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SEXUAL MISCONDUCT BY LAW ENFORCEMENT: A NEW MEANING TO STOP AND FRISK?

By: Anastasia Cassisi

INTRODUCTION

"In the criminal justice system, sexually based offenses are considered especially heinous. In New York City, the dedicated detectives who investigate these vicious felonies are members of an elite squad known as the Special Victims Unit. These are their stories."[1]

Turn on the television at any time during the day and you are likely to find at least one channel playing an episode of Law and Order, Special Victims Unit (S.V.U.). If you catch the opening sequence, after a few moments of catchy music, an ominous narrator recites the above words. The fictional show is about a group of New York City detectives who investigate sex crimes and the attorneys who prosecute the offenders.[2] The show portrays sex crimes as egregious offenses committed by heinous criminals. However, what the show fails to depict is what happens when these dedicated detectives commit these heinous crimes and other forms of sexual misconduct. This note will explore the stories of these victims and the lack of federal legal remedies against the offending officers.

While there are overwhelming statistics about sexual assaults on college campuses,[3] instances of sexual assaults and rape by

[1] *Law and Order: Special Victims Unit*, IMDB, http://www.imdb.com/title/tt0203259/?ref_=ttqt_qt_tt (last visited Mar. 18, 2018).

[2] *See id.*

[3] *See Campus Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/statistics/campus-sexual-violence (last visited Aug. 28, 2019) ("Sexual violence on campus is pervasive. 11.2% of all students [graduate and undergraduate] experience rape or sexual assault through physical force, violence or incapacitation . . . . [A]mong undergraduate students, 23.1% of females and 5.4% of males experience rape or sexual assault through physical force, violence, or incapacitation."

high profile celebrities,[4] and the "#MeToo" movement illuminating workplace sexual harassment via social media platforms,[5] sexual misconduct by law enforcement actively remains concealed and stay largely outside the attention of media coverage.[6] Consequently, sexual misconduct by law enforcement officers is both underreported and understudied.[7] The few existing studies there are only focus on sex crimes that lead to departmental action and criminal charges against the officer and neglect to address other forms of sexual misconduct.[8]

Sexual misconduct by law enforcement includes a wide range of behaviors. Not all of which are considered illegal under the federal statutes discussed throughout this paper. Sexual misconduct includes behavior such as:

[4] *See Beyond Harvey Weinstein: 33 other high-profile men accused of sexual misdeeds or related behavior*, L.A. TIMES (Oct. 26, 2017, 2:20 PM), http://www.latimes.com/entertainment/la-et-accused-20171017-htmlstory.html (listing, among others, the following celebrities charged with allegations of sexual misdeeds: Harvey Weinstein, Bill Cosby, Bill O'Reilly, Donald Trump, Casey Affleck, Steven Seagal, and Anthony Weiner).

[5] *See* Sarah McCammon, *In the Wake of #MeToo, More Victims Seek Help for Repressed Trauma,* NAT'L PUB. RADIO (Dec. 27, 2017), https://www.npr.org/2017/12/27/573146877/in-the-wake-of-metoo-more-victims-seek-help-for-repressed-trauma; Bonnie Marcus, *What Women Can Do To Successfully Navigate the Workplace Post #MeToo*, FORBES (Jun. 13, 2019, 1:45 PM), https://www.forbes.com/sites/bonniemarcus/2019/06/13/what-women-can-do-to-successfully-navigate-the-workplace-post-metoo/#5d3a963c4e95.

[6] *See* Matt Sedensky, *AP: Hundreds of officers lose licenses over sex misconduct,* ASSOCIATED PRESS (Nov. 1, 2015), https://apnews.com/fd1d4d05e561462a85abe50e7eaed4ec/ap-hundreds-officers-lose-licenses-over-sex-misconduct [hereinafter *Hundreds*] ("In interviews, lawyers and even police chiefs told the AP that some departments also stay quiet about improprieties to limit liability, allowing bad officers to quietly resign, keep their certification and sometimes jump to other jobs.").

[7] *See* Paula Mejia, *Why Cops Get Away With Rape*, NEWSWEEK (July 9, 2014, 6:12 PM), http://www.newsweek.com/police-sexual-assault-rape-justice-258130; s*ee also Hundreds*, *supra* note 6.

[8] *See* Philip M. Stinson et al., *Police Sexual Misconduct: A National Scale Study of Arrested Officers*, BOWLING GREEN ST. U., CRIM. JUST. FAC. PUBLICATIONS, 1, 6 (2014) [hereinafter Stinson]. Stinson states:

[T]he line of studies had focused initially on nonviolent consensual acts and then shifted to include cases that clearly involved sexual harassment and coercion. Data on cases that involve the most egregious forms of sex-related misconduct including rape and violent sexual assaults has been lacking—despite the fact that scholars often use the term "police sexual violence" as a label for many forms of sex-related misconduct; *See also Hundreds*, *supra* note 6 ("The Associated Press uncovered about 1,000 officers who lost their badges in a six-year period for rape, sodomy and other sexual assault; sex crimes that included possession of child pornography; or sexual misconduct such as propositioning citizens or having consensual but prohibited on-duty intercourse.").

1. Sexual contact by force (*e.g.,* sexual assault, rape);
2. Sexual shakedowns (*e.g.,* extorting sexual favors in exchange for not ticketing or arresting a citizen);
3. Gratuitous physical contact with suspects (*e.g.,* inappropriate or unnecessary searches, frisks, or pat-downs);
4. Officer-initiated sexual contacts while on duty;
5. Sexual harassment of colleagues/ co-workers;
6. Engaging in citizen-initiated sexual contact while on duty;
7. Sexual behavior while on duty (*e.g.,* masturbation, viewing and/or distributing pornographic images, sexting);
8. Voyeuristic actions that are sexually motivated (*e.g.,* looking in windows of residences for sexually motivated reasons);
9. Unnecessary contacts/actions taken by officers for personally and/or sexually motivated reasons (*e.g.,* unwarranted call backs to crime victims, making a traffic stop to get closer look at the driver for non-professional reasons); and
10. Inappropriate and unauthorized use of department resources and/or information systems for other than legitimate law enforcement purposes.[9]

Title 18 of the United States Code § 2241 only criminalizes some of these behaviors under the crime of aggravated sexual abuse.[10] The definition of this crime is to knowingly cause another person to engage in a sexual act,[11] "by using force against that person or

[9] *See* INT'L ASS'N OF CHIEFS OF POLICE, ADDRESSING SEXUAL OFFENSES AND MISCONDUCT BY LAW ENFORCEMENT: EXECUTIVE GUIDE 3-4 (2011) [hereinafter IACP].

[10] *See* 18 U.S.C. § 2241 (2007).

[11] *Id.* Under 18 U.S.C. § 2246(2) (1998), a "sexual act" is defined as:

(A) contact between the penis and the vulva or the penis and the anus . . . contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

by threatening or placing that other person in fear that any person would be subjected to death, serious bodily injury[12] or kidnapping."[13] Notably, the statute covers only the first two behaviors on the list above: 1. sexual contact by force (sexual assault and rape) and 2. sexual shakedowns (extorting sexual favors in exchange for not ticketing or arresting a citizen).[14] Consequently, officers engaging in behaviors listed numbered 3-10 above, such as voyeuristic activities or misusing departmental resources, are not subject to any federal criminal penalties since there is no sexual act.[15] Throughout this paper, "sexual misconduct" is used to refer to the broader context of behaviors as described in the list above and "sex crimes" or "crimes" refer to these federal crimes as defined by 18 U.S.C. § 2241.

Victims of sexual misconduct can be left feeling afraid, helpless and skeptical of the outcomes of reporting.[16] While states have the ability to prosecute officers for committing sexual misconduct, relying solely on state prosecution of law enforcement raises a number of concerns. First, state prosecutors work with local law enforcement regularly in order to prosecute other crimes.[17] As such, prosecutors form professional, and sometimes personal, relationships with local law enforcement.[18] Thus, "[a] district

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. 18 U.S.C. § 2246 (1998).

12 18 U.S.C. § 2241. 18 U.S.C. § 2246(4) defining "serious bodily injury" as "involv[ing] a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 18 U.S.C. § 2246 (tense alternation added).

13 18 U.S.C. § 2241.

14 *Id.*

15 *Id.*

16 *See* Timothy M. Maher, *Sexual Misconduct: Officer's Perceptions of its Extent and Causality*, 28 CRIM. JUST. REV. 355, 358-59 (2003).

17 *See* Paul Cassell, *Who prosecutes the police? Perceptions of bias in police misconduct investigations and a possible remedy*, WASH. POST (Dec. 5, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/05/who-prosecutes-the-police-perceptions-of-bias-in-police-misconduct-investigations-and-a-possible-remedy/?utm_term=.302f26846b43.

18 *See generally* Kate Levine, *Who Shouldn't Prosecute the Police,* 101 IOWA L. REV. 1447, 1469-1470 (2016) (stating "[t]o foster such professional reliance, prosecutors must have a smooth working relationship with the police. This relationship naturally carries over

attorney's office that is one day calling a police officer to the stand as a critical witness may have a difficult time the next day investigating that same officer and charging him with a crime."[19] Sex crimes must be prosecuted without the inherent bias that results from regularly working with the defendant-officer[s]. Additionally, in order to achieve change within the system, federal oversight of local law enforcement has long been regarded as necessary.[20] Accordingly, a combination strategy of pursuing federal prosecution for crimes that already fall within federal jurisdiction is a simple solution to addressing the issue of prosecutorial bias.[21]

This Note seeks to explore sexual misconduct by law enforcement officers and the federal legal options available against both the individual officer and the department in which the officer works. This note will argue that due to flaws in the current criminal and civil proceedings that a victim can bring, victims of sexual misconduct by law enforcement are left with inadequate federal legal options. As discussed below, these legal options need to be reformed.

Part I of this Note will: (A) discuss the lack of media attention on law enforcement misconduct; (B) explain reasons for the lack of data on sexual misconduct; (C) dismantle the "bad apple theory" and; (D) argue that sexual misconduct by law enforcement is vast and a systemic problem in departments across the nation. Part II will discuss the federal legal options available to a victim of sexual misconduct by law enforcement. These options include (A) prosecuting the officer under federal law 18 U.S.C. § 242; (B) bringing a 42 U.S.C. § 1983 civil action against the officer acting in his individual capacity; and (C) bringing a 42 U.S.C. § 1983 action against the municipality in which the officer works. This

outside of work." Moreover, "[m]aintaining a good relationship with individual officers and the good will of a police department is essential to a prosecutor's success in obtaining convictions, and thus to her professional life.")

19 Cassell, *supra* note 17.

20 *See generally* Editorial Board, *Local Police Need Federal Oversight. Exhibit A: Chicago*, N.Y. TIMES (Jan. 21, 2017) https://www.nytimes.com/2017/01/21/opinion/sunday/local-police-need-federal-oversight-exhibit-a-chicago.html; Susan Heavey & Sarah N. Lynch, *Before he is ousted, Sessions limits U.S. oversight of local police*, REUTERS (Nov. 9, 2018, 8:57 AM), https://www.reuters.com/article/us-usa-police/before-he-is-ousted-sessions-limits-u-s-oversight-of-local-police-idUSKCN1NE1NL.

21 *See* 18 U.S.C. § 242 (1996).

paper will argue that none of these options, as currently formulated, provide adequate recourse to a victim of sexual misconduct by law enforcement.

To address the legal shortcoming addressed in Part II, Part III will make four proposals. First, Assistant United States Attorneys must actively prosecute under § 242. Second, H.R. Bill 6568 must be revived and enacted by Congress to close the law enforcement consent loophole in federal law. Third, courts must adopt a lower standard of municipal liability. Specifically, deliberate indifference must be changed to the lower standard of pattern and practice as defined by the Department of Justice.[22] Finally, there should be a rebuttable evidentiary presumption of municipal liability once pattern and practice is established.

I. SEXUAL MISCONDUCT BY LAW ENFORCEMENT IS A SYSTEMIC PROBLEM THAT IS UNDERREPORTED AND UNDERSTUDIED

A. Media Attention on Law Enforcement Misconduct

Michael Brown, Eric Garner, and Tamir Rice are only a handful of the names that echo in chants calling for police conduct reform in the United States.[23] The Black Lives Matter movement began in 2013 as a call to action against anti-black policing, politicians and legislation.[24] Among other things, Black Lives Matter seeks justice for victims of excessive force by police officers. Protests throughout the country have brought media attention to the innocent people that died as a result of anti-black policing practices across the country. While Black Lives Matter brought media attention to physical violence at the hands of police, movements attempting to bring light to sexual violence by police have not been as successful.

The "#SayHerName" movement centers around race and gender-specific violence such as sexual assault and battery by law

22 *See infra* Part III: Proposals.

23 *See* Cara E. Trombadore, *Police Officer Sexual Misconduct: An Urgent Call to Action in a Context Disproportionately Threatening Women of Color,* 32 HARV. J. RACIAL & ETHNIC JUST. 153, 156 (2016).

24 *See* SHANELLE MATTHEWS & MISKI NOOR, BLACK LIVES MATTER 4 YEAR REPORT 2 (Black Lives Matter, 2017), https://static1.squarespace.com/static/5964e6c3db29d6fe8490b34e/t/59678445d482e97ec9c94ed5/1499956322766/BLM-4yrs-report.pdf.

enforcement officers.[25] The movement seeks to call attention to the sexual misconduct by law enforcement officers, but has not hit the media with the same force as Black Lives Matter.[26] By and large, sexual misconduct lurks in the shadows of the media attention surrounding anti-black policing, except in the most shocking cases.[27] It is necessary that all cases of sexual misconduct receive the same attention as other forms of law enforcement misconduct to raise awareness of the extent of this issue.

Recently, former Oklahoma City Police Officer, Daniel Holtzclaw, was convicted of eighteen felony charges and sentenced to 263 years in prison for rape, sexual battery, indecent exposure, and forcible oral sodomy of thirteen women who were in custody or inside his police car.[28] Holtzclaw's victims were all African-American women that he targeted while patrolling low-income neighborhoods.[29] While the racial dimension of Holtzclaw's behavior is not an isolated incident,[30] the Holtzclaw case is one of the few times where these crimes have been the center of national media attention.

25 *See* KIMBERLÉ WILLIAMS CRENSHAW ET AL., SAY HER NAME, RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN, JULY 2015 UPDATE, 1-2.

26 *See generally id.* at 2, 7, 28; Kanya Bennett, *Say Her Name: Recognizing Police Brutality Against Black Women*, ACLU (June 14, 2018, 4:20 PM), https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/say-her-name-recognizing-police-brutality.

27 *See infra* Part I-B- Under-reporting: Why don't we have all the numbers?

28 *See* KFOR-TV & K. Querry, *Attorneys for Former Oklahoma City Officer convicted of sex crimes file appeal,* OKLA.'S NEWS 4 (last updated Feb. 1, 2017, 4:10 PM), http://kfor.com/2017/02/01/attorneys-for-former-oklahoma-city-officer-convicted-of-sex-crimes-files-appeal/.

29 *See* Sarah Larimer, *Disgraced ex-cop Daniel Holtzclaw sentenced to 263 years for on-duty rapes, sexual assaults,* WASH. POST (Jan. 22, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/01/21/disgraced-ex-officer-daniel-holtzclaw-to-be-sentenced-after-sex-crimes-conviction/?utm_term=.e0d3de009911; *see also infra* for additional discussion pertaining to the racial dimensions of sexual misconduct by police.

30 *See generally* Jasmine Sankofa, *Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform*, 59 HOW. L. J. 651, 652, 653-56 (2016).

B. Under-reporting—Why Don't We Have All the Numbers?

While present media attention focuses on the need for better data collection on the use of deadly and excessive force,[31] sexual misconduct against arrestees remains largely unreported and uninvestigated.[32] The "Say Her Name" movement attributes this to a culture where there is an "uneven power dynamic between an officer and his victim" and that officers know they are unlikely to face penalties.[33] Victims of sexual misconduct by law enforcement officers often have vulnerable characteristics that make them unlikely to report the offending officer in the first place.[34] These victims include addicts, those with criminal records, victims of a crime, the poor, minorities, and the young. A study conducted by Bowling State University found that approximately 40% of the approximately 219 cases of sex-related crimes committed were committed against minors.[35] Moreover, the timing of the sexual misconduct is under the exclusive control of the officer; "police-citizen interactions often occur in the late-night hours that provide low public visibility and ample opportunities to those officers who . . . take advantage of citizens."[36] In taking advantage of the vulnerability of unsuspecting victims, sexual misconduct can lead to a victim feeling ashamed and unwilling to report the misconduct.

Race is another factor that contributes to a victim's vulnerability. In fact, there is a "great deal of history to point out that this is not a recent phenomenon. That sexual violence by

31 *See* Aaron C. Davis & Wesley Lowery, *The FBI director calls lack of data on police shootings 'ridiculous,' 'embarrassing'*, WASH. POST (Oct. 7, 2015), https://www.washingtonpost.com/national/fbi-director-calls-lack-of-data-on-police-shootings-ridiculous-embarrassing/2015/10/07/c0ebaf7a-6d16-11e5-b31c-d80d62b53e28_story.html (stating the FBI has attempted to collect information about people who are killed by police officers, "but reporting is voluntary and only 3 percent of the nation's 18,000 police departments comply. As a result, the data is virtually useless . . . ." Since government-collected information is lacking, non-governmental entities such as *The Guardian* and *The Washington Post* "are becoming the lead source of information about violent encounters between police and civilians.")

32 *See* Zoë Carpenter, *The Police Violence We Aren't Talking About*, NATION (Aug. 27, 2014), https://www.thenation.com/article/police-violence-we-arent-talking-about/.

33 *See* CRENSHAW, *supra* note 25, at 26.

34 *See* Stinson, *supra* note 8, at 8, 30 (stating victims of police sexual misconduct may not report it to the authorities because "they feel humiliated or they may fear retaliation").

35 *See id.* at 6, 26.

36 *Id.* at 2.

police and law enforcement . . . has been a constant threat throughout U.S. history"[37] and "has consistently been part of the arsenal of oppression and policing and repression against communities of color."[38] Sexual violence against black women dates back to slavery, where black women were not protected against rape because they were not persons protected under the law.[39] Post-Reconstruction era segregation laws and the Jim Crow era further exposed black women to "threats, indecent exposure, and gang rape" by "white employers, police officers, and strangers."[40] Years later, the Holtzclaw case indicates that black women are still exposed to the threat of sexual misconduct by law enforcement to the same extent that they were during the reconstruction and Jim Crow era.

The victim's emotional response to experiencing sexual misconduct compounds the issue of underreporting. In particular, victims fear retaliation by the officer or other officers in the department for reporting sexual misconduct.[41] Victims of rape and sexual assault by law enforcement often find it "hard . . . to come forward with allegations because they may not feel safe to do so."[42] A victim of Holtzclaw, for example, who was taken into custody for being high on angel dust and handcuffed in the hospital bed was coerced into "performing oral sex, suggesting her cooperation would lead to dropped charges."[43] She felt that "'all police [would] work together'" and was scared to report the officer's misconduct.[44] This victim's response is not without merit. In fact,

37 Cheryl Corley, '*Invisible No More' Examines Police Violence Against Minority Women,* NAT'L PUB. RADIO (Nov. 5, 2017, 9:00 AM), https://www.npr.org/2017/11/05/561931899/invisible-no-more-examines-police-violence-against-minority-women.

38 *Id.*

39 *See* Sankofa, *supra* note 30, at 673-75.

40 *Id.* at 676.

41 *See* Diana Tourjée, *Serial Rapist and Sniveling Cop Daniel Holtzclaw Faces 3 Centuries Imprisonment,* VICE (Dec. 11, 2015, 4:55 PM), https://www.vice.com/en_us/article/nz8p5m/serial-rapist-and-sniveling-cop-daniel-holtzclaw-faces-3-centuries-imprisonment.

42 Diana Tourjée, *Sexual Assault by Police Officers Is Even More Common Than You Think,* VICE (Nov. 2, 2015, 5:00 PM), https://www.vice.com/en_us/article/gvze7q/sexual-assault-by-police-officers-is-even-more-common-than-you-think.

43 Matt Sedensky & Nomaan Merchant, *Betrayed by the Badge,* ASSOCIATED PRESS (Nov. 1, 2015), http://interactives.ap.org/2015/betrayed-by-the-badge/ [hereinafter *Betrayed*].

44 *Id.*

Chief Bernadette DiPino of the Sarasota Police Department in Florida, who studies police sexual misconduct for the International Association of Chiefs of Police,[45] stated, "[sexual misconduct is] happening probably in every law enforcement agency across the country. . . . [I]t's so underreported, and people are scared that if they call and complain about a police officer, they think every police officer is going to be then out to get them."[46]

Additionally, hopelessness and "skepticism about the ability [or willingness] of officers and prosecutors to investigate their colleagues"[47] deters victims from reporting. Another of Holtzclaw's victims, "[t]he youngest of the accusers, who was 17 when she says Holtzclaw raped her on her mother's front porch, said the attack left her unsure about what to do.[48] 'Like, what am I going to do?' she said at the pretrial hearing. 'Call the cops? He was a cop.'"[49] Her feeling of hopelessness is not uncommon among victims. In fact, it echoes that of Holtzclaw's victim who was high on angel dust. This hopelessness leads to a feeling of skepticism that even if the victim does report the officer, very little will be done to help her.[50]

Unlike instances of lethal force, where there is undeniable evidence of the occurrence (the dead body), the sole source of evidence of sexual misconduct is the victim. Despite the failure of departments to keep accurate data on deadly force by officers, other evidence—such as death records, autopsies, news reports, and families seeking repercussions against the department for those killed by law enforcement—assist in producing prompt reports and provide reliable data on deadly force.[51] Victims of sexual misconduct, on the other hand, have the choice of whether to report the incident. This choice is undoubtedly influenced by

45 *See Hundreds*, *supra* note 6.
46 *Betrayed*, *supra* note 43.
47 *See Hundreds*, *supra* note 6.
48 *Betrayed*, *supra* note 43.
49 *Id*.
50 *See generally id.*
51 *See* Jon Swaine et al., *The Counted People killed by police in the US.*, *About the Project*, GUARDIAN, https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/about-the-counted (last visited Aug. 30, 2019). The Guardian tracked deaths by police in 2015 and 2016 by compiling verified crowdsourced data in using "police reports and witness statements, by monitoring regional news outlets, research groups and open-source reporting projects such as the websites Fatal Encounters and Killed by Police." *Id*.

the emotions of fear of retaliation, shame, and hopelessness, discussed above. When the source of evidence (the victim) is silenced, it is impossible to track the extent of this issue.[52]

C. Not Just a Few "Bad Apples"

Although still largely unreported by victims and under-investigated by departments, sexual misconduct by law enforcement officers occurs more frequently than one would think.[53] Much like excessive force, the data on sexual misconduct is primarily collected by news sources and universities, since neither local departments nor the federal government are required to keep track of this information.[54] A study conducted by Bowling State University identified 548 sex related crimes committed by police officers between 2005-2007.[55] The study used Google News and Google Alerts to compile information from news and media sources.[56] These sources typically only report "newsworthy crimes" that have shock value to the reader.[57] Of these 548 sex related crimes, 118 instances involved forcible or statutory rape, "93 cases of forcible sodomy, 43 aggravated and simple assaults, and 11 cases that involved a sexual assault with an object."[58] Notably, this study only provides insight on sex crimes and does not account for other forms of sexual misconduct that are not exposed in the media. Thus, this study only gives us a part of the picture of sexual misconduct.

A study conducted by the Associated Press in 2015 uncovered that about 1,000 officers "lost their badges[59] in a six-year period for rape, sodomy, and other sexual assault like sex crimes that

52 *See* Stinson, *supra* note 8, at 3.

53 *See* Tourjée, *supra* note 41.

54 *See* Swaine, *supra* note 51; Stinson, *supra* note 8, at 3.

55 *See* Stinson *supra* note 8, at 14.

56 *See id.* at 4.

57 *See id.* at 25-26 (describing the potentially skewed results of the study toward only uncovering more violent instances of sexual misconduct which were predominantly "newsworthy" acts of sexual violence, particularly those involving minors).

58 *Id.* at 25.

59 *See Hundreds*, *supra* note 6; Rachel A. Harmon, *Legal Remedies for Police Misconduct* 43 (Va. Pub. L. & Legal Theory Res. Paper, Paper No. 40, 2017) (describing that officers have licenses or certifications by the state in which they work, "the commissions that provide for the training and certification of officers, or other state boards, also have the power to deprive an officer" of his or her power over civilians).

included possession of child pornography or sexual misconduct such as propositioning citizens or having consensual but prohibited on-duty intercourse."[60] This number translates to a police officer losing their badge approximately every two to three days as a result of engaging in sexual misconduct between 2009 and 2014. As shocking as these numbers are, they are still likely a gross undercount.[61] Although this study provides a fuller picture than the Bowling State study, the Associated Press study does not account for officers who did not lose their badges, but nevertheless had claims of sexual misconduct asserted against them. Such claims are made against the officer, but may go uninvestigated or may not result in a penalty.[62] Additionally, this number does not account for states, such as California or New York, which do not have a "statewide system to decertify officers for misconduct."[63] Decertification systems prevent terminated officers from being hired in other jurisdictions within the state.[64] Therefore, officers who lose their badges in a state without a decertification system can be hired as officers in other jurisdictions and continue to work.[65] This also means that officers who lose their badges in states without a decertification system are not counted in this study, as there is no way to track who lost their badge for engaging in sexual misconduct in those states.[66]

60 *Hundreds*, *supra* note 6.

61 *See id.*

62 *See generally id.*

63 *Id.*

64 *See Betrayed, supra* note 43; *see also* Roger L. Goldman, *Police Officer Decertification: Promoting Police Professionalism through State Licensing and the National Decertification Index,* MASS POLICE REFORM (Aug. 20, 2015), http://masspolicereform.org/2015/08/police-officer-decertification-promoting-police-professionalism-through-state-licensing-and-the-national-decertification-index/.

65 *See* Goldman, *supra* note 64. Forty-four out of fifty states have decertification programs that entail a process for removal of a police officer who has engaged in serious misconduct:

[T]hereby preventing the officer from serving with any law enforcement agency in that state. . . . [I]n the absence of such a law, there is nothing to stop a department from hiring an obviously unfit police officer. . . . [W]hy would an officer known to be unfit be hired by another department . . . ? [A] chief of a financially strapped department has the choice of hiring a certified but questionable officer or hiring a brand new recruit, whose academy training may have to be paid for out of the department's budget. Thus, there is a financial incentive to ignore police misconduct. . . . [A] cash-poor department is able to hire [unfit officers] at a discount. Finally, the officer is immediately ready for duty, while the new recruit has to spend up to six months at the police academy. *Id.*

66 *See Betrayed, supra* note 43. In fact, "[a]necdotal evidence suggests that in the absence of decertification, officers who have been disciplined or fired for violating individual

D. The Systemic Culture of Sexual Misconduct by Law Enforcement

The sentiment that these heinous crimes are only committed by a few rogue officers (or bad apples) is false and overlooks the larger context of law enforcement culture that allows and breeds this type of behavior among officers.[67] One example that shows how this behavior extends beyond an individual offending officer is the Oakland, California Police Department. In 2016, the department conducted an investigation into the sexual misconduct of Officer Brendan O'Brien, who committed suicide.[68] Tipped off by his suicide note, which included information about sexual misconduct committed against a teenage sex worker, a court-ordered investigation revealed that at least fourteen officers from Oakland and eight members of other law enforcement agencies were involved in a sexual relationship with the teenage sex worker that "would be considered statutory rape and human trafficking."[69] Four other officers were terminated by the city administrator for other instances of sexual misconduct, including "attempted sexual assault, engaging in lewd conduct in public, assisting the crime of prostitution, assisting in evading arrest for the crime of prostitution," and seven more were suspended for "failing to report other officers who had sexual conduct with a minor."[70] In response to the scandal, the Mayor of Oakland, Libby Schaaf stated, "[w]e need to root out what is clearly a toxic, macho culture," and that she is running "a police department, not a frat house."[71]

Issues such as hyper-masculinity, gender stereotypes, and the blue wall of silence all contribute to the systemic culture of misconduct by officers. These issues have come to light in the

rights frequently find employment in smaller departments with poor candidate screening or more limited resources for hiring highly-qualified officers." *See* Harmon, *supra* note 59, at 44.

67 *See* Tourjée, *supra* note 41.

68 *See* Sam Levin, *Four Oakland police officers fired, seven suspended, in sexual misconduct case*, GUARDIAN (Sept. 7, 2016, 9:21 PM), https://www.theguardian.com/us-news/2016/sep/07/oakland-police-officers-fired-sexual-misconduct-scandal.

69 *Id.*

70 *Id.*

71 Sam Levin, *Oakland loses third police chief in a week amid scandals,* GUARDIAN (June 18, 2016, 12:22 AM), https://www.theguardian.com/us-news/2016/jun/18/third-oakland-police-chief-quits-within-a-week-amid-scandals.

context of excessive force but have parallels when analyzing sexual misconduct. For example, in the context of excessive force, "policing has often been traced to racial bias, but it may stem in equal part from gender. . . . [H]idden police officer machismo is exacerbating the more commonly noticed problem of racial profiling."[72] Indeed, studies document how gender stereotypes and masculinity lead to more aggressive behavior in departments where former members of the military are given hiring preferences and where officers bully suspects.[73]

Contrastingly, in precincts where there are more women, there are fewer excessive force claims since women are more likely to use de-escalation techniques by acting as a mediator rather than drawing their weapons.[74] Female officers also decrease the amount that a department has to spend in defending claims of excessive force.[75] Specifically, greater female representation within departments may also decrease the instances of sexual misconduct committed by officers.[76] Sexual misconduct by officers is tied to masculinity and power: "[W]hen police officers get macho, women of color may also become victims of their violence. Police bullying of women can come in the forms of false charges, physical violence or sexual assaults."[77]

The blue wall of silence further exacerbates the issue of sexual misconduct by officers. The wall of silence is an unwritten code among officers not to report or investigate the errors or misconduct of other officers as a symbol of loyalty.[78] Take the Oakland Police

72 Frank Rudy Cooper, *America's police have a masculinity problem,* BUS. INSIDER (July 19, 2016, 10:21 PM), http://www.businessinsider.com/americas-police-have-a-masculinity-problem-2016-7.

73 *See id.*

74 *See* Kelly Wallace, *Could more female police lead to safer communities?* CNN, http://www.cnn.com/2017/04/24/health/women-law-enforcement-recruitment/index.html (last updated Apr. 24, 2017, 6:28 AM) ("The average male officer is 8½ times more likely to have an excessive force complaint against him than a woman . . . .").

75 *See id.* ("When it comes to excessive force liability lawsuits, the average male officer costs between 2½ and 5½ times more than the average female police officer. The average male officer is two to three times more likely to have been named in a citizen's excessive force complaint.").

76 *See generally id.*

77 Cooper, *supra* note 72.

78 *See* Selwyn Raab, *THE UNWRITTEN CODE THAT STOPS POLICE FROM SPEAKING*, N.Y. TIMES, (June 16, 1985) https://www.nytimes.com/1985/06/16/weekinreview/the-unwritten-code-that-stops-police-from-speaking.html.

Department, for example. According to the *Court-Appointed Investigator's Report on the City of Oakland's Response to Allegations of Officer Sexual Misconduct*, the investigation of Officer O'Brien's suicide "went off track as soon as it started."[79] The Criminal Investigation Division of the Oakland Police Department closed the investigation of O'Brien's death within a week of opening it, despite "evidence suggesting other officers had inappropriate contact with [the teenager]."[80] The Criminal Investigation Division further did "not inform the [District Attorney's] Office of the allegations [thus] shield[ing] its inadequate investigation from external review."[81] Moreover, when the department's Internal Affairs Division conducted an administrative investigation, investigators failed to "ask follow-up questions that could have led to additional information."[82] When interviewing the teenage victim, the investigator's "tone alternated between frustrated, angry, and patronizing" but when interviewing the officers implicated by O'Brien's suicide note, the investigator was "friendly and non-confrontational."[83] The subsequent report that summarized the interviews described the officers as witnesses rather than subjects of the investigation, minimizing the role that these officers had in the misconduct.[84] *The Court-Appointed Investigator's Report* concluded that the department inadequately investigated Officer O'Brien's death and other officers in their role in sex scandal.[85]

As shown by the investigation conducted by the Oakland Police Department, the blue wall of silence leads to cover-ups and cultivates a "culture of American policing [that] does nothing to encourage the good apples from policing the bad ones. In fact, it

79 EDWARD SWANSON ET AL., COURT-APPOINTED INVESTIGATOR'S REPORT ON THE CITY OF OAKLAND'S RESPONSE TO ALLEGATIONS OF OFFICER SEXUAL MISCONDUCT 24 (June 21, 2017) https://www.clearinghouse.net/chDocs/public/PN-CA-0010-0025.pdf.

80 *Id.* at 10.

81 *Id.* at 26.

82 *Id.* at 16.

83 *Id.* at 16, 18.

84 *See id.* at 19.

85 *See id.* at 24-28.

does the opposite and thus leaves all of us . . . vulnerable to any bad apples with violent tendencies, badges, and firearms."[86]

When "cops don't tell on cops,"[87] "the code of silence all but assures impunity for officers who commit human rights violations."[88] The very nature of sexual misconduct makes this systemic nature even more troubling. When sexual misconduct is inadequately investigated by the department, as it was in Oakland, victims of sexual misconduct are left to trust a system that is not punishing the crimes committed by officers.

II. RECOURSE

Sexual misconduct by officers is understudied and the lack of data caused by underreporting is exacerbated by issues of race relations and the blue wall of silence. Even if victims overcome their own vulnerabilities and come forward to report sexual misconduct to the authorities, victims ultimately have limited avenues of legal recourse. This Note focuses exclusively on the current federal options for victims.[89] Under federal law, a victim can file: (1) a complaint of an 18 U.S.C § 242 federal crime; (2) a 42 U.S.C. § 1983 civil lawsuit against the offending officer individually; and/or (3) a 42 U.S.C. § 1983 civil lawsuit against the department in which the offending officer works.[90] As explained below, these current options offer inadequate assistance to victims of sexual misconduct. Consequently, the federal law needs to be reworked in order to have meaningful options that will provide redress to individual victims and will decrease sexual misconduct by officers.

86 Keli Goff, *Racist Cops, Abused Women and the Blue Wall of Silence*, DAILY BEAST, https://www.thedailybeast.com/racist-cops-abused-women-and-the-blue-wall-of-silence (last updated Apr. 13, 2017, 3:26 PM).

87 COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, COMMISSION REPORT 53 (1994).

88 *Code of Silence*, HUM. RTS. WATCH, https://www.hrw.org/legacy/reports98/police/uspo27.htm (last visited Sept. 22, 2019).

89 While there are certainly state options as well, this Note limits its scope to federal options. It is my position that focusing on federal legal options will remove the issue of prosecutorial bias of state prosecutors against an officer with which they may work daily. As discussed in Part III-A, centralizing reporting of misconduct claims to agents of the federal government will not only remove the bias that a state prosecutor may have but will also provide data as to the extent of the issue.

90 *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 464-465 (2004).

A. File Criminal Charges against the Officer

This section will argue that as currently formulated, federal law fails to provide adequate criminal sanctions against officers who commit sexual misconduct. First, as discussed in Part (1) of this section, while 18 U.S.C. § 242 criminalizes sexual misconduct by an individual acting under color of law, charges are rarely brought under the statute.[91] Second, as discussed in Part (2) of this section, federal law is lagging behind state law in failing to enact H.R. Bill 6568, "Closing the Law Enforcement Consent Loophole Act of 2018" which provides that an individual in the custody of law enforcement is incapable of consenting to sex.[92] As discussed in Part III: Proposals, below, charges under § 242 must be actively brought by prosecutors and the "Closing the Law Enforcement Consent Loophole Act of 2018" must be enacted by Congress in order to ensure that perpetrators of sexual misconduct by law enforcement do not escape charges due to a hole in federal law.

1. File Criminal Charges against the Officer under 18 U.S.C. § 242 in Federal Court

18 U.S.C. § 242, in relevant part, provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse . . . shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.[93]

91 *See* Paul J. Watford, *Screws v. United States and the Birth of Federal Civil Rights Enforcement*, 98 MARQ. L. REV. 465, 483 (2014).

92 *See* Closing the Law Enforcement Consent Loophole Act of 2018, H.R. 6568, 115th Cong. (2ND SESS. 2018).

93 18 U.S.C. § 242 (1996).

This section allows for the federal prosecution of torts and crimes that are otherwise usually subject to state jurisdiction. Section 2241 of the Code defines aggravated sexual abuse as "knowingly caus[ing] another person to engage in a sexual act—(1) by using force against that other person; or (2) by threatening or placing another person in fear that any person will be subjected to death, serious bodily injury, or kidnapping."[94] In the context of sexual misconduct, the constitutional violation lies in an individual's Fourth Amendment right to bodily integrity and Fourteenth Amendment right to due process.[95] The sentencing options for § 242 feature a maximum of life imprisonment or death, and thus indicate the seriousness of this federal crime.[96]

Section 242 is a Reconstruction-era statute enacted as a part of the Civil Rights Act of 1866. The act was intended to protect the civil rights of freed slaves after the Civil War.[97] Congress "sought to secure equal rights in everyday" life as a result of a significant amount of racially motivated violence after the Civil War.[98] However, due to a series of decisions that struck down portions of the Civil Rights Act of 1866,[99] there was a "dormancy in federal civil rights enforcement."[100] This dormancy led to unregulated violence at the hands of both law enforcement and private citizens against blacks in the south.[101] It was not until 1939 when the Attorney General at the time, Frank Murphy, created the Civil Rights Section of the Department of Justice that hope of reviving federal civil rights enforcement grew.[102]

The new Civil Rights Section was looking for statutes under which they could prosecute civil rights violations.[103] Two statutes, the Anti-Peonage Act of 1867 and what is now 18 U.S.C. § 241, were too limited to be applied to civil rights violations generally.[104]

94 18 U.S.C. § 2241 (2007) (alternation to original).
95 *See* Fontana v. Haskin, 262 F.3d 871, 878-79, 881 (9th Cir. 2001).
96 *See* 18 U.S.C. § 242.
97 *See* Watford, *supra* note 91, at 471.
98 *Id.*
99 *See generally id.* at 472, 474.
100 *Id.* at 474.
101 *See id.*
102 *See id.*
103 *See id.* at 475.
104 *See id.* at 475-476 (stating:

The third, now 18 U.S.C. § 242, "had been the subject of only two reported [trial court] decisions."[105] The *Screws* case, discussed below, was a test case for the Civil Rights Section to take to the Supreme Court to define "willfully" and "operating under color of law" under § 242.[106]

In *Screws v. United States,* the police placed Robert Hall under arrest for theft of a tire.[107] Hall was brought to the courthouse, where the three arresting officers beat him with their fists, a solid-bar, and a two-pound blackjack, rendering him unconscious.[108] Hall was then thrown in jail and died shortly thereafter.[109] The Supreme Court analyzed a predecessor statute of § 242 to address the issue of the "non-enumerated constitutional right to be free from police brutality."[110]

In § 242 prosecutions, prosecutors are required to prove beyond a reasonable doubt that (1) that there was a constitutional violation and (2) that the officer violated the constitution willfully.[111] In the Court's analysis of the terms of § 242, Justice Douglas first addressed and defined "willfully" as having the specific intent to deprive the victim of their constitutional rights.[112] Notably, "[t]he fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution."[113] Moreover, the court requires proof the act was "intentional rather than accidental"[114] or that there was "[a]n evil motive to accomplish that which the statute condemns becomes a constituent element of

the Anti-Peonage Act of 1867, is of relatively limited use, since it's confined to cases involving peonage, aform of involuntary servitude. . . . 18 U.S.C. § 241 . . . prohibits two or more persons from conspiring to prevent someone from exercising his or her federal constitutional rights . . . [but is] limited to interference with rights arising from the relationship between the victim and the federal government [not the state].

105 *Id.* at 476 (alteration to original).

106 *Id.* at 476-77.

107 Screws v. United States, 325 U.S. 91, 92 (1945).

108 *Id.* at 92-93.

109 *Id.* at 93.

110 *See* Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2179-81 (1993).

111 18 U.S.C. § 242 (1996) (this statue protects against violations of the constitution or laws of the United States).

112 *Screws*, 325 U.S. at 107.

113 *Id.* at 106.

114 *Id.* at 101.

the crime."[115] Importantly, the willful purpose "need not be expressed; it may be inferred from all the circumstances attendant on the act."[116]

Second, the Court defined acting "under color of law."[117] Where "officers of the State were performing official duties" and misuse the "power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law" then the officer is acting under "'color of state law.'"[118] The Court declined to invalidate the statute for vagueness and remanded the case for retrial with jury instructions consistent with the defined terms.[119]

The Court's decision in *Screws* makes clear that the officer need not be thinking in constitutional terms at the time of the constitutional violation and the willful purpose may be inferred from the circumstances. So long as the state actor is intentionally engaging in behavior with a bad purpose that violates the Constitution, they are acting willfully and therefore violating § 242. In the context of sexual misconduct, these definitional conclusions are particularly important. When an officer rapes someone, their purpose is to commit rape, not to consciously violate the individual's Fourteenth Amendment right to due process or their Fourth Amendment right to bodily integrity. Yet the officer is engaging in behavior specifically covered by the statute that correlates directly to constitutional violations. Officers do not accidentally rape civilians. This behavior is intentional in each and every case and therefore, under the *Screws* analysis, the conduct falls within the ambit of § 242.

Critics of *Screws* argue that Justice Douglas's opinion "attempted, unsuccessfully, to solve the vagueness problem" of the statute.[120] They further complain that *Screws*' language is facially inconsistent and "*Screws* is not a model of clarity."[121] These critics

115 *Id.*
116 *Id.* at 106.
117 *See generally id.* at 107-108.
118 *Id.* at 109, 110.
119 *See id.* at 103, 113.
120 Lawrence, *supra* note 110, at 2180.
121 *United States v. Johnstone,* 107 F.3d 200, 208 (3d Cir. 1997) (where a police officer was convicted of six counts of excessive force, the Court analyzed the *Screws* standard to determine whether the jury was properly instructed as to the intent requirement under § 242.).

further argue that the Court imposed a requirement that "made it harder for the government to win convictions, even in cases where the defendants obviously acted in bad faith" and that it has never been clear how to prove this element.[122] Under the cloud of these critics, prosecutors were strongly discouraged from bringing a § 242 claim since it was ultimately not clear how to prove one.

For years, § 242 has been rarely used.[123] Even after the *Screws* decision, "[t]he federal government brought relatively few § 242 prosecutions, and that's still true today."[124] Research on § 242 shows that the *Screws* case was the last time the Supreme Court analyzed § 242. Moreover, less than "100 federal prosecutions are brought against law enforcement officials for constitutional violations each year."[125] This small number is likely attributable to two reasons. First, the statute is over 150 years old and was enacted in response to racially motivated violence resulting from the end of the Civil War.[126] As shown by Holtzclaw, however, aggravated sexual abuse is still racially motivated and the behavior this statute was enacted to criminalize is very much alive today.[127] As such, prosecutors should dust off this long forgotten statute and deploy it as a powerful tool against aggravated sexual abuse by state law enforcement.

Second, the mixed critiques of *Screws* regarding the difficulties in proving whether an officer acted willfully lead to few prosecutors wanting to take on the case. Federal prosecutors must not bring federal charges "unless they believe that the government will likely prevail at trial."[128] However, when the federal prosecutor is unsure of the elements of proving a charge under § 242, they are not prohibited from bringing the case in the first place; it just makes the case harder to prove. It is the job of the

122 Watford, *supra* note 91, at 482.

123 *Id*. at 483.

124 *Id*.

125 Harmon, *supra* note 59, at 41 (these violations included § 242 violations as well as use of force cases.) "For decades, under two federal statutes known as Section 241 and Section 242, the division has conducted thorough, impartial investigations of individual officers for criminal violations of constitutional rights. . . . From 2009 – 2016, the division charged more than 580 law enforcement officials for committing willful violations of civil rights and related crimes." CIVIL RIGHTS DIVISION HIGHLIGHTS: 2009-2017, 32 (Jan. 2017), https://www.justice.gov/crt/page/file/923096/download.

126 *See generally,* Watford, *supra* note 91, at 471; Lawrence, *supra* note 110, at 2118.

127 Larimer, *supra* note 29.

128 Harmon, *supra* note 59, at 41.

prosecutor to demand courts further define the terms of § 242 so they may prosecute these cases. They should not let such an important and applicable statute fall to the wayside based on the fact that it is confusing. It has been over 70 years since *Screws* was last analyzed by the Supreme Court. It is time for prosecutors to force the courts to clarify the terms at issue.

Regardless of the outstanding confusion and criticisms of *Screws*, the Civil Rights Section of the Department of Justice should zealously pursue § 242 prosecutions against officers. *Screws* defines willfully as acting intentionally with a bad purpose to commit a constitutional violation.[129] Under this definition, instances of aggravated sexual abuse by state actors are always committed willfully, and therefore need to be prosecuted. These prosecutions are important to "build public confidence in the government's commitment to lawful policing and fair application of criminal justice."[130] Law enforcement officers are not outside of the reach of criminal law, especially when they intentionally commit criminal acts. The fact that the case may be difficult for prosecutors to prove, or that the case may be headed to the Supreme Court for further clarification, is not a reason to let these crimes go unpunished. The federal government must actively pursue criminal prosecutions using this longstanding federal statute to punish sexual violence by officers and to bring justice to its victims.

2. Closing the Law Enforcement Consent Loophole Act of 2018

As the federal law stands, a law enforcement officer accused of rape or sexual assault can use consent as a defense to the charges. H.R. Bill 6568, entitled "Closing the Law Enforcement Consent Loophole Act of 2018" (hereinafter H.R. Bill 6568),[131] seeks to amend the federal crime of sexual abuse of a minor or ward.[132] The amendment would add subsection (c) to provide: "[w]hoever, being a Federal law enforcement officer, knowingly engages in a sexual act with an individual who is under arrest, in detention, or

129 *Screws v. United States*, 325 U.S. 91, 103 (1945).

130 Harmon, *supra* note 59, at 43.

131 Closing the Law Enforcement Consent Loophole Act of 2018, H.R. 6568, 115th Cong. (2ND SESS. 2018).

132 18 U.S.C. § 2243 (2007) (sexual abuse of a minor or a ward).

otherwise in the actual custody of that Federal law enforcement officer, shall be fined under this title, imprisoned not more than 15 years, or both."[133] The amendment would also prevent law enforcement officials from asserting consent as a defense to charges of sexual assault and rape of people in custody.[134] Presently, more than half the states allow the consent defense in prosecutions against law enforcement for sex crimes.[135] However, recently New York was a key state that has eliminated the consent defense; thus, closing the loophole and spurring federal interest in doing the same.[136] Supporters of the H.R. Bill 6568 "argue the bill criminalizes an action that should clearly be criminal: raping somebody while in a position of legal power over them, then falsely claiming it was consensual."[137] Without this amendment, such behavior is not criminalized under the present statute. Notably, there was no outright opposition to the bill, both federally and on the state level for similar bills.[138]

Importantly, H.R. Bill 6568 also includes an incentive to states to encourage annual reports to Congress reporting the number of such complaints.[139] Representative Jackie Speier, of California introduced the H.R. Bill 6568 in July of 2018.[140] In doing so, she addressed that while "sexual misconduct is the second most frequently reported form of police abuse . . . the true scope of the problem is unknown because states are not required to report

133 H.R. 6568.

134 *Id*. (amending subsection (d) to add paragraph (3) "In a prosecution under subsection (c), it is not a defense that the other person consented to the sexual act.").

135 *H.R. 6568 (115th): Closing the Law Enforcement Consent Loophole Act of 2018*, *Summary*, GOVTRACK, https://www.govtrack.us/congress/bills/115/hr6568/summary (last updated Aug. 30, 2018) [hereinafter *Govtrack H.R. 6568*].

136 *See* N.Y. PENAL LAW § 130.05 (McKinney 2018); *see also Govtrack H.R. 6568*, *supra* note 135.

137 *Govtrack H.R. 6568*, *supra* note 135.

138 *See generally id*.

139 H.R. 6568. H.R. 6568 states:

The Attorney General shall submit to Congress, on an annual basis, a report containing-
(1) the information required to be reported to the Attorney General under section 3(b); and
(2) information on the number of reports made, during the previous year, to Federal law enforcement agencies regarding Federal law enforcement officers engaging in a sexual act with an individual who is under arrest, in detention, or otherwise in the actual custody of the law enforcement officer. *Id*.

140 *Id*.

these kinds of allegations."[141] Thus, in providing an incentive to states to report data both federal and state governments will be able to get a better picture as to the scope of this country-wide problem if the bill is enacted.

Although H.R. Bill 6568 died in Congress,[142] similar bills on the state level have gained momentum.[143] Regardless, it is imperative that there is a law at the federal level punishing the rape of a ward while in a position of legal power and also a law preventing accused law enforcement officers from using consent as a defense to abusing the differential in power they have over citizens.

B. File Civil Charges against the Officer

1. Civil Remedies Under § 1983

While criminal prosecutions are one avenue of recourse for victims, civil damages are another remedy that victims can seek. Despite the confusion surrounding § 242 in *Screws*, the Court's decision "helped breathe life into another, more useful tool," 42 U.S.C. § 1983.[144] This section of the United States Code provides a civil avenue of recourse for victims of sexual misconduct by officers. Section 1983 provides:

> 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

141 *H.R. 6568 (115th): Closing the Law Enforcement Consent Loophole Act of 2018*, *Overview*, GOVTRACK, https://www.govtrack.us/congress/bills/115/hr6568 (last visited Oct. 13, 2019) [hereinafter *Govtrack H.R. 6568* Overview].

142 *Id*. A bill under the same name was brought to the Senate in November 2018, but was not passed. *See* Closing the Law Enforcement Consent Loophole Act of 2018, S. 3688, 115th Cong. (2ND SESS. 2018); *see also infra* Part III(B) (further discussion and analysis of S. 3688).

143 *Govtrack H.R. 6568*, *supra* note 135. Similar legislation passed in Maryland, New Hampshire, and Kansas with no opposition. *Id.*

144 Watford, *supra* note 91, at 484.

> law, suit in equity, or other proper proceeding for redress . . . .[145]

A civil § 1983 lawsuit can be brought for damages against three possible parties: (1) the officer acting in their individual capacity, (2) the officer acting in his official capacity, or (3) the department or city.[146] Central to any § 1983 claim against any of these three parties are state action and a constitutional violation.

Like § 242, under any § 1983 action, the officer must be acting under color of law, or as an agent of the state.[147] Whether an officer acts under color of law depends on "the nature of the circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties."[148] If the acts of sexual misconduct are "made possible only because the wrong doer is clothed with the authority of state law"[149] the action is under color of law, even if the officer is acting for purely personal purposes.

For example, in *Smith v. Carruth*, color of law was established when the plaintiff was kidnapped and raped by the officer who "flashed his police badge, handcuffed her, *Mirandized* her, placed her under arrest[,] . . . [a]nd used his position and authority to intimidate the victim into compliance."[150] Similarly, in *Rogers v. City of Little Rock*, Morgan, a uniformed officer, followed the plaintiff, Rogers, in his patrol car after he stopped her for a broken tail light.[151] The court held Morgan "abused his power while carrying out the official duties entrusted to him by the state . . . [and thus] he acted under the color of state law."[152]

The constitutional violation is based on either the Fourth Amendment right to bodily integrity or the Fourteenth

145 42 U.S.C. § 1983 (2012).

146 *See* Hafer v. Melo, 502 U.S. 21, 31 (1991); Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 n.10 (1989); Monell v. Dep't of Soc. Serv., 436 U.S. 658, 690 (1978).

147 42 U.S.C. § 1983. "Every person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia . . . .*" *Id.* (emphasis added).

148 Rogers v. City of Little Rock, 152 F.3d 790, 798 (8th Cir. 1998).

149 Smith v. Carruth, No. CIV.A.15-4570, 2017 WL 785345, at *8 (E.D. La. Mar. 1, 2017) (quoting West v. Atkins, 487 U.S. 42, 49 (1988)).

150 *Id.* at *8-9.

151 *See Rogers,* 152 F.3d at 793, 798.

152 *Id.* at 798.

Amendment right to due process. If the misconduct occurs during arrest or investigatory stop, it is analyzed under the Fourth Amendment,[153] whereas the Fourteenth Amendment is used when no arrest occurs.[154] The standard to prove a violation of the statute is dependent on which constitutional right is being violated.

The protection of the Fourth Amendment is triggered during an arrest and continues to protect a suspect when they are in the patrol vehicle on the way to booking.[155] The Fourth Amendment protects against the unreasonable seizure of one's bodily integrity.[156] Although the Fourth Amendment is often examined in the context of the use of excessive force during arrest, the Fourth Amendment "prohibits more than the unnecessary strike of a nightstick, sting of a bullet, and thud of a boot."[157] Thus, courts have extended it to sexual misconduct by officers.[158]

For example, in *Fontana v. Haskin*, Mia Fontana was arrested for drunk driving, handcuffed, and driven to Orange County Jail by Officers Haskin and Deschepper.[159] On the way to the jail, Haskin sat in the back seat next to Fontana and "inappropriately touched and sexually harassed [Fontana]."[160] His conduct included: "telling [Fontana] she had nice legs; telling [Fontana] that he could be her 'older man'; putting his arm around [Fontana]; [and] massaging her shoulders."[161] Consequently, Fontana sued Haskin under § 1983 for violating her civil rights based on the Fourth and Fourteenth Amendments.[162] The court held, "although a possible fit under the Fourteenth Amendment, [Fontana's claim] is better seen as a Fourth Amendment claim

153 *See* Fontana v. Haskin, 262 F.3d 871, 878-81 (9th Cir. 2001) (stating "the Fourth Amendment protects a criminal defendant after arrest on the trip to the police station.").

154 *See Rogers*, 152 F.3d at 796.

155 *See Fontana*, 262 F.3d at 879.

156 *See* U.S. CONST. amend. IV.

157 *Fontana,* 262 F.3d at 878.

158 *See generally id.* at 878-79 (stating "[b]eyond the specific proscription of excessive force, the Fourth Amendment generally proscribes 'unreasonable intrusions on one's bodily integrity,' [citation omitted] and other harassing and abusive behavior that rises to the level of 'unreasonable seizure.'").

159 *See id.* at 875.

160 *Id.*

161 *Id.*

162 *See id.*

because she had been seized by the police."[163] Similarly, in *Knickerbocker v. City of Colville*, where there were numerous incidents of sexual misconduct against two officers, the court held that the Fourth Amendment applies in incidents where the officers seized the plaintiffs for the purpose of an arrest.[164] Where the sexual assault occurred "outside of the setting of a custodial arrest or investigatory stop," the incident should be analyzed under the Fourteenth Amendment, rather than the Fourth.[165]

Generally, the Fourth Amendment inquiry then becomes whether there has been an unreasonable seizure. This analysis involves weighing "the severity of the crime," "the threat that the suspect poses," and "whether the suspect is resisting or attempting flight."[166] Reasonableness, in the context of the Fourth Amendment in § 1983 actions, "depends on not only when a seizure is made, but also how it is carried out."[167] In determining whether a particular arrest is carried out constitutionally, the court weighs the nature and quality of the intrusion against the individual rights under the Fourth Amendment.[168] Likewise, "when there is no need for the force, *any* force is constitutionally unreasonable" and "gratuitous and completely unnecessary acts of violence by the police during a seizure violate the Fourth Amendment."[169]

These factors of Fourth Amendment analysis all concern counter-veiling governmental interests. Where the seizure involves sexual misconduct by an officer, however, the courts in *Fontana* and *Knickerbocker* note that there *is no* counter-veiling governmental interest[170] or

> situation that would justify any amount of purposeful sexual verbal and physical predation against a handcuffed arrestee. No risk of flight nor threat to officer safety exists to justify such an abuse

163 *Id.* at 881.

164 *See* Knickerbocker v. City of Colville, No. 2:15-CV-19-RMP, 2016 U.S. Dist. LEXIS 107088, at *8-9, 12 (E.D. Wash. Aug. 11, 2016).

165 *Id.* at *12-13.

166 *Fontana,* 262 F.3d at 880.

167 Tennessee v. Garner, 471 U.S. 1, 8 (1985).

168 *See* Graham v. Connor, 490 U.S. 386, 396 (1989).

169 *Fontana*, 262 F.3d at 880.

170 *Id.*; Knickerbocker, 2016 U.S. Dist. LEXIS 107088, at *9.

> of the one-sided power arrangement that arises from a custodial arrest.[171]

Unlike cases that involve excessive force by officers, cases involving sexual misconduct are easier to prove since it is presumed that no sexual touching of a seized person can ever be reasonable under any circumstances. Sexual violence by officers when a suspect is arrested, in and of itself, is a violation of the Fourth Amendment.

The Fourteenth Amendment due process clause protects the right not to be subjected to the wanton infliction of physical harm by anyone acting under color of law, even when not under arrest.[172] The scope of protection includes the substantive due process right to bodily integrity or privacy and the right to be free from "sexual fondling and touching or other egregious sexual contact."[173] To successfully claim a violation of the Fourteenth Amendment against an officer individually, the misconduct must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscious."[174] If sexual misconduct by the officer is proven, the conduct shocks the conscience as a matter of law.

In *Haberthur v. City of Raymore*, Lisa Haberthur claimed a violation of her rights under the Fourteenth Amendment against the City of Raymore and Officer Steve Untrif.[175] Untrif had approached Haberthur on multiple occasions leading up to the sexual assault and harassment.[176] The first occasion, Untrif followed Haberthur home and parked in her driveway, when he approached her, he told her that he should have ticketed her for speeding but did not and left.[177] The next interaction occurred when Haberthur was at work, Untrif told her that he would be waiting for her down the road to give her a ticket.[178] The next

171 *Fontana*, 262 F.3d at 881.

172 *See generally* Rogers v. City of Little Rock, 152 F.3d 790, 795-96 (8th Cir. 1998).

173 Haberthur v. City of Raymore, 119 F.3d 720, 723 (8th Cir. 1997).

174 Knickerbocker v. City of Colville, No. 2:15-CV-19-RMP, 2016 U.S. Dist. LEXIS 107088, at *10.

175 *See Haberthur,* 119 F.3d at 721.

176 *Id.*

177 *Id.*

178 *Id.*

interaction occurred at Haberthur's workplace again where, in uniform, Untrif "placed his hand under [Haberthur's] sweatshirt and fondled her breast and chest, then ran his hands down her sides, placed his arm around her neck, and invited her to go to a back room with him."[179] The court held that this was enough to sufficiently allege the deprivation of her substantive due process rights as there was an implication for sexual contact by a police officer who was in uniform, ticketed her, and followed her in his police car.[180]

A similar situation occurred in *Rogers v. City of Little Rock*. In *Rogers,* Vivian Rogers was stopped by Officer Vincent Morgan for having a broken tail light, then proceeded to ask her for proof of insurance for her car and when she did not have it, he called a tow truck.[181] He then decided to cancel the tow and follow Rogers home in his patrol car so that she could look for her insurance information.[182] While still on duty, Morgan followed Rogers into her home where he "started touching and kissing her and led her into the bedroom where he told her to take off her clothes."[183] Rogers began taking off her clothes, but stopped and told Morgan that she did not want to have sex with him.[184] In response, Morgan again demanded that she take off her clothes, pushed her onto the bed and had sex with her.[185] The court, quoting *City of Sacramento v. Lewis*,[186] noted that, "conduct that is 'intended to injure in some way unjustifiable by any government interest' is likely to be conscience shocking"[187] and the Morgan's conduct was a violation of her constitutional right to "intimate bodily

179 *Id*.

180 *Id.* at 724.

181 *See* Rogers v. City of Little Rock, 152 F.3d 790, 793 (8th Cir. 1998).

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.* at 793-794.

186 County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998). In *Lewis*, a motorcycle passenger, Lewis, was killed in a police chase. *Id.* at 836-37. Lewis' parents brought a § 1983 claim alleging that the occurrence was a violation of Lewiw's Fourteenth Amendment right to life. *Id.* at 837. The Court in *Lewis* held that a police officer does not violate substantive due process by causing death in a reckless and indifferent to life high speed chase. *Id.* at 853-54.

187 *Rogers,* 152 F.3d at 797.

integrity."[188] Consequently, Morgan was individually liable for $100,000 in damages.[189]

Section 1983 is an inadequate solution for sexual misconduct claims as case law created standards to address excessive force cases. Though § 1983, on its face, applies to the broad deprivation of rights by officers acting under color of law, case law has shaped the applicability of this statute to apply best in cases where law enforcement uses excessive force against arrestees.[190] Even if victims receive monetary damages, the offending officer may still remain on the beat unless the department takes disciplinary action.[191] Thus, analyzing cases of sexual misconduct by law enforcement under § 1983 does not make sense and § 1983 has failed to be a satisfying legal remedy for victims.[192]

2. Claims Against the Officer Individually

Elements of a § 1983 action against an officer for engaging in sexual misconduct are easy to prove and plaintiffs often win.[193] A successful § 1983 claim against an officer individually for sexual misconduct results in civil damages paid to the victim.[194] Although civil damages under § 1983 may justly compensate a victim of excessive force by an officer, it is an incomplete solution for a victim of sexual misconduct. Cities also indemnify officers

188 *Id*.

189 *Id*. at 793.

190 *See* Fontana v. Haskin, 262 F.3d 871, 876-77 (9th Cir. 2001) ; McDowell v. Rogers, 863 F.2d 1302, 1305-07 (6th Cir. 1988) (in which the plaintiff was beat with a nightstick by a police officer while he was in prison after his arrest); *see also* Knickerbocker v. City of Colville, No. 2:15-CV-19-RMP, 2016 U.S. Dist. LEXIS 107088 at *7-8, 17-18, 25 (E.D. Wash. Aug. 11, 2016). Robins v. Harum, 773 F.2d 1004, 1006, 1008-10 (9th Cir. 1985) (where plaintiff arrestees were assaulted by the sheriff and the jury returned a verdict of excessive use of force and a violation of the Fourth Amendment).

191 *See infra* Part II-B (2).

192 *See Fontana*, 262 F.3d at 880 (while "excessive force is a useful analog, it is not directly applicable to assess [sexual misconduct by police officers] . . .because there can be no 'countervailing governmental interest'" in the context of sexual misconduct.).

193 *See generally* Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L. J., 587, 589 (2000) ("The great majority of civil rights suits actively pursued under 42 U.S.C. § 1983 conclude with a settlement for money. When these suits proceed to trial, and plaintiffs win, they receive money—often in substantial amounts.").

194 *See id.*

when they are on the hook individually.[195] In fact, officers often never pay the damages from their civil cases.[196] "[P]olice officers are so far removed from the process of settling cases and paying money damages that they often have no idea how much their cases settle for, or even whether they settle at all."[197] Therefore, results of a civil lawsuit do not have a deterrent effect on the officers and civil damages alone are insufficient. As "police departments . . . are notoriously unable or unwilling to discipline, much less fire, police officers,"[198] predacious officers are left on the force leaving the public subject to potential future sexual misconduct.

There is no solution to the deterrence issue in § 1983 actions asserted against officers individually. Indemnification is a result of union negotiations with the city, "[w]hen the city errs on the side of indemnifying every officer, no one complains. The unions are satisfied—they successfully protect their members."[199] However, this is why the proposals suggested to address issues in § 1983 actions against the municipality are so important. If officers are not deterred from committing sexual misconduct through § 1983 actions, the department needs to be held responsible for its indifference to its officer's conduct.

C. A § 1983 Action Against the Municipality

A "person" under § 1983 has been extended to cities, municipalities, and other local government units for "constitutional torts caused by the municipality itself."[200] A § 1983 claim can be asserted against the department in which the officer works when there is a constitutional violation. In order to establish liability of a department or municipal entity under § 1983, an officer acting in his official capacity must "commit unconstitutional acts and those actions are shown to have been caused by a 'policy or custom,' [of the department]."[201] Liability for

195 *See id.* at 590-91.
196 *See id.* at 590.
197 *Id.*
198 *Id.* at 589.
199 *Id.* at 588.
200 R.A. v. City of New York, 206 F. Supp. 3d 799, 802 (E.D.N.Y. 2016).
201 Claudio v. City of Chicopee, 965 N.E.2d 209, 212 (Mass. App. Ct. 2012) (*quoting* Estate of Bennett v. Wainwright, 548 F.3d 155, 177 (1st Cir. 2008); *see generally* 42 U.S.C § 1983 (2012); Rogers v. City of Little Rock, 152 F.3d 790, 799-800 (8th Cir. 1998)

officers acting in their official capacities is "another form of action against the city, and it requires the same showing that a policy or custom caused the alleged violation"[202] and a showing of a deprivation of rights by an officer acting under color of state law.[203] Official capacity suits can be brought against the officer who commits the sexual misconduct and their superiors, such as the police chief.

To prove a § 1983 claim against the municipality or an officer acting within their official capacity, there must be a showing that there is a policy or custom within the department that led to the constitutional violation.[204] An official policy or custom under § 1983 means:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
> 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.[205]

For the department to be liable, their policy or custom must amount to tacit authorization or deliberate indifference to the constitutional violations committed by the officer.[206] In order to prove deliberate indifference, there must be "actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm."[207] The policy

202 Rogers, 152 F.3d at 800.

203 *See* Lemons v. City of Milwaukee, No. 13-C-0331, 2016 U.S. Dist. LEXIS 88820, at *52 (E.D. Wis. July 8, 2016); *see also* Smith v. Carruth, No. 15-4570, 2017 WL 785345, at *2 (E.D. La. Mar. 1, 2017).

204 *See* Mason v. Lafayette City-Parish Consol. Gov't, 806 F.3d 268, 280 (5th Cir. 2015).

205 *Id.* (internal quotation marks omitted).

206 *See Rogers,* 152 F.3d at 799-800.

207 Schneider v. City of Grand Junction Police Dep't, 717 F.3d 760, 771 (10th Cir. 2013) (quoting Barney v. Pulsipher, 143 F.3d 1299, 1307 (10th Cir. 1998) (involving two inmates

or custom requirement is used to distinguish the acts of the individual officer from the acts of the municipality, thereby limiting the liability of the municipality to the acts for which the municipality—and not only the individual officer—is also responsible.[208]

Finally, causation must be established by the plaintiff proving that the municipality's actions or inactions were the moving force that caused plaintiff's deprivation of constitutional rights.[209] The department's failures must be the moving force behind the violation in that it "requires a forceful showing of both culpability and causation" on the part of the department.[210] This element is applied "with especial rigor" when the claim of municipal liability is based on inadequate training, supervision and deficiencies in hiring.[211]

Inadequate training, supervision and deficiencies in hiring are common allegations against the municipality under § 1983. For a successful claim, the plaintiff must prove that the deficient hiring, failure to train, or failure to supervise by the department was the moving force leading to the constitutional violation by the officer.[212] These claims are difficult to prove and many cases fail on the basis of causation.

Past lawsuits over sexual misconduct have failed. For example, in *Alfaro v. City of Houston,* Officer Abraham Joseph "was convicted of aggravated sexual assault by a public servant."[213] Four of his victims sued the City of Houston alleging that they were liable under § 1983 "for unconstitutional policies and practices in hiring, training, and supervising police officers."[214] The court determined that the list of approximately twenty complaints in a six-year period pertaining to forcible sexual assault complaints against numerous officers in the department

who, while serving a 48-hour sentence for minor offenses, were sexually assaulted by a jailer and brought § 1983 action)).

208 *See id.* at 770.

209 *See id.*

210 Smith v. Carruth, No. CIV.A.15-4570, 2017 WL 785345, at *8-9 (E.D. La. Mar. 1, 2017) (discussing failure to train liability by the department).

211 *Schneider*, 717 F.3d at 770 (internal quotation marks omitted).

212 *See Smith*, 2017 WL 785345, at *8-9.

213 Alfaro v. City of Houston, No. CIV.A.H-11-1541, 2013 WL 3457060, at *1 (S.D. Tex. July 9, 2013).

214 *Id.*

was insufficient.[215] The court stated "evidence of prior complaints about sexual assaults by officers does not show a pattern that would support the inference that the City was deliberately indifferent to constitutionally deficient screening of police officers or a causal link between the screening and rapes committed by police officers."[216] Therefore, the city was not liable.[217]

Claims of excessive force by officers and sexual misconduct are inherently different. Force is incidental to arrest, and physical force is not illegal for officers to use against those who they suspect committed a crime.[218] Officers are given wide leeway in determining how much force is reasonable under the changing circumstances of arrest. Consequently, courts are hesitant to restrict officers' discretion.[219] In the context of sexual misconduct, however, any number of sexual misconduct claims asserted against any of the officers warrants significant disciplinary action. Proving deliberate indifference by the municipality in § 1983 actions, such as in the *Alfaro* case and in other cases about sexual misconduct allegations, is too demanding of plaintiffs and is based on the very different context of excessive force cases.

Importantly, proving deliberate indifference is a very hard burden for plaintiffs to overcome. Deliberate indifference requires "more than a list of instances of misconduct to ensure that the jury has the necessary context to glean a pattern"[220] and must account for the number of incidents in the context of the department's size and number of arrests.[221] This high standard makes sense in the context of excessive force. If departments were always liable in every excessive force claim by an arrestee who feels that an officer could have used less force against him, that would exceed the municipality's rightful liability. But when there is a list of claims of sexual misconduct are made against an officer that departments, like Oakland, fail to investigate appropriately, the department is acting deliberately indifferent to the misconduct of

215 *See id.* at *14.

216 *Id.* at *13.

217 *Id.* at *1.

218 *See generally* Graham v. Connor, 490 U.S. 386 (1989).

219 Simon Bronitt & Philip Stenning, *Understanding Discretion in Modern Policing*, 35 CRIM. L. J. 319, 322 (2011).

220 Alfaro, 2013 WL 3457060, at *13 (S.D. Tex. July 9, 2013) (citing Peterson v. City of Fort Worth, 588 F.3d 838, 851 (5th Cir. 2009)).

221 *Id.* (Changed this from the Oporto Cite).

their officers. The high standard is unwarranted and applying it leaves sexually predacious officers on the force even when there are multiple claims of sexual misconduct asserted against the officer.

III. PROPOSALS

Sexual misconduct by officers involves more than just a few bad apples; it is often a systemic problem.[222] Accordingly, the issue needs to be addressed on two levels, individually and systemically. Part III-A addresses the lack of prosecutions under § 242 and proposes holding officers accountable by Assistant United States Attorneys ("AUSAs") actively bringing § 242 prosecutions against officers. As explained above, § 1983 actions against the officer individually often succeed in achieving verdicts or settlements, but they are not successful deterrents of future sexual misconduct due to indemnification.[223] Accordingly, § 242 will provide the deterrent effect necessary to stop officers from engaging in this behavior in the first place.

Part III-B will argue for an additional criminal reform, specifically for H.R. Bill 6568, which eliminates the consent defense, to be revived and enacted by Congress. Part III-C and D address the systemic nature of the problem. The civil proposals laid out in these parts address § 1983 actions against the municipality and the high deliberate indifference standard. These proposals change deliberate indifference in a two-prong approach. First, deliberate indifference must be lowered to the standard of pattern and practice. Second, establishing a rebuttable evidentiary presumption satisfying the new standard of pattern and practice in § 1983 claims of sexual misconduct will hold departments liable for their deficient hiring, failure to train, or failure to supervise. Together, these proposals address the individual deterrent that is currently lacking while also addressing the systemic change that is necessary to change the law enforcement culture which allows this issue to go unaddressed.

222 *See supra* Part I-D.
223 *See supra* Part II-(B)(1).

A. Actively Pursuing § 242 Prosecutions

Section 242 is a law that was enacted to address the issue of sex crimes committed by officers. The legislative history addresses the fact that historically, the crimes under the statute were committed against freed slaves.[224] Over 150 years later, black women are still among the targets of sexual misconduct, as exemplified by Holtzclaw.[225] But sexual misconduct by officers is not only a problem experienced by minorities.[226] Officers who engage in sexual misconduct prey on vulnerable victims who are hesitant to report them in the first place. As the data stands, police officers rarely face criminal penalties for this behavior.[227] Accordingly, AUSAs need to investigate and prosecute officers for committing federal crimes.

Centralizing reports of sexual misconduct to agents of the federal government is necessary to address the issues of lack of accountability, state prosecutorial bias, and the lack of data on sexual misconduct. Having a particular body that is devoted to the investigation of these claims addresses the issue of victims having to make a claim to the department in which the officer works. This allows for the victim feeling safe asserting a claim and bias free investigation of the claim. Moreover, this allows for the federal government to keep track of sexual misconduct by officers, which is something that they do not presently track.[228] Tracking the claims asserted, who the victims are, the context of the misconduct, and other variables will allow for the Department of Justice to analyze incidents at a foundational level and allow them to establish how to best address these claims.

This proposal is not putting any additional burden on the federal government. It is *already* the responsibility of AUSAs to prosecute

224 *See* Watford, *supra* note 91, at 483.

225 *See generally* Larimer, *supra* note 29; *see also* KFOR-TV & K. Querry, *supra* note 28.

226 *See* Mejia, *supra* note 7.

227 *See* Watford, *supra* note 91, at 483.

228 E-mail from Deena Smith, Librarian, Fed. Judicial Ctr., to author (Mar. 13, 2018, 17:48 EST) (on file with author) (stating, "I have not been able to find any research conducted by our organization related to police misconduct / police sexual abuse (https://www.fjc.gov/research). I also looked at resources from the Administrative Office of the Courts (http://www.uscourts.gov/statistics-reports/analysis-reports), and didn't find anything there either.").

crimes under § 242; they simply are not bringing these cases. As mentioned earlier, this failure may be due to the fact that the statute is forgotten or that it is associated with problems of a different time. But the issue of sexual misconduct by officers is clearly a very real issue today. Confusion caused by *Screws* is another reason why this statute may have been shied away from by prosecutors. But unclear case law is no reason to stop bringing cases. Over 70 years has passed since *Screws* was decided and it may be time for a § 242 case to be re-evaluated by the Supreme Court to clear up the confusion. It is up to the prosecutors to bring these cases to the Court for this to happen. In order for there to be any future deterring effect on officers engaging in sexual misconduct, § 242 needs to be revived to ensure criminal accountability of officers.

B. Enact "Closing the Law Enforcement Consent Loophole Act of 2018"

Presently, H.R. Bill 6568 is dead in Congress.[229] For reasons discussed throughout this paper, it is imperative that it be revived and enacted. Interestingly enough, a second version of "Closing the Law Enforcement Consent Loophole Act of 2018" was introduced in November of 2018.[230] However, the language in this version of the bill, "Closing the Law Enforcement Consent Loophole Act of 2018" (hereinafter S. 3688) tracks the language of 18 U.S.C. § 242.[231] An S. 3688 amendment to 18 U.S.C. § 2243 would add subsection (c), which would prohibit:

229 *Govtrack H.R. 6568* Overview, *supra* note 141.

230 *S. 3688 (115th): Closing the Law Enforcement Consent Loophole Act of 2018, Text*, GOVTRACK, https://www.govtrack.us/congress/bills/115/s3688/text (last visited Oct. 12, 2019) [hereinafter Govtrack S. 3688]; *compare* Closing the Law Enforcement Consent Loophole Act of 2018, S. 3688, 115th Cong. (2ND SESS. 2018) *with* 18 U.S.C. § 242 (1996) which states:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse . . . shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

231 *See generally* S. 3688; 18 U.S.C. § 242

> Whoever, acting under color of law, knowingly engages in a sexual act with an individual, including an individual who is under arrest, in detention, or otherwise in the actual custody of any Federal law enforcement officer, shall be fined under this title, imprisoned not more than 15 years, or both.[232]

It also amends 18 U.S.C. § 2243 to add, "[i]n a prosecution under subsection (c), it is not a defense that the other individual consented to the sexual act."[233] In essence, S. 3688, seeks to criminalize the very acts that § 242 already does. This just goes to show how little-used, § 242 really is and how imperative it is that prosecutors actively start bringing charges under this statute.

Regardless, even though S. 3688 died in Congress,[234] H.R. Bill 6568 should be revived, as it adds meaningful language to federal law. The bill's goal to close the consent loophole is a critical and timely update to federal law. H.R. Bill 6568 specifically criminalizes sexual acts by federal law enforcement officers. While states individually are starting to follow New York's lead in enacting similar legislation, having a federal parallel for victims of sexual misconduct by federal law enforcement officers is essential.

C. Changing Deliberate Indifference to Pattern and Practice

As the law stands, § 1983 claims against the municipality are very difficult to prove. Case law shaped the definition of deliberate indifference to address municipal liability for excessive force by officers. A high standard that governs municipal liability for legal behavior by officers, however, cannot be the same standard that governs municipal liability for illegal sex crimes committed by them. Instead of the high standard of deliberate indifference, courts should adopt a lower standard of pattern or practice, as defined by the Department of Justice, for claims of sexual misconduct.

232 *See* S. 3688.

233 Govtrack S. 3688, *supra* note 230.

234 *S. 3688 (115th): Closing the Law Enforcement Consent Loophole Act of 2018, Overview*, GOVTRACK, https://www.govtrack.us/congress/bills/115/s3688 (last visited Oct. 12, 2019).

The Department of Justice conducts investigations into departments through the Civil Rights Section, one of which is a pattern and practice investigation.[235] Under what was formerly 42 U.S.C. § 14141, now re-codified as 34 U.S.C. § 12601, it is unlawful for a law enforcement agency to "engage in a pattern or practice of conduct . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[236] In order to conduct a pattern or practice investigation, a single incident is not enough; the Department of Justice must show "the agency has an unlawful policy or that the incidents constituted a pattern of unlawful conduct."[237] In terms of sexual misconduct, the pattern and practice would be defined as the law enforcement agency engages in a pattern or practice of deficient hiring, failure to train, or failure to supervise that leads to the constitutional violation the agency will be held liable under § 1983.

Therefore, the lower standard of pattern and practice still embodies the policy considerations under deliberate indifference. Some cases will meet the threshold to satisfy the lower standard while others will not.

For example, let's apply the lower pattern and practice standard and evidentiary presumption to the facts of *Alfaro v. City of Houston.* Four victims of Officer Abraham Joseph sued the City of Houston. Evidence in the case included a list of approximately twenty complaints in a six-year period pertaining to forcible sexual assault complaints against numerous officers in the department. The court said this evidence was insufficient to prove the department was deliberately indifferent.[238] Under the lower standard of pattern and practice, however, the results of the case would likely be different. The four victims of Officer Joseph would

235 *How Department of Justice Civil Rights Division Conducts Pattern-or-Practice Investigations*, U.S. DEP'T JUST., https://www.justice.gov/file/how-pp-investigations-work/download (last visited Oct. 12, 2019).

236 34 U.S.C § 12601 (2017).

237 *Addressing Police Misconduct Laws Enforced by the Department of Justice,* U.S. DEP'T JUST., https://www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice (last updated Feb. 28, 2019).

238 Alfaro v. City of Houston, No. H-11-1541, 2013 WL 3457060, at *13 (S.D. Tex. July 9, 2013) (*citing* Oporto v. City of El Paso, No. EP-10-CV-110-KC, 2010 WL 3503457, at *1 (W.D. Tex. June 14, 2012) (*quoting* "where the court rejected 32 similar incidents of police misconduct over 15 years.")).

likely satisfy the number of claims required under the presumption to be asserted against an individual officer to establish pattern or practice. The burden would now shift to the department to rebut the presumption in order to not be held liable.

Further, the lower standard balances the fact that the municipality should only be held liable for their own actions with the fact that when there is a pattern of crimes committed by officers within a department, the department should be held liable for their failure to address it. Therefore, a single claim against one officer in the department, and no other claims made against other officers would not lead to municipal liability.

D. Establish a Rebuttable Evidentiary Presumption

In conjunction with lowering the standard to pattern and practice, there should be a rebuttable evidentiary presumption of pattern or practice when a single officer has three or more claims of sexual misconduct against them, or, ten percent of officers in the department have claims of sexual misconduct asserted against them. This presumption shifts the burden from the plaintiff to the department to prove that there is not a pattern and practice of deficient hiring, failure to train, or failure to supervise that led to the sexual misconduct at issue. Further, the presumption considers that the current standard of deliberate indifference involves "more than a list of instances of misconduct to ensure that the jury has the necessary context to glean a pattern"[239] and also accounts for the number of incidents in the context of the department's size and number of arrests.[240] This presumption also balances the rights of the department to limit liability to their own acts by recognizing that when departments do take the necessary corrective action, they will not be held liable for the crimes committed by an officer.

Moreover, this solution also fits the context of proving deliberate indifference in sexual misconduct cases as opposed to excessive force cases. A department's reliance on their officer's judgment about the need for physical force in the moment may be justifiable

[239] *Alfaro,* 2013 WL 3457060 at *13 (*citing Peterson v. City of Fort Worth*, 588 F.3d 838, 851 (5th Cir. 2009).

[240] *Oporto,* 2010 WL 3503457 at *5.

and necessary for policing. However, an officer choosing to engage in sexual misconduct while on duty is never justifiable. A department's deficient hiring, failure to train, or failure to supervise that leads to multiple claims of sexual misconduct against an officer or multiple officers in the department should result in civil damages. Having this rebuttable evidentiary presumption of deliberate indifference will put departments on notice that sexual misconduct claims will not be treated the same as excessive force and prudent municipalities will begin to reform their ways.

CONCLUSION

As the law stands today, victims of sexual misconduct by law enforcement officers are left without adequate legal options. Not only are officers not punished criminally, but they are indemnified from paying civil damages. This leaves sexual assaulters and rapists patrolling the very communities on which they prey. Moreover, under federal law these officers can claim that the victim consented to the officer's abuse of power.

Sexual misconduct by law enforcement is not the product of a few bad apples, it is the product of systemic machismo in departments throughout the United States. While these crimes often lurk in the shadows outside of media attention, the horrors brought to light by Holtzclaw's case and the Oakland Police Department scandal show how prevalent and widespread this problem really is. The fact that sexual misconduct is "happening probably in every law enforcement agency across the country"[241] is unacceptable. It is time the law reflect how unacceptable this behavior is.

It is the job of prosecutors and civil attorneys alike to seek justice for victims of sexual misconduct by law enforcement. With a federal criminal statute already on the books that addresses this very issue, it is time prosecutors actively prosecute under it. Any confusion as to the language of the statute is for the courts to decide and it is time that they do so. Additionally, H.R. Bill 6568 must be enacted so that the law enforcement consent loophole is closed. Civilly, the standards for municipal liability need to be

241 *See* Betrayed, *supra* note 43.

lowered. A two-prong approach, first, changing deliberate indifference to pattern and practice, then creating a presumption of liability shifting the burden on the department to rebut, creates a standard that holds the department liable for deficient hiring, failure to train, and failure to supervise officers that commit sexual misconduct.

In our present criminal justice system, sexually based offenses are considered especially heinous, *except* when they are committed by law enforcement. It is time to finally hold the offending officers and the departments in which they work accountable for these vicious felonies.