrative mentioned above where the Virginia State Trooper pulled his weapon out on then college student James Durant for a misdemeanor speeding violation. We know that there was probable cause to apprehend the college student for alleged speeding, a misdemeanor in Virginia.<sup>78</sup> But based upon the numerous assertions by the officer alleging that the college student stole the car, does that add in some way to the probable cause for a speeding offense? And, based upon the officer pulling out his weapon and aiming it at the college student, ordering the college student to “f&%king” exit the car and to place his body in a position to be searched, are these actions consistent with the offense of speeding ten miles over the posted speed limit? More importantly, is this Congress’s *specific intent* with the Equal Protection Clause of the 14<sup>th</sup> Amendment?

Clearly the officer had probable cause to apprehend the college student for speeding, but did he go beyond his authority, after conjuring up a separate basis to engage in a clearly felonious stop warranting weapons out and at the ready to take a more intrusive search of a suspect, ultimately fabricating the facts upon which he was able to extend a basic search and seizure under the 4<sup>th</sup> Amendment. We know that the officer had no report of the vehicle being stolen; this alone is the crux of his excessive abusive actions. If all the officer had to legitimately form his basis for a search and seizure was a misdemeanor (speeding), this Virginia State Trooper implicitly exceeded his authority under law and arguably departed from training, custom and practice when he engaged the college student under his fabricated belief, or *hunch*, that the car was stolen.

We know that for 42 U.S.C § 1983 cases, the offending officer has a judicially imposed defense of Qualified Immunity, which allows him or her to evade personal liability for violating a citizen’s constitutional rights. And we know that the crux of the judicially imposed standard of qualified immunity for § 1983 cases is a violation of a citizen’s U.S. Constitutional rights; with Qualified Immunity, the plaintiff is left to show using the “clearly established law” doctrine for precedent, an exact factual precedent, which is very difficult to prove. However, if there is no precedent, then the defense of *Qualified Immunity* may stand, thus relieving the officer of responsibility. And, if precedent exists, the facts have to be almost

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<sup>77</sup> *Id.* at p. 1.

<sup>78</sup> Va. Code Ann. § 46.2-937. “For purposes of arrest, traffic infractions shall be treated as misdemeanors. Except as otherwise provided by this title, the authority and duties of arresting officers shall be the same for traffic infractions as for misdemeanors.”

identical to the U.S. Constitutional right abridged by the officer. For example, in *Mattos v. Agarano*,<sup>79</sup> the defense of Qualified Immunity stood because the court could not find precedent of a U.S. Constitutional right when an officer repeatedly tased a pregnant woman who was 1) nonviolent, and 2) simply refused to exit her car for what amounted to a misdemeanor stop. Similarly, in *Jessop v. City of Fresno*,<sup>80</sup> *Qualified Immunity* stood for officers who stole \$225,000 from a plaintiff during a legitimate search based upon a warrant. The court granted the defense of Qualified Immunity because “the circuit had never addressed a situation involving theft of property seized pursuant to a search warrant by police officers.”<sup>81</sup> Thus, in the case of the college honor student stopped by a Virginia State Trooper for traveling 10-miles faster than the posted speeding limit, in order to prevail against a Qualified Immunity defense, he needs to show that the officer 1) violated his U.S. Constitutional rights (in this case, 4<sup>th</sup> and 14<sup>th</sup>), and 2) show precedent upon which his facts exactly mirror a previously ruled upon case. Is this reasonable to hold the officer personally liable for clearly violating a citizen’s rights and departing his office’s training and policy? Is this Congress’s *Specific Intent*?

The *singular* aspect of having to show clear precedent, an exact precedent, supports that granting the defense of Qualified Immunity for rogue peace officers sends the clearest message to injured potential plaintiffs that even if the state is held liable, the rogue peace officer will not be held accountable. In fact, according to the American Bar Association House of Delegates Report for Resolution 301c in the 2020 House of Delegates meeting at the ABA 2020 Annual meeting:

Police officers are virtually always indemnified. Between 2006 and 2011, in forty-four of the country’s largest jurisdictions, officers financially contributed to settlement and judgments in just .41% of the approximately 9,225 civil rights damages actions resolved in plaintiffs’ favor, and their contribution amounted to just .02% of the over \$730 million spent by cities, counties, and states in these cases. Officers did not pay a dime of the over \$3.9 million awarded in punitive damages.<sup>82</sup>

So why would a rogue peace officer honor a citizen’s U.S. Constitutional rights when the courts will not hold the officer liable—and in those minority of cases when a

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<sup>79</sup> 661 F. 3d 433 (9<sup>th</sup> Cir 2011).

<sup>80</sup> 936 F. 3d 937 (9<sup>th</sup> Cir. 2019).

<sup>81</sup> *Resolution 301a*, *supra* note 76, at 5.

<sup>82</sup> *Id.* at 15; *see also* Lant B. Davis, John H. Small & David J. Wohlberg, *Suing the Police in Federal Court*, 88 YALE L. J. 781, 810-12 (1979); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 686 (1987).

rogue peace officer is held financially liable, he is often indemnified? The idea behind the judicially created Qualified Immunity standard had the justifiable purpose of not holding a public official personally liable for actions taken while executing their office. But this idea was premised upon the government official not committing crimes:

Qualified immunity is a court-developed legal doctrine...[it] has been defended as necessary to ensure that individual government employees will not be subjected to potentially crushing personal civil liability merely for making honest mistakes or for failing to anticipate doctrinal developments in constitutional law.<sup>83</sup>

In fact, in 1781, Congress voted into law § 1983, which states “officers who violated U.S. Constitutional rights were strictly liable.”<sup>84</sup> Further, the protection indicated that if the defendant [officer] “acted in good faith,” he could receive the benefit of qualified immunity. In *Pierson v. Ray*,<sup>85</sup> a group of officers received the Qualified Immunity protection when they arrested several African American clergymen who attempted to use a bus terminal that was then segregated. The officers stressed they were “acting in good faith” and the U.S. Supreme Court concurred with § 1983, stating Congress did not intend to abrogate the defense of probable cause and good faith.<sup>86</sup>

However, this principle is not new or sacrosanct to police departments across the Union. Under U.S. Equal Employment Commission<sup>87</sup> principles, a government agent found to have committed an offence, e.g., a Title VII<sup>88</sup> protection, is not

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<sup>83</sup> *Resolution 301a*, *supra* note 76, at 1; see *Pierson v. Ray*, 386 U.S. 547 (1967).

<sup>84</sup> *Resolution 301a*, *supra* note 76, at 3; see also William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 58-60 (2018); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 415 (1986).

<sup>85</sup> 386 U.S. 547 (1967).

<sup>86</sup> *Id.* at 555.

<sup>87</sup> See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/> (last visited Nov. 7, 2020).

<sup>88</sup> *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964> (last visited Nov. 7, 2020). (“To enforce the [US] constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes. Be it enacted by the Senate and House of Representatives of the United States

usually held personally liable so long as he or she was acting within the scope of their employment. Only when he or she steps clearly outside of their office and acts on their own accord without out any benefit or direction of the Agency can they then be held liable. Similarly, in the U.S. military, a commander cannot be sued personally for committing a wrong. In law enforcement, due the very nature of engaging with citizens in potentially lethal settings, the officer needs some measure of assurance that he will not be held personally liable for executing the duties of his sworn office. This is reasonable and arguably the basis of qualified immunity. However, in the minority of the egregious cases, where the officer steps outside of his office and acts on his own accord, ultimately ending the life of an American citizen, should this be qualified immunity as a “*get out of jail free card?*”

Similarly, the military does not have qualified immunity for its police officers, although they are held liable for wrongdoing. For example, with issue of civilian engagement during an armed conflict, the military turns to the Law of Armed Conflict<sup>89</sup> (LOAC) for guiding principles and laws for personal accountability. LOAC is simply a collection of treaties that govern warfare to limit unnecessary loss of life and unnecessary loss of property. A military member who violates a certain treaty, such as the Geneva Convention, can be tried criminally under Article 18 of the Uniform Code of Military Justice;<sup>90</sup> similarly, a military member can be disciplined administratively for a violation of LOAC. Moreover, we have witnessed the military holding accountable those members who violated “an enemy’s” (not a citizen of the United States) rights; such is the case with the 1968 Mai Lay Massacre,<sup>91</sup> where Lt. William Calley was tried and convicted for killing civilians. And, in 2003-2006, the infamous Abu Ghraib prison in Iraq, with cases involving military police guards who abused the “enemy” detainees;<sup>92</sup> they too were tried in

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of America in Congress assembled, That this Act may be cited as the ‘Civil Rights Act of 1964.’”).

<sup>89</sup> See Law of Armed Conflict Deskbook, 2015, International and Operational Law Department, The Judge Advocate General’s Legal Center and School, U.S. Army Charlottesville, Virginia, LCDR David Lee, JAGC, USN Editor and Contributing Author, [https://www.loc.gov/rr/frd/Military\\_Law/pdf/LOAC-Deskbook-2015.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Deskbook-2015.pdf).

<sup>90</sup> 10 U.S.C.A. § 815 (West 2020).

<sup>91</sup> “In response to news of the massacre, the military launched an investigation into the Charlie Company and their alleged actions. Lt. General W.R. Peers, who led the initial investigation, recommended that charges be brought against 28 officers as well as two non-commissioned officers involved in covering up the massacre. Charges were brought against a total of 13 officers. Ultimately, only one soldier, Lt. William Calley, was convicted and sentenced to life in prison.” Kristeen Briggs & Jonathon Figueroa, *My Lai Massacre*, BAYLOR (Mar. 16, 1968), <https://blogs.baylor.edu/mylaimassacre/>.

<sup>92</sup> “Eleven US soldiers were convicted of crimes relating to the Abu Ghraib scandal. Seven of those were from Maryland-based 372nd Military Police Company. A number of other service

a court of law (a court-martial). So, if the military will hold accountable a member for violating an “enemy’s” human rights, why are we grappling with police departments not holding peace officers accountable for violating American citizen’s rights?

And, with regards to civil liability in the military, and other federal government entities, a person harmed by the military due to the negligence of a military member (civilian or active duty), can file under the Federal Tort Claims Act for redress against the military or government in general. However, if a military member exceeds his or her authority and engages in an activity not warranted or sanctioned by the military, he or she is opened up to civil liability from a potential plaintiff and does not enjoy the defense of qualified immunity. Such is the case, for example, when military commanders attempt to exert pressure on local business members who they believe breached a contract, etc. with one of the military commander’s troops. In that scenario, the military commander presumptively exposes herself to, in this case, interfering with a lawful contract between two distinct parties, the merchant and the customer.

However, and more germane to the issue of abusive law enforcement, since the military has thousands of law enforcement officers, a deeper view of its culture is helpful in this analysis. Each military branch has a policing unit as a distinct part of its organization, and the function of this policing unit is similar, if not almost exactly akin to the function of peace officers. Again however, unlike civilian peace officers, military police do not enjoy the defense of qualified immunity. Most military bases, forts, posts, etc., have military housing where hundreds of military members and their civilian family reside. When an issue arises that involves a military police officer, the civilian suspect is afforded the same treatment expected of a non-military peace officer under the U.S. Constitution. Interestingly, however, the notion of military police abuse violating the U.S. Constitution is *de minimis* at best. So, why is Qualified Immunity not needed in the military? Could it be the security clearance background check of each military police officer to grant them a “secret clearance”? Could it be the intensive training, including training by military lawyers, or Judge Advocates? Could it be the longstanding and culturally enriched diversity training that all military members receive? Or could it ultimately be the specific and general deterrence from being prosecuted under the UCMJ, or being administratively discharged from the Armed Forces? In other words, military police officers are indeed held accountable by the law and their chain of command for wrongs committed. Their background checks, training and discipline are also

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members were not charged but reprimanded...” *Iraq Prison Abuse Scandal Fast Facts*, CNN WORLD, <https://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/index.html> (last updated Mar. 22, 2020).

important factors. So, what is the difference between criminal accountability for military police officers and civilian police officers? Could it all amount to accountability for wrongs committed? Military police commanders and First Sergeants universally have direct tie-ins and very close working relationships with the servicing Judge Advocate's office. Thus, matters warranting judicial or administrative attention are expeditiously handled. And since there are no bargaining units in the military, time spent on infractions are expeditiously managed. However, for small and large (felonious) matters, members of the military enjoy free representation by a defense lawyer for any offense alleged, be it judicial or administrative. And with all elements of administrative actions, or judicial punishments, a military member's due process rights are inherent, implicit, and respected.

The truth of the matter is that military police officers are not known for abuse of discretion while engaging with civilians for alleged crimes committed. But again, why do military police not have the defense of Qualified Immunity when they engage with civilians for matters ranging from infractions to misdemeanor to felonies, which are prosecuted by Special Assistant United States Attorneys in U.S. Federal Magistrate Court.<sup>93</sup> This difference is worthy of further study. Military police on a given post, fort, or base specifically and routinely engage in domestic matters, assaults, drunk and disorderly conduct, etc., but rarely is it alleged or reported that a military police officer has abused his or her discretion by denying a suspect his or her civil rights under the U.S. Constitution. In a recent interview, Brigadier General Jimmy E. McMillian, USAF Retired, former Director of the Air Force Security Forces world-wide commanding over 30,000 military police officers, said:

Military members do not need qualified immunity, it is not required based upon the lack of cases and upon the systems in place to govern the military police member's actions in the execution of law

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<sup>93</sup> "Magistrate judges serve as judicial officers of the U.S. district courts and exercise the jurisdiction delegated to them by law and assigned by the district judges. Magistrate judges may be authorized to preside in almost every type of federal trial proceeding except for felony cases." Federal Judicial Center, Magistrate Judgeships, <https://www.fjc.gov/history/judges/magistrate-judgeships> (last visited Sept. 2020); *see also* Sgt. Thomas Hamilton, *What is Federal Magistrate Court?*, GOODFELLOW AIR FORCE BASE (Apr. 27, 2009), <https://www.goodfellow.af.mil/Newsroom/Features/Display/Article/375655/what-is-federal-magistrates-court/> ("So few military members deal with Federal Magistrate's Court that most do not know it exists. However, with many civilians working on or visiting military installations, there must be a forum in order to deal with criminal acts they commit. That is what Magistrate's Court is for. If you are a civilian, have a civilian spouse or have civilian friends, you should understand Federal Magistrate's Court.").

enforcement. And it is simply not the culture of the Air Force to shield a member from his/her responsibility for doing wrong. Holding Air Force Security Force members accountable is a huge distinction between how we manage our military police for engaging in misconduct and how civilian units across the country manage their peace officers. Our military police follow the Uniform Code of Military Justice where the local commander has courts-martial authority; this too is a big difference, but it goes to the issue of accountability by the local leadership and sends the clearest message to military police that they will be held accountable for misconduct. And, military police commanders deal with matters expeditiously with the help of their local prosecutors, the judge advocates. Another difference is Internal Affairs, the Air Force Security Forces do not have Internal Affairs; we do however work with the Office of Special Investigations, which falls under the Air Force Inspector General's office to conduct investigations into certain allegations of misconduct within local Security Forces units. What I've seen too with civilian units is that the Internal Affairs personnel are bound by union agreements and other ties to the local police chief who is also bound by union agreements, this is on par with qualified immunity. That is not the same in the Air Force. Further, another key difference is our diversity and diversity training. When you look at a local police unit, many of the officers are from the local area, went to the same high schools in many cases and were not exposed to too much outside of their local community. Yet, in the Air Force, we have vast diversity on different levels and most, if not all, of the Security Forces Airmen assigned to a particular unit are from locations different locations other than their present assignment. They have lived, engaged, and worked with people of various races, religions, and backgrounds; in essence, their first encounter with a person of African American descent is not met with apprehension or fear or bias. Another difference concerns the levels of authority or chain of command. The levels are smaller in the Air Force than in civilian police units; in many cases, an Air Force patrol officer has probably three to four levels of authority before reaching his or her local commander. This adds to the tight accountability and control. And again, we don't get the need for qualified immunity because the actions required for qualified immunity are almost non-existent in the Air Force due to training and accountability. Another difference is our close working

relationship with the Air Force JAGs who provide advice on virtually all search and seizure cases. Our cops are able to reach a judge advocate at any hour of the day or night to get search authority through the Mission Support Commander, who normally serves as the military magistrate. This too lends to the fact that many of our cases do not amount to a denial of Fourth Amendment protections because the arresting Security Forces members act along a chain of direction and authority. Lastly, as I'm sure it is the same with civilian units, the Air Force has a force escalation model that dictates when weapons come out, and our specific training requires the officer to de-escalate the situation. That combined with their Law of Armed Conflict training and their Rules of Engagement orders dictate how and when they respond to a threat. Our officers deal with DUIs, larceny, assaults, burglary, distribution of narcotics, etc. Yet, in my 30 years as an Air Force Security Police Officer, latter Security Forces Officer, up to commander over all Air Force Security Forces (approximately 35,000), I have only seen a handful of cases whereby the Security Forces Airman denied a person his or her civil rights; but in each of those cases, the Security Forces Airman was disciplined and indeed held accountable.<sup>94</sup>

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<sup>94</sup> Interview with Brigadier General Jimmy E. McMillian, USAF Retired (Aug. 10, 2020). ("Brig. Gen. Jimmy E. McMillian [was] the Director of Security Forces, Deputy Chief of Staff for Logistics, Installations and Mission Support, Headquarters U.S. Air Force, Washington, D.C. He [was] the focal point for ensuring the physical security of nuclear assets within the Air Force and planning and programming for more than 30,000 active-duty and Reserve components' security forces at locations worldwide. He provide[d] policy and oversight for protecting Air Force resources from terrorism, criminal acts, sabotage and acts of war, and he ensures Security Forces are trained, equipped and ready to support contingency and exercise plans. General McMillian earned his commission after graduating from the ROTC program at North Carolina Agriculture and Technical State University in 1981. During his career, he has served in a variety of security forces operations and instructor assignments in Montana, Texas, New Jersey, Nevada, North Dakota Turkey and Washington, D.C. He has also served in major command headquarters positions at Air Combat Command, Air Mobility Command and Air Force Space Command. He has commanded at the squadron, group, and wing levels." U.S. Air Force, <https://www.af.mil/About-Us/Biographies/Display/Article/108451/brigadier-general-jimmy-e-mcmillian/>. General MacMillian is currently a member of the Senior Executive Service serving as Assistant Manager for Infrastructure and Environmental Stewardship for the U.S. Department of Energy-Savannah River. Comments from General MacMillian are personal and do not reflect the policies or opinions of the U.S. Department of Energy or the US Department of the Air Force.

Similar to General McMillian, whose perspective is that of a Commissioned Officer, Chief Master Sergeant Brian S. Cain,<sup>95</sup> United States Air Force Retired, a former Security Forces [police] officer, offered his perspective on why military police do not require or need Qualified Immunity. As a Security Forces leader who Enlisted and started as an Airman Basic and rose to the top 1% of Enlisted members in the Air Force, Chief Master Sergeant Cain emphasized accountability as one of the primary reasons for not having qualified immunity. He pointed out 1) the smaller chain of command in the military and how the unit commander is intimately familiar with troops under his/her command; 2) differences in standards of discipline and use of force training; 3) background checks, as did General McMillian, emphasizing that Security Forces Airman have to have at least a Secret Clearance; some, according to General McMillian, have to have Top Secret security clearances and higher, depending on the job they are assigned by “higher headquarters.”

Thus, the concept of Qualified Immunity in the military for its police is not necessary as military training, tight management and control are sufficient to thwart or reduce drastically incidences in which civilians are denied their U.S. Constitutional rights. However, this is not to argue that a military model of law enforcement is recommended. As retired Illinois Special Agent Larkand Taepé stated in his interview:

Military members are trained to kill, civilian law enforcement is trained to stop, but with “Wyatt Earp” types of police officers, the rogue peace officers, they are bent on killing as a first option. But, from the singular standpoint of following the military model for accountability, ABSOLUTELY! The states need to take note of the military law enforcement hiring, training and accountability, with hopes of replicating in part this successful model for reducing and controlling the number of rogue peace officers and those who follow and condone the actions of the rogue peace officer if we as a nation

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<sup>95</sup> Interview with Chief Master Sergeant Brian S. Cain, USAF Retired (Aug. 12, 2020). Chief Master Sergeant Cain served in the United States Air Force for 24 years as an Air Force Security Forces Officer. His education background includes an AA (Community College of the Air Force) in criminal justice, a BS (University of Phoenix) in Management, and an MBA (Trident University). During his 24 years of service, he was a Security Forces Patrol Leader, Flight Chief, Operations Superintendent, Squadron Superintendent and Superintendent of Security and Policing for 30,000 visiting US Forces station in the United Kingdom Chief Cain said, I supervised over 1,200 Air Force Security Forces police officers during my Air Force Career; *See also* Air Force Instruction 31-118, Air Force Security Forces Standards and Procedures (Aug. 8, 2020), [https://static.e-publishing.af.mil/production/1/af\\_a4/publication/afi31-118/afi31-118.pdf](https://static.e-publishing.af.mil/production/1/af_a4/publication/afi31-118/afi31-118.pdf).

are ever to truly arrive at a substantive reimagining of the American state peace officer.<sup>96</sup>

Additionally, the late Attorney Johnnie Cochran Jr. stated in his 1996 publication, *Journey to Justice*, “militarization was good as far as the white majority was concerned.”<sup>97</sup> Military influence on civilian police units “militarize” civilian police units creating distinct circles; the epitome of a “we and them” concept of law enforcement operations; an “enemy” type of thinking vice to protect and serve a civilian population; an occupational force vice the original meaning of an officer of the peace; the Norman Rockwell<sup>98</sup> image:

Most people also welcomed the increasing militarization of the [police] force, particularly its growing reliance on widely scattered automobile patrol units that further isolated officers from the communities they policed. Militarization was good, as far as the white majority was concerned, because it kept the police out of sight until you called them and then they came pretty quickly. More important, it allowed Los Angeles to police its vast area with very few officers, which meant very cheaply. Latinos and African Americans took a different view of this process since they were treated differently by the reformed police department from the start. Johnnie L. Cochran Jr.<sup>99</sup>

And, on this point, General McMillian mentioned that civilian police units focus resources and efforts in certain parts of communities where racial minorities dominate.<sup>100</sup> Similarly, Attorney Cochran, in his publication *Journey to Justice*, gave distinct reasons not to “militarize peace officers in Los Angeles” in the following quote:

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<sup>96</sup> Interview with Larkland Taepe, *supra* note 75.

<sup>97</sup> Johnnie L. Cochran, *Journey to Justice* 77 (1997).

<sup>98</sup> “The Massachusetts trooper depicted sitting at a diner with a young boy [Caucasian] in Norman Rockwell’s iconic painting, ‘The Runaway,’ died on Sunday at 83. Richard Clemens was a 29-year-old trooper when Rockwell asked him to pose for the painting...I don't think Rockwell could have chosen a more appropriate model, said Mary Blaauboer. It's a symbol of police officers and how they help people. But it symbolized my father as a person, too. It showed his heart, and his whole life.” POL Staff, *Mass. Trooper in Norman Rockwell Painting Dies*, POLICE MAG. (May 8, 2012), <https://www.policemag.com/349993/mass-trooper-in-norman-rockwell-painting-dies>

<sup>99</sup> Cochran, *supra* note 97, at 77.

<sup>100</sup> Interview with Brigadier General Jimmy E. McMillian, *supra* note 94.

A ridged former military officer named William Parker, who believed that the best way to ensure an honest police force was to people its ranks with former Soldiers and Marines with no personal ties to the community. He purposefully recruited new officers from among discharged young servicemen in the South and Midwest, and they brought with them not only the racial prejudices common to their regions at the time but also deeply rooted Bible-Belt notions of public rectitude.<sup>101</sup>

Thus, although there are insights to be gained by understanding the operational controls the military has over its police forces, applying military operational thinking to civilian interactions with police presents certain dangers. Citizens are not enemies: they are members of the Republic who pay peace officers' salaries and fund their resources and more importantly, they are the object of the phrase *protect and serve*. The duty of a peace officer is to protect and serve, period. What General McMillian posits is consistent with that philosophy, i.e., the consistent accountability practices of the military police forces against the minority of rogue officers who, on their own volition, deny citizens their civil rights; this accountability clearly supports the absence of or need for Qualified Immunity in the military.

In sum, and for the reasons articulated herein, we recommend abolishing the judicially created defense of Qualified Immunity across the Union—as Colorado did on June 19, 2020 through its Enhanced Law Enforcement Integrity Act.<sup>102</sup> In the Colorado Revised Statutes, it states:

**13-21-131. Civil action for deprivation of rights - definition.**

- (1) A peace officer, as defined in section 24-31-901 (3), employed by a local government who, under color of law, subjects or causes to be subjected, including failing to intervene, any other person to the deprivation of any individual rights that create binding obligations on government actors secured by the bill of rights, article ii of the state constitution, is liable to the injured party for legal or equitable relief or any other appropriate relief.
  
- (2) (a) statutory immunities and statutory limitations on liability, damages, or attorney fees do not apply to claims brought

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<sup>101</sup> Cochran, *supra* note 97, at 78.

<sup>102</sup> S.B. 20-217, 72<sup>nd</sup> Gen. Assemb., Reg. Sess. (Colo. 2020).

pursuant to this section. The “Colorado Governmental Immunity Act,” article 10 of title 24, does not apply to claims brought pursuant to this section.

**(b) qualified immunity is not a defense to liability pursuant to this section.** (emphasis added).<sup>103</sup>

Each state in the Union should swiftly enact legislation to hold rogue peace officers accountable for their actions and nullify the use of Qualified Immunity; at the federal level, we recommend amending § 1983 to abolish the defense of qualified immunity. On June 3, 2020, Senators Kamala Harris<sup>104</sup>, Edward Markey, and Cory Booker introduced such a Bill in the U.S. Senate calling for the abolishment of the Qualified Immunity defense in § 1983 cases:

“Law enforcement should not be completely shielded from accountability when they violate someone’s civil rights,” **said Senator Harris**. “It is clear that the Supreme Court’s qualified immunity doctrine is broken and in need of reform. It is time that we say clearly that police officers should be held accountable to the law and to the people they are sworn to protect, period.”

“In our culture of systemic racism, qualified immunity is one of the foremost tools of oppression,” **said Senator Markey**. “We cannot wait on the Court to fix its mistake. Police officers are murdering black and brown Americans in our streets without any accountability. We must act now and end qualified immunity once and for all. I thank Senators Booker and Harris for their partnership on this important resolution.”

“For too long our courts have closed their doors to people seeking redress when police violate their constitutional rights,” **said Senator Booker**. “We’ve got to ensure that there is access to justice to truly hold police accountable for their misconduct. This resolution is just the first step of moving forward to ensure people can use our courts to achieve the justice they deserve.”

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<sup>103</sup> Colo. Rev. Stat. Ann. § 13-21-131.

<sup>104</sup> Following the Jan. 20, 2021, swearing in ceremony, Senator Kamala Harris should be referred to as Vice President Kamala Harris.

“The American people are sick and tired of police abuse without consequences,” **said Senator Sanders**. “Congress must end ‘qualified immunity’ now so that police can be held accountable for wrongdoing, just like everybody else. I am proud to be joining Senators Markey, Harris and Booker in advancing a resolution that calls for precisely that.”

“George Floyd, Eric Garner, Breonna Taylor and countless other unarmed Black Americans whose names we do not know have been killed at the hands of police officers,” **said Senator Warren**. “We need to fundamentally reform policing in America, and that must begin with real accountability for law enforcement officers responsible for unjustified killings of Black men and women. That’s why Congress must end qualified immunity for police officers and departments that violate Americans’ constitutional rights.”<sup>105</sup>

Similarly, sponsored by U.S. Representative Karen Bass (D CA), in June 2020, the U.S. House of Representatives passed the George Floyd Justice in Policing Act of 2020, H.R. 7120. It is now with the Senate for action, and the White House has already published its position on H.R. 7220:

The [Trump] Administration opposes House passage of H.R. 7120, the George Floyd Justice in Policing Act of 2020. This overbroad bill would deter good people from pursuing careers in law enforcement, weaken the ability of law enforcement agencies to reduce crime and keep our communities safe, and fail to bring law enforcement and the communities they serve closer together. The Administration favors a targeted approach that will improve the quality of police services provided to every American community,

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<sup>105</sup> *Harris, Markey, Booker Introduce Senate Resolution to Abolish Qualified Immunity for Law Enforcement, Hold Officers Accountable for Police Brutality*, KAMALA D. HARRIS U.S. SENATOR FOR CALIFORNIA (Jun. 3, 2020), [https://www.harris.senate.gov/news/press-releases/harris-markey-booker-introduce-senate-resolution-to-abolish-qualified-immunity-for-law-enforcement-hold-officers-accountable-for-police-brutality#:~:text=Harris%2C%20Markey%2C%20Booker%20Introduce%20Senate%20Resolution%20to%20Abolish,cannot%20be%20dismantled%20without%20accountability%20in%20the%20courts; see also S. Res 602, 116<sup>th</sup> Cong. \(2020\).](https://www.harris.senate.gov/news/press-releases/harris-markey-booker-introduce-senate-resolution-to-abolish-qualified-immunity-for-law-enforcement-hold-officers-accountable-for-police-brutality#:~:text=Harris%2C%20Markey%2C%20Booker%20Introduce%20Senate%20Resolution%20to%20Abolish,cannot%20be%20dismantled%20without%20accountability%20in%20the%20courts; see also S. Res 602, 116<sup>th</sup> Cong. (2020).)

instead of using an excessive approach such as the one taken by H.R. 7120.<sup>106</sup>

Similar to Colorado's Enhanced Law Enforcement Integrity ACT,[SB 20-217], H.R. 7120 provides the essence of reimagining peace officers, and among other sweeping changes, this legislation seeks to lower the criminal intent standard in criminal prosecutions against peace officers from the high standard of "willful," to a lesser burden of "knowing or reckless." It also provides a limit on the defense of Qualified Immunity in § 1983 cases against peace officers, etc.<sup>107</sup>

However, simply striking away Qualified Immunity will not be sufficient; other actions, such as those detailed in Colorado's Enhanced Law Enforcement Integrity Act<sup>108</sup>, provide a good start. Legislators should focus on a 360 degree approach to re-image the concept of a peace officer. In addition to abolishing the § 1983 of the Qualified Immunity defense, other measures are required, including enhanced hiring practices with substantive background searches and polygraphs, mental evaluations, frequent diversity and inclusion training in all training, tighter supervisory or command chains, close working relationships with criminal prosecutors to advise on a moment's notice and non-threatening community engagements for areas patrolled, i.e., the peace officer must know the community and its people where they patrol.<sup>109</sup>

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<sup>106</sup> See *Statement of Administrative Policy: H.R. 7120- George Floyd Justice in Policing Act of 2020*, EXECUTIVE OFFICE OF THE PRESIDENT (June 2020), [https://www.whitehouse.gov/wp-content/uploads/2020/06/SAP\\_HR-7120.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/06/SAP_HR-7120.pdf).

<sup>107</sup> "On June 25, 2020, the U.S. House of Representative strongly supported H.R. 7120, the 'George Floyd Justice in Policing Act.' This comprehensive bill passed by a margin of 236 yeas to 181 nays and has been sent to the US Senate for consideration. Among other things, the legislation holds all law enforcement officials accountable for their actions, ends 'qualified immunity' for police officers, ends racial and religious profiling, empowers our communities, establishes uniform policies for the use of force, mandates data collection on police encounters, bans chokeholds and 'no knock' warrants, limits military equipment on American streets, requires body-worn cameras and classifies lynching as a hate crime, therefore making it open to Federal resources for investigations and prosecutions." H.R. 7120, 116th Cong. (2020); See also *George Floyd Justice In Policing Act Passes The Us House*, NAACP, (June 2020) <https://www.naacp.org/latest/george-floyd-justice-policing-act-passes-u-s-house>.

<sup>108</sup> Colo. Rev. Stat. Ann. § 20-217 (West 2020).

<sup>109</sup> Operation Full Stride, Metropolitan Police Washington DC, Engaging the Community One Step at a Time (2020), [https://octo.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/OFS\\_brochure.pdf](https://octo.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/OFS_brochure.pdf). ("In an effort to increase our community- police interaction, crime prevention, and visibility in all of the city's neighborhoods, the Metropolitan Police Department is re-introducing an age-old tactic, the footbeat. Operation Full Stride will add foot patrols to all seven police districts to encourage interaction between the people who are sworn to protect the city and the people they

#### IV. UNDER 42 USC 1983, ERADICATE THE “DELIBERATE INDIFFERENCE STANDARD”<sup>110</sup> FOR CIVIL LIABILITY CASES BROUGHT AGAINST A MUNICIPALITY

When an official acting under the color of law recklessly and consciously ignores the consequences of his actions, this amounts to the legal premise of “Deliberate Indifference,” which, in a § 1983 case against a municipality, has to be proven by the plaintiff by a preponderance of evidence; this task has stalled many civil cases under § 1983 from exacting accountabilities of wrongs from municipalities. Unlike negligence, e.g., duty, breach, proximate cause and damages, deliberate indifference falls somewhere between negligence and intentional actions (torts) to cause harm against a person: Deliberate indifference “is defined as requiring (1) an ‘aware[ness] of facts from which the inference could be drawn that a substantial risk of serious harm exists’ and (2) the actual ‘drawing of the inference.’”<sup>111</sup>

Again, overcoming Deliberate Indifference is a tall task, as a plaintiff must show by a preponderance of evidence that the municipality failed to train [its officers] adequately, and that this failure was a conscious act of the municipality.<sup>112</sup> In order for a plaintiff to succeed in a § 1983 case for liability against a municipality, he must prove that “the particular policy or custom of the municipality that caused the injury was so inadequate that it amounts to ‘deliberate indifference’ to the rights of persons whom the police come in contact.”<sup>113</sup>

For example, in *City of Canton v. Harris*, the Court stated that the municipality must be found to have made a conscious and deliberate decision to fail to provide an adequate training program.<sup>114</sup> *Harris* involved a Mrs. Geraldine Harris, who in 1978 was arrested for a misdemeanor driving offense. She was transported to the Canton Police Department station and was found on the floor of the police vehicle

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serve. This program is intended to help you get to know the footbeat officers and the leadership team — the sergeants and lieutenants — in your police service area (PSA) so you can call on them in a time of need or whenever you have questions about police service in your neighborhood. So join us as we make strides to serve you better and help us to prevent and solve crimes in the Nation’s Capital.”).

<sup>110</sup> Guardians, *supra* note 53.

<sup>111</sup> Elliott v. Jones, 2009 U.S. Dist. LEXIS 91125, \*14 (N.D. Fla. Sept. 1, 2009).

<sup>112</sup> Guardians, *supra* note 53; *see also* Kevin R. Vodak, *A Plainly Obvious Need for New-Fashioned Municipal Liability: The Deliberate Indifference Standard and Board of County Commissioners of Bryan County v. Brown*, 48 DEPAUL L. REV. 785 (1999).

<sup>113</sup> Guardians, *supra* note 53.

<sup>114</sup> 489 U.S. 378, 387 (1989) (“...there are limited circumstances in which an allegation of a ‘failure to train’ can be the basis for liability under § 1983... We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”).

that transported her. Officers asked her if she needed medical attention and she responded incoherently, and no medical treatment was rendered. Once inside the police station, she fell to the ground twice; the second time she fell, officers just left her on the floor assuming that she would be safer simply on the floor, and again, no medical attention was rendered. After being released, her family immediately transported her to a hospital, and she was given proper emergent medical attention. Mrs. Canton filed a § 1983 case in Federal District Court alleging, among other wrongs, that she was denied protection under the Due Process Clause of the 14<sup>th</sup> Amendment of the U.S. Constitution because she did not receive medical attention. Thus, the obvious question in these cases turns on whether the officers' training should have led them to get Mrs. Canton medical attention.

The Court (a jury) granted her relief citing a Canton City regulation that gave police shift commanders discretion (assuming with no previous training) on providing medical assistance to detainees. The 6<sup>th</sup> Circuit Court affirmed the decision that liability attaches if a municipality is shown to have acted “recklessly, intentionally, or with gross negligence, and that the lack of training was so reckless or grossly negligent that deprivation of persons’ constitutional rights was substantially certain to result.”<sup>115</sup> However, the Court of Appeals ultimately reversed the judgment and remanded for a new trial.<sup>116</sup> In a similar case involving deliberate indifference, the court reasoned that only when a failure to train amounts to a deliberate indifference to a plaintiff’s constitutional rights does liability for failure to train serve as a basis for liability under § 1983.<sup>117</sup> Of note, just four years earlier from *Canton* (1989), in 1985, the Court ruled that one incident of excessive force does not in and of itself amount to a sustainable allegation of failure to train.<sup>118</sup>

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<sup>115</sup> *Id.* at 382; see also John K. Murphy, *Can “Failure to Train” Lead to Litigation?*, HGExperts, <https://www.hgexperts.com/expert-witness-articles/can-failure-to-train-lead-to-litigation-22012> (last visited Nov. 8, 2020).

<sup>116</sup> *Harris*, 489 U.S. at 383; see also UMKC: INSIDE THE SUPREME COURT, <https://www1.law.umkc.edu/justicepapers/CantonDocs/CantonMainPage.htm> (last visited No. 8, 2020) (“On the other hand, although the jury awarded her a \$200,000 verdict against the city, it denied her any recovery against any of the individual officers thus implicitly rejecting some of her testimony...and more than ten years after her arrest, the Supreme Court overturned her verdict against the City. By that time, Ms. Harris was suffering from cancer and no retrial ever occurred. She died in July of 1991.”).

<sup>117</sup> *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658 (1978); see also David Achtenberg, *City of St. Louis v. Praprotnik* 485 U.S. 112 (1987), <https://www1.law.umkc.edu/justicepapers/praprotnik/praprotnikmainpage.htm> (last visited Nov. 8, 2020) (“An unconstitutional action by an official whose decisions are subject to review cannot be treated as a final policy unless the reviewing body approves both the decision and its unconstitutional basis.”).

<sup>118</sup> *Okla. City v. Tuttle*, 471 U.S. 808 (1985). With an even more narrow scope, the U.S. Supreme Court limited municipal liability for single offenses by its officers. In *Tuttle*, the plaintiff was shot

And, in 1997, the U.S. Supreme Court held that the only situation in which the need for training has been deemed “obvious” is in the use of firearms.<sup>119</sup> “Before a municipality can be liable, a plaintiff in a § 1983 claim now must prove that an officer committed a felony or show evidence that the officer had a history of continual use of excessive force.”<sup>120</sup>

We hold today that the inadequacy of police training may serve as the basis for 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police came into contact...Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under 1983...Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality – a 'policy' as defined by our prior cases – can a city be liable for such a failure under 1983.<sup>121</sup>

Additionally, the Court addressed the issue of negligent hiring in *Brown v. Bryan County*.<sup>122</sup> In *Brown*, Deputy Burns applied excessive force against the Plaintiff, Mrs. Jill Brown as he attempted to pull her out of a car. Mrs. Brown was not armed, nor had she committed any crimes. As a result of the force applied to Mrs. Brown, she sustained knee injuries requiring surgery. Ms. Brown brought suit under § 1983 for negligent hiring and excessive force. When Deputy Burns first applied to the Brian County Sherriff's Department to be a deputy sheriff, he had a warrant for his arrest and a criminal record that included driving while intoxicated, nine (9) moving traffic violations, a probation violation, assault and battery, public drunkenness, resisting arrest and driving while on a suspended driving license, yet he was hired to serve as a peace officer. As Michigan State Police Officer Lt. Arden Bow detailed, hiring is one of the issues that need correction. And certainly, as Gen Jimmy McMillan stated, the Air Force does extensive background checks on its security police. Sherriff Moore did neither, and in fact, Deputy Sherriff Burns was

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by a peace officer when he failed to “halt” in his bodily movements and instead attempted to reach down towards his boots. A 1983 action ensued, and a jury awarded his widow \$1,500,000. The U.S. Court of Appeals affirmed. The Supreme Court ultimately reversed.

<sup>119</sup> *Bd. of the Cty. Comm'rs v. Brown*, 520 U.S. 397 (1997); *see also* *Gold v. City of Miami*, 151 F.3d 1346 (11th Cir. 1998)

<sup>120</sup> *Guardians*, *supra* note 53, at 66.

<sup>121</sup> *Harris*, 489 U.S. 378, 388-89 (1989).

<sup>122</sup> 67 F.3d 1174 (5th Cir. 1995).

a relative of Sherriff Moore. The District Court and Court of Appeals found for Mrs. Brown on both the excessive force allegation and the county's hiring practices allegation.<sup>123</sup>

However, on review to the U.S. Supreme Court, the Court vacated the District Court of Appeals stating that Mrs. Brown failed to show a "conscious disregard for a high risk that [deputy sheriff] Burns would use excessive force in violation of Mrs. Brown's federally protected rights."<sup>124</sup> Moreover, the court stated that only if a reasonable policy maker, who after examining an applicant's background could perceive the "plainly obvious consequence" that a deprivation of federal rights could occur if that person is hired, that a single hiring decision could constitute a municipal policy.<sup>125</sup> However, it took Justice O'Connor to correctly sum up the question of municipal liability for hiring, which is a purely ministerial and policy driven function of police Departments.

Similarly, as Retired General McMillian summed up hiring necessities for law enforcement officers in the military, "extensive background searches are a part of the hiring process" (albeit for security clearances for classified access); and as Retired Illinois Special Agent Larkland Taepe also summed up hiring practices for the Illinois State Police, "there is a need to delve further into a potential new Illinois State Police officer's background beyond just speaking to the references he or she provided." Both retired law enforcement officers from two perspectives clearly articulate the need for careful hiring of law enforcement officers. Looking purely into the issue negligent hiring, the case law is clear. However, the basis courts have relied upon to deny relief for negligent hiring theories of law have been usually couched under a *respondeat superior* basis.

Take for example, *Piotrowski v. City of Houston*.<sup>126</sup> Here we see again that the bar for liability against a municipality is set high. The court held that a 42 U.S.C. § 1983 claim under the theory of *respondeat superior* is not available against a

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<sup>123</sup> *Id.* at 1185; *see also* Vodak, *supra* note 112, at 805 ("The jury found Burns liable for applying excessive force and the county's hiring and training policies 'so inadequate as to amount to deliberate indifference' of Brown's constitutional rights. The Supreme Court addressed only the claim based on Sheriff Moore's hiring decision.").

<sup>124</sup> *Brown*, 520 U.S. at 415.

<sup>125</sup> *See generally id.*

<sup>126</sup> 237 F.3d 567, 579 (5th Cir. 2001) ("Municipal liability for section 1983 violations results if a deprivation of constitutional rights was inflicted pursuant to official custom or policy. Official policy is ordinarily contained in duly promulgated policy statements, ordinances or regulations. But a policy may also be evidenced by custom, that is: (2). . . a persistent, widespread practice of City officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy...Actions of officers or employees of a municipality do not render the municipality liable under section 1983 unless they execute official policy as above defined").

municipality. Moreover, even an unconstitutional act committed by a municipality is unlikely where the act is isolated.<sup>127</sup>

In *Piotrowski*, the plaintiff sued the city of Houston for attempted murder when her friend, a peace officer in an off-duty status, attempted to kill her, rendering her a paraplegic and for the numerous other city officials who allegedly covered up the matter.<sup>128</sup> The defendant, City of Houston, denied that any existing “custom or policy” resulted in Mrs. Piotrowski being shot. Instead, they posited that the cause of her injuries is because of “the misconduct of rogue [peace] officers.”<sup>129</sup> Ms. Piotrowski was initially awarded \$26 million, but the case was reversed on appeal. The U.S. Court of Appeals did not find “municipal liability or liability based on a state-created danger theory.”<sup>130</sup> The Court delineated what constitutes municipal liability: “Under the decisions of the Supreme Court and this court, municipal liability under § 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose ‘moving force’ is the policy or custom.”<sup>131</sup>

And under *Wahab v. City of New York*, “[m]unicipal liability for civil rights violations can also result from either a municipally endorsed policy, or a custom or practice that is so widespread the municipality had actual or constructive knowledge of it.”<sup>132</sup> Additionally, the Court said that “the unconstitutional conduct must be directly attributable to the municipality through some sort of official action or imprimatur; isolated unconstitutional actions by municipal employees will almost never trigger liability.”<sup>133</sup>

In sum, in *Piotrowski*, since the court could not find a policy or custom for police abuse based upon the facts presented by Mrs. Piotrowski, the City of Houston ultimately evaded municipal liability. The Court in *Piotrowski* said: “Isolated violations are not the persistent, often repeated, constant violations, that constitute custom and policy as required for municipal § 1983 liability...A customary municipal policy cannot ordinarily be inferred from single constitutional violations.”<sup>134</sup>

Additionally, the court’s rationale for failing to levy municipal liability was that the peace officer was in an off duty status and “moonlighting.” Although

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<sup>127</sup> *Id.* at 578.

<sup>128</sup> *Id.* at 572.

<sup>129</sup> *Id.* at 580.

<sup>130</sup> *Id.* at 583.

<sup>131</sup> *Id.* at 578.

<sup>132</sup> 386 F. Supp. 2d 277 (S.D.N.Y. 2005).

<sup>133</sup> *Piotrowski*, 237 F. 3d at 578 (citing *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984)).

<sup>134</sup> *Id.* at 581.

“moonlighting” was a policy approved by the Houston Police Department, the Court could not link this policy with Mrs. Houston’s attempted murder.

In comparing to *Piotrowski* to *City of Los Angeles v. Heller*,<sup>135</sup> which involved an on-duty officer acting under *the color of law*, the Court found no municipal liability for clear police abuse based upon a lack of “infliction of Constitutional harm.” In *Heller*, the Respondent was assaulted by police officers following a presumed driving while intoxicated stop that resulted in his falling through a window. The Respondent was not under the influence. The Respondent filed a § 1983 action for a non-probable cause stop and for excessive force and lost at the District Court level. The jury was not instructed on any affirmative defenses for the officer and returned a verdict for the officer. The Court of Appeals reversed the ruling related to the City of Los Angeles, but not the officer. The U.S. Supreme Court reversed and remanded the case, holding that the jury’s finding of no constitutional injury was conclusive against the officer and the City of Los Angeles.<sup>136</sup>

But this was an action for damages, and [none of our cases] authorizes the award of damages against a municipal corporation based on the actions of one of its officers when, in fact, the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.<sup>137</sup>

In the dissent, Justice Stevens and Justice Marshal reasoned that the Petitioner contended that Los Angeles condoned a policy of excessive force in making arrests, and that the actions of the police using “clear excessive violence” violated his constitutional rights:

Thus, despite the majority's summary assertion to the contrary, it is perfectly obvious that the general verdict rejecting the excessive force claim against Officer Bushey did not necessarily determine the constitutionality of the city's “escalating force” policy – a subject on which the jury had received no instructions at all. The verdict merely determined that the officer's action was not unreasonable “in the

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<sup>135</sup> 475 U.S. 796 (1986).

<sup>136</sup> *Id.* at 799.

<sup>137</sup> *Id.*

light of all the surrounding circumstances” – which, of course, included the evidence that Officer Bushey was merely obeying orders and following established Police Department policy...The Court today reverses an interlocutory decision in a constitutional rights case on the basis of assumptions that dramatically conflict with the record and with settled legal principles. The Court mistakenly assumes that there was a necessary inconsistency between the verdict of no liability against the individual officer and a possible verdict against the municipal defendants; it then mistakenly assumes that dismissal was an appropriate response to the perceived inconsistency. Perhaps not coincidentally, the Court achieves these results without the aid of briefs or argument, and relies on an anonymous author to explain what it has done.<sup>138</sup>

These cases and others demonstrate a marked departure from Congress’s legislative intent for holding a municipality liable. The precedent speaks for itself.

- *Canton*: To find against the municipality, the municipality has to have made a *conscious and deliberate decision* to not have a training program;<sup>139</sup>
- *Jones*: Deliberate indifference “is defined as requiring (1) an ‘awareness of facts from which the inference could be drawn that a substantial risk of serious harm exists’ and (2) the actual ‘drawing of the inference’”;<sup>140</sup>
- *Brown*: For a municipality to be held liable, a plaintiff in a § 1983 claim must prove a felony was committed by that officer or provide evidence of the officer’s history and continued use of excessive force.<sup>141</sup>
- *Praprotnik*: “An unconstitutional action by an official whose decisions are subject to review cannot be treated as a final policy unless the reviewing body approves both the decision and its unconstitutional basis”<sup>142</sup>
- *Bennett*: Unconstitutional actions must be directly attributable to an official action or imprimatur of the municipality, and even so, if an action is unconstitutional but isolated, it is highly unlikely to trigger liability.<sup>143</sup>

There are, of course, many others to add to this list. Is this Congress’s Legislative *Specific Intent* for § 1983 cases? Is deliberate indifference a hindrance or enabler

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<sup>138</sup> *Id.* at 803, 808 (Stevens, J., dissenting).

<sup>139</sup> See generally *Harris*, 489 U.S. 378.

<sup>140</sup> *Elliott v. Jones*, No. 4:06CV89-MP/AK, 2009 U.S. Dist. LEXIS 91125, at \*14 (N.D. Fla. Sep. 1, 2009).

<sup>141</sup> *Brown*, 520 U.S. at 397.

<sup>142</sup> Achtenberg, *supra* note 117.

<sup>143</sup> *Bennett*, 728 F.2d 762.

of Congress’s specific intent with § 1983 cases? These rulings and hundreds of others serve to continue the hurdle of proving municipality liability for § 1983 plaintiffs.<sup>144</sup>

However, although state actors can apply Deliberate Indifference to deny civil rights, the crux of the matter centers around citizens being harmed or killed by a peace officer while in custody when not an apparent risk of harm to the police officer or others. And then there is the defense of “Excited Delirium” diagnosis in cases where *unarmed citizens* “mysteriously die” in the custody of peace officers.<sup>145</sup> The Excited Delirium diagnosis is used by law enforcement to explain why an unarmed suspect mysteriously dies after being aggressively and violently arrested and cuffed by officers, and in some cases, “*hog-tied*.” The defense often centers around the *assumed* use of narcotics, which in some cases is ruled out by the medical examiner. In fact, according to Dr. Michael Baden, a medical examiner in New York, excited delirium should not be considered a valid cause of death at all:<sup>146</sup>

Usually, people are dying of asphyxiation because police restrained them in prone positions—a cause of death that has a long and well history, he said. It’s just a means of dismissing or whitewashing too much force used by law enforcement...There’s nothing scientific. The concept is: A person dies and you don’t find any other cause of death, then it’s excited delirium. My concern is that it seems to be a boutique diagnosis that’s largely used only when somebody dies during restraint by law enforcement.<sup>147</sup>

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<sup>144</sup> Matthew J. Crown, et. al., *Municipal Liability: Strategies, Critiques, and a Pathway Toward Effective Enforcement of Civil Rights*, 91:3 DENVER UNIV. L. REV 584-585 (2014) (“...as more often is the case, plaintiffs must show that the alleged injury was caused by a municipality’s unwritten policy or by municipal inaction. In such cases, proving municipal liability is ‘exceptionally difficult’ because the Supreme Court has instituted ‘rigorous standards of culpability and causation . . . to ensure that the municipality is not held liable solely for the actions of its employee.’ Regardless of whether one agrees with the current approach to municipal liability, the result is that courts rarely find municipalities liable under § 1983. These onerous legal standards have the predictable consequence of discouraging plaintiffs from pursuing municipal liability claims.”).

<sup>145</sup> See Brandon Lowrey, “Amid Deadly Arrest, ‘Delirium Diagnosis Draws New Scrutiny,’” Law 360 (Oct. 18, 2020), [https://www.law360.com/access-to-justice/articles/1320187/amid-deadly-arrests-delirium-diagnosis-draws-new-scrutiny?nl\\_pk=f9c55e41-e0f5-47d4-8ccb-c770a9769192&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=access-to-justice\\_](https://www.law360.com/access-to-justice/articles/1320187/amid-deadly-arrests-delirium-diagnosis-draws-new-scrutiny?nl_pk=f9c55e41-e0f5-47d4-8ccb-c770a9769192&utm_source=newsletter&utm_medium=email&utm_campaign=access-to-justice_)

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

Moreover, excited delirium is not *even* recognized as a valid medical diagnosis according to the American Psychological Association, the American Medical Association, and the World Health Organization, yet the courts and law enforcement have used it to justify or explain away the death of unarmed American citizens while in a peace officer's custody. Assuming excited delirium is valid, is it a question of deliberative indifference to fail to train peace officers when the supposed diagnosis of excited delirium dates back to 1980? According to Police Chief Ken Wallentine, West Jordan, Utah Police Department and former Chief of Law Enforcement for the Utah Attorney General, "Appellate court cases do send a clear message to officers and government officials: Training is critical."<sup>148</sup>

Deaths can often be prevented by police who know what the signs are, and know to treat it as a life-or-death medical emergency rather than a crime in progress. The goal...is to calmly contain and cool down the subject until paramedics can safely treat them. I like to say law enforcement officers are well-aware of excited delirium...[b]ut that's not true.<sup>149</sup>

Thus, does the absence of training on *excited delirium* diagnosis equate to Deliberate Indifference and in the case of Qualified Immunity, does excited delirium grant a pass for otherwise abusive conduct by peace officers? According to the § 1983 case, *Roell v. Hamilton County Board of Commissioners*, excited delirium granted such a pass to peace officers for the death of Mr. Gary Roell, who was naked, but armed with a flower basket and a garden hose.<sup>150</sup> The Court ruled for the officers thus granting them *Qualified Immunity*.<sup>151</sup> However, Judge Karen Moore's dissent cited to *Champion v. Outlook Nashville Inc.* (argued by Johnnie Cochran, et. al.), which held that law enforcement officers must de-escalate a situation and use minimal force in cases where a person exhibits signs of mental instability and is unarmed.<sup>152</sup>

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> 870 F.3d 471, 476 (6th Cir. 2017).

<sup>151</sup> *Id.* at 487.

<sup>152</sup> *Id.* at 490 (quoting *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004)) (Nashville, Tennessee police officers pepper sprayed a severely autistic man, Mr. Calvin D. Champion, who was handcuffed, bounded at his feet, and was not resisting arrest. They also applied pressure to his back. Mr. Champion later died in police custody. Affirming the judgement of the district court in favor of Mr. Champion, the Court of Appeals for the 6th Circuit said, "While the Officers undoubtedly faced unenviable choices in their interactions with Champion, they are not entitled to qualified immunity. Based upon the testimony presented at trial, the

Unfortunately, unlike *Roell*, the citizen in police custody is often simply discovered deceased without explanation. In his book, *Journey to Justice*,<sup>153</sup> Johnnie Cochran discusses how Ron Settles, a high school star football athlete was found hung in his cell in 1981 one day after he was arrested for allegedly possessing cocaine, assaulting an officer, resisting arrest, and failing to produce an identification card (all misdemeanors). An autopsy by a second medical examiner determined that Ron Settles died from a choke hold, an opinion that differed from the Los Angeles medical examiner's previous findings. Following this case, and others, in 1982, Los Angeles banned the so-called choke hold.<sup>154</sup>

Case law preceding *Settles* provides a more comprehensive foundation for eliminating the concept of *Deliberate Indifference* in from a § 1983 case against a municipality. However, the road to eradicating Deliberate Indifference has been fraught with significant potholes. For example, in *Los Angeles v. Lyons*,<sup>155</sup> the Supreme Court ruled against an injunctive relief prayer asking the Court to rule that law enforcement stop using [and training] chokeholds; unfortunately, the U.S. Supreme Court in a 5-4 decision stated the Defendant, Mr. Adolph Lyons, a 1976 victim of the deadly chokehold, apparently did not have “standing” to request the injunctive relief sought because he cannot prove that he will be choked again in the future. Does this ruling support Congress's Legislative *Specific Intent*?

In *Lyons* (1976), Mr. Adolph Lyons, an African American citizen, was stopped for a misdemeanor traffic violation, a broken taillight, and later choked by Los Angeles peace officers until he was unconscious, bleeding and had urinated in his pants. Although Mr. Lyons did not resist, and followed the orders of Los Angeles peace officers, these peace officers, following their implicit departmental training and policy, placed Mr. Lyons in a choke hold that caused him to lose consciousness and that damaged his larynx. He sued the City of Los Angeles in Federal District court in a § 1983 suit and requested an injunction against use of the chokehold in non-life threatening situations. Mr. Lyon's requested relief under § 1983 for denial of his civil rights under the 4<sup>th</sup>, 8<sup>th</sup> and 14<sup>th</sup> Amendments of the U.S. Constitution was granted, as was his injunctive relief request. The U.S. Court of Appeals affirmed the District Court's ruling:

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Officers' actions in this particular situation violated Champion's clearly established rights”).  
Champion, 380 F.3d at 896.

<sup>153</sup> Cochran, *supra* note 97, at 167-88.

<sup>154</sup> Larry Altman, *Chokeholds have been banned in Los Angeles for decades*, Daily Breeze (Dec. 4, 2014) (“In May 1982, the Los Angeles Board of Police Commissioners and City Council banned the two types of chokeholds that caused deaths, either by blocking the airway or blood flow. Other departments followed suit”).

<sup>155</sup> 461 U.S. 95 (1983).

The court found that “[during] the course of this confrontation, said officers, without provocation or legal justification, applied a *Department-authorized* chokehold which resulted in injuries to plaintiff.” The court found that the “City of Los Angeles and the Department authorize the use of these holds under circumstances where no one is threatened by death or grievous bodily harm.” The court concluded that the use of the chokeholds constitutes “deadly force,” and that the city may not constitutionally authorize the use of such force “in situations where death or serious bodily harm is not threatened.”<sup>156</sup>

When the case got to the U.S. Supreme Court in 1982, however, the Court reversed the Court of Appeals. The U.S. Supreme Court reversed the injunctive relief request, again citing standing. Adding yet another barrier to reimagining peace officers, the U.S. Supreme Court ruled that regarding the use of the choke hold, a policy of the LAPD, deliberate indifference is not a factor because there is no inference to be drawn of substantial harm<sup>157</sup> [leading to death] from the use of the chokehold. Furthermore, given that a number of victims continued to be killed by peace officers using the chokehold after the injunction was granted by the District and Appeals courts, the U.S. Supreme Court ultimately sustained the practice, stating that the policy of using a choke hold by peace officers does not amount to deliberate indifference. In fact, Chief Darrel Gates, the Los Angeles Police Department commanding officer at the time, stated that the Court’s decision was a vindication of his Department.<sup>158</sup> “We may be finding that in some blacks when [the choke hold] is applied, the veins and arteries do not open as fast as they do in *normal* people.”<sup>159</sup>

In the dissenting opinion, the Court, led by Justice Marshall, joined by Justice Blackmun, Justice Brennan, and Justice Stevens, noted that in circa 1980, African Americans accounted for 9% of the population in Los Angeles, but represented 75% of the deaths caused by peace officers using chokehold.<sup>160</sup> They also

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<sup>156</sup> *Id.* at 119 (Marshall, J., dissenting).

<sup>157</sup> *Id.* at 113.

<sup>158</sup> Dave Gilson, *Thurgood Marshall Blasted Police for Killing Black Men With Chokeholds*, MOTHER JONES (Dec. 4, 2014) (“While the case was being considered, the LAPD temporarily suspended its use of the bar-arm hold, where pressure is applied to the windpipe, and the carotid chokehold, where pressure is applied to the carotid artery”).

<sup>159</sup> *Id.*

<sup>160</sup> *Los Angeles v. Lyons*, 461 U.S. 95, 116 n. 3 (1983) (Marshall, J., dissenting) (“Thus in a city where Negro males constitute 9% of the population, they have accounted for 75% of the deaths resulting from the use of chokeholds. In addition to his other allegations, Lyons alleged racial

concluded that the “chokehold” was part of the policy and training given to members of the Los Angeles Police Department. Again, yet after the Los Angeles County District Court issued a preliminary injunction forbidding the use of the chokehold in 1980, six additional deaths occurred, even after the U.S. Court of Appeals stayed the District Court’s preliminary injunction and while the matter was being appealed. Justice Marshall’s, *et. al.*, artfully crafted dissent is best summed up in the first paragraph of the Dissent:

The District Court found that the city of Los Angeles authorizes its police officers to apply life-threatening chokeholds to citizens who pose no threat of violence, and that respondent, Adolph Lyons, was subjected to such a chokehold. The Court today holds that a federal court is without power to enjoin the enforcement of the city's policy, no matter how flagrantly unconstitutional it may be. Since no one can show that he will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy. The city is free to continue the policy indefinitely as long as it is willing to pay damages for the injuries and deaths that result. I dissent from this unprecedented and unwarranted approach.<sup>161</sup>

*Res Ipsa Loquitur*,<sup>162</sup> deliberate indifference, a judicially imposed precedent amounting to a marked departure from Congress’s clearest intent with § 1983

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discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment paras. 10, 15, 23, 24, 25, 30. Of the 16 deaths, 10 occurred prior to the District Court's issuance of the preliminary injunction, although at that time the parties and the court were aware of only 9. On December 24, 1980, the Court of Appeals stayed the preliminary injunction pending appeal. Four additional deaths occurred during the period prior to the grant of a further stay pending filing and disposition of a petition for certiorari...and two more deaths occurred thereafter”) (referring to *Los Angeles v. Lyons*, 453 U.S. 1308 (1981)).

<sup>161</sup> *Id.* at 113 (Marshall, J., dissenting).

<sup>162</sup> “*Res ipsa loquitur* means, roughly, ‘the thing speaks for itself.’ Courts developed the concept of *res ipsa loquitur* to deal with cases in which the actual negligent act cannot be proved, but it is clear that the injury was caused by negligence. This doctrine was first recognized in the case of a man who was struck and severely injured by a barrel that rolled out of the second-story window of a warehouse. In the trial of the case, the defense attorney argued that the plaintiff did not know what events preceded the barrel rolling out of the window and thus could not prove that a warehouse employee was negligent. The plaintiff’s attorney countered that barrels do not normally roll out of warehouse windows. The mere fact that a barrel fell from the window was *res ipsa loquitur*; ‘it spoke for itself,’ and it said that someone must have been negligent.” Edward Richards, *Res Ipsa Loquitur*, PUB. HEALTH L. MAP - BETA 5.7, <https://biotech.law.lsu.edu/map/ResIpsaLoquitur.html>.

matters, proscribes no accountability for the municipality and no motivation to reimage peace officers or amend their training, or hold peace officers accountable under their thin blue line.<sup>163</sup> Who is going to change this judicially imposed standard? Congress must act in this *judicial restraint era*, holding accountable peace officers and their municipalities for abuse of police discretion and to eliminate the concept of deliberate indifference from the calculus of judicial examination of discretionary abuse cases. Municipal accountability for Constitutional offenses committed by peace officers must occur if, as a Nation, we are to reimagine the concept of a peace officer.

And convincing those responsible for the conduct of rogue peace officers and repercussions is an indispensable step. Simply defunding police departments does not serve to support a positive change in policy, culture or practice. Holding police departments and municipalities accountable sends the clearest message for change. Additionally, holding a municipality accountable for an officer who violates a citizen's Constitutional rights will send a clear message across a single police unit that such violations will not be tolerated. It will also motivate the Department's leaders to take affirmative steps to reduce incidences of police abuse. Furthermore, when this top to bottom approach on standards is implemented as a matter of leadership and management, peace officers will be sufficiently motivated to follow their Unit's policies and procedures. Thus, eradicating the judicially imposed standard of a plaintiff having to prove *deliberate indifference* is just one step further to eliminating police abuse against American citizens, and will be a monumental step forward in securing passage of 42 U.S.C § 1983.

## V. CONCLUSION

It is respectfully requested that § 1983 and 10 USC §§ 241 and 242 be amended. According to Colonel Ian Sablad, USAF Ret.:<sup>164</sup> “Years after Congress enacted

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<sup>163</sup> “In the 1950s, Los Angeles police Chief Bill Parker picked up the term [Thin Blue Line], mentioning it in speeches and adopting it as the title of a TV show he conceived to promote a polished image of the Los Angeles Police Department, which had been plagued by a history of corruption within the force. Parker left behind a controversial legacy. Under his leadership, the LAPD faced accusations of police brutality and racism as it transformed into more professionalized and militarized force that engaged in proactive policing — changes Parker viewed as necessary to ensure public safety. Parker himself made a series of racist comments about Blacks and Latinos during his tenure, including in the midst of the 1965 Watts riots.” David Hernandez, *The thin blue line: The history behind the controversial police emblem*, S.D. Union-Tribune, July 6, 2020.

<sup>164</sup> Interview with Colonel Ian Sablad, USAF Retired (Sept. 1, 2020). Mr. Sablad is a former United States Air Force Security Forces Flight Commander and graduate of University of Colorado, Boulder where he received his BS. He is also a graduate of Webster University where

section 1983, attorneys, legislators and citizens are questioning the statute's effectiveness as a legal tool for deterring policy misconduct."<sup>165</sup> Under 42 U.S.C 1983, the judicially imposed "deliberate indifference standard" and "qualified immunity protection" standard for civil liability cases brought against a municipality must be summarily eradicated if this Nation is fulfill the promises of Equal Protection and Congress's specific intent to enact appropriate legislation. Similarly, under 18 U.S.C §§ 241 and 242, the statutorily imposed requirement of specific intent or "willful" burden of proof for criminal cases must equally be eradicated to ensure Equal Protection and Congressional specific intent.

With the onslaught of cases involving unnecessary police abuse and indeed targeted law enforcement against American citizens, primarily African Americans, our judicial system has imposed barriers to justice. Some courts tried and succeeded, only to be Remanded and Reversed, ultimately resulting in a systematic miscarriage of justice. And most egregious in this color of law criminal enterprise are the numerous unjustifiable homicides committed by the Wyatt Earp's or rogue peace officers using unwarranted deadly force upon American citizens. Under skewed and deliberate judicial reasoning, the municipality is often absolved of liability or responsibility.

Congress must amend § 1983 and §§ 241 and 242. The die is cast (*Iacta alea est*) with 1) Colorado's Enhanced Law Enforcement Integrity ACT, Senate Bill 20-217, which clearly redefines, reinforces and strengthens Congress's *specific intent*, giving little variance upon which a court can later misinterpret or misconstrue this intent; 2) Senators Kamala Harris, Edward Markey, and Cory Booker's U.S. Senate Bill calling for the abolishment of the qualified immunity defense in § 1983 cases; and 3) the U.S. House of Representatives' George Floyd Justice in Policing Act of 2020, H.R. 7120, introduced by Representative Karen Bass. Now is the time for Congress to act by introducing and duly passing federal legislation and other

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he received his MA in management and business. He served in the Air Force for 27 years; during such time, he was an officer in USAF Security Forces for three years where he served as a Security Forces Flight Commander and Base SWAT Team Leader. Colonel Sablad supervised over 170 law enforcement officers during his time with law enforcement. His officers dealt with offenses ranging from domestic assaults to drug possession/use, larceny, and disturbance of the peace for a base population of over 30,000 people. Colonel Sablad said: "We [US Air Force] do not simply put crimes committed by our police officers under the rug, we deal with it openly and through that, other Security Forces members learn quickly that certain behaviors will simply not be tolerated. We do not protect our cops who misbehave, nor do we cover up their crimes. This is one of the reasons why, in my 27 years on active duty, I have never seen one instance of a Security Forces officer violating a person's 'Constitutional rights' through abusive policing. It is simply not in our culture and again, simply not tolerated."

<sup>165</sup> Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L. J. 753, 753 (1993).

measures to ensure the promises of the 14<sup>th</sup> Amendment's Equal Protection Clause for all American citizens, and of emergent significance, Americans of African Descent, Black Lives Matter.