

REOPENING FERGUSON AND RETHINKING CIVIL RIGHTS PROSECUTIONS

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ABSTRACT

A deeply flawed eighty-six page legal memorandum revealed the rationale for the U.S. Justice Department’s March 2015 decision not to prosecute Ferguson police officer Darren Wilson. The Article rejects the Department’s contention that prosecution was not permitted by the governing law and explains why the failure to indict was supported by neither the law nor Wilson’s own grand jury testimony.

Screws v. United States (1945), the leading Supreme Court decision on the requirements for a civil rights prosecution, and the principal authority on which the Justice Department relied, has been widely misinterpreted. The Article explains how *Screws*, when considered in light of the Court’s more recent, but much-neglected opinion in *Lanier v. United States* (1997), does not pose as high a hurdle to civil rights prosecutions as most lower federal courts and civil rights lawyers, including prosecutors in the Justice Department, have long believed. The Article seeks to elevate *Lanier* to its rightful place at the center of the constitutional canon governing civil rights prosecutions and proposes legislation that would codify its lower standard of proof, with the aim of reviving the criminal sanction as the only effective remedy for bringing justice to the families of men and women of color slain by unconstitutional police violence.

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I. INTRODUCTION

It has been almost fifty years since the Kerner Commission concluded, in the antiquated language of its time, that riots in twenty-three cities during the summer of 1967 were triggered in part by “a widespread belief among Negroes in the existence of police brutality and in a ‘double standard’ of justice and protection—one for Negroes and one for whites.”¹ While policing has not been without progress, little has changed in terms of the frequency with which African Americans have been killed in officer-involved shootings. Beginning with the fatal shooting of eighteen-year-old Michael Brown in Ferguson, Missouri on August 9, 2014, there were so many high-profile killings by white police officers of unarmed young African American men² in the next eight months, causing riots in Ferguson and Baltimore and mass demonstrations in dozens of other cities, that President Obama called the homicides a “slow-rolling crisis.”³

When St. Louis County Prosecuting Attorney Robert McCulloch failed to obtain an indictment against the Ferguson police officer who killed Michael Brown,⁴ protestors were so convinced by now-discredited witness accounts that

1 NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 5 (1967), <https://www.ncjrs.gov/8073NCJRS.pdf> [<https://perma.cc/7L9P-5FXV>]. Known as the Kerner Commission, after its chair Governor Otto Kerner of Illinois, the eleven-member panel was appointed by President Lyndon Johnson in 1967 to investigate the causes of riots in the black neighborhoods of major U.S. cities including Detroit, Chicago, Newark, and Los Angeles.

2. Although their stories are not as well publicized, African American women have also been killed by the police with alarming frequency. See Andrea J. Ritchie, *#SayHerName: Racial Profiling and Police Violence Against Black Women*, 41 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 187 (Aug. 11, 2016), <https://socialchangenyu.com/sayhername-racial-profiling-and-police-violence-against-black-women> [<https://perma.cc/7VKE-H2ND>]; Kate Abbey-Lambetz, *These 15 Black Women Were Killed During Police Encounters. Their Lives Matter, Too*, HUFFINGTON POST (Feb. 13, 2015), http://www.huffingtonpost.com/2015/02/13/black-womens-lives-matter-police-shootings_n_6644276.html [<https://perma.cc/264X-FTZU>].

3. Julie Hirschfeld Davis & Matt Apuzzo, *President Obama Condemns Both the Baltimore Riots and The Nation’s ‘Slow-Rolling Crisis,’* N.Y. TIMES (Apr. 28, 2015), http://www.nytimes.com/2015/04/29/us/politics/events-in-baltimore-reflect-a-slow-rolling-crisis-across-us-obama-says.html?_r=0 [<https://perma.cc/4KNC-5CTT>].

4. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> [<https://perma.cc/HNN5-ZNH2>].

Brown's hands were in the air when he was shot to death, that the slogan "Hands Up, Don't Shoot" and the gesture of hands up, palms out became a national symbol of outrage.⁵ Indeed, Ferguson has since taken on the iconic significance of cities like Montgomery and Selma in the pantheon of historic places in the civil rights movement. Most prominent among the other uncharged officer-involved shootings that followed Ferguson are the chokehold death of Eric Garner in Staten Island;⁶ the fatal shooting of twelve-year-old Tamir Rice in Cleveland as he played with a replica of a semi-automatic pistol;⁷ the killing of John Crawford III while holding a BB/pellet air rifle he had picked up off a shelf while shopping at a Walmart in a suburb of Dayton Ohio;⁸ and the death of seventeen-year-old Laquan McDonald, who was shot sixteen times by a Chicago

5. Charlotte Alfred, *8 Unforgettable Symbols from an Extraordinary Year of Protest*, HUFFINGTON POST (Dec. 28, 2014), http://www.huffingtonpost.com/entry/protest-symbols-2014_n_6297818 [<https://perma.cc/7AQR-JEQN>]. Ferguson fueled the growth of the Black Lives Matter movement, which started as a protest group after the acquittal of George Zimmerman in the killing of Trayvon Martin, and has since become the spearhead of a new civil rights movement. See Alex Altman, *Person of the Year: The Short List, No. 4, Black Lives Matter*, TIME (Dec. 21, 2015), <http://time.com/time-person-of-the-year-2015-runner-up-black-lives-matter> [<https://perma.cc/35PZ-ALTP>]. Ferguson has also emerged as an international as well as domestic symbol of America's civil rights problems. See Charlie Rose, *All Eyes on Putin*, CBS NEWS (Sept. 27, 2015), <http://www.cbsnews.com/news/vladimir-putin-russian-president-60-minutes-charlie-rose> [<https://perma.cc/U576-T54J>] ("If everything was perfect [in the United States,] there wouldn't be the problem of Ferguson.") (statement of Russian President Vladimir Putin).

6. Al Baker, David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/3T2T-XMMU>]. Garner's final words, "I can't breathe," uttered eleven times in the struggle with police officers that led to his death, became a rallying cry for protests. The decision of a Staten Island grand jury not to indict the lead officer, Daniel Pantaleo, who described the maneuver as a "takedown" move rather than a chokehold, which is banned by the New York City Police Department, came barely a week after the grand jury refused to indict in Ferguson. See J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html> [<https://perma.cc/WNA4-PVZ7>]. New York City later settled a civil wrongful-death claim with the family of Eric Garner for \$5.9 million. J. David Goodman, *Eric Garner Case Is Settled by New York City for \$5.9 Million*, N.Y. TIMES (July 13, 2015), <http://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html> [<https://perma.cc/8A26-BH6E>]. Two years after Garner's death, the Justice Department still had not decided whether to file federal civil rights charges. Alan Feuer & Matt Apuzzo, *With Prosecutors at Odds, U.S. Inquiry into Eric Garner's Death Drags On*, N.Y. TIMES (July 11, 2016), <http://www.nytimes.com/2016/07/12/nyregion/with-prosecutors-at-odds-us-inquiry-into-eric-garner-death-drags-on.html> [<https://perma.cc/7CK8-XUFN>] (describing disagreement between prosecutors in the U.S. Attorney's Office in Brooklyn and prosecutors in the Justice Department over whether there was sufficient evidence to indict).

7. Emma G. Fitzsimmons, *12-Year-Old Boy Dies After Police in Cleveland Shoot Him*, N.Y. TIMES (Nov. 23, 2014), <http://www.nytimes.com/2014/11/24/us/boy-12-dies-after-being-shot-by-cleveland-police-officer.html> [<https://perma.cc/TYR9-7RTM>].

8. Elahe Izade, *Ohio Wal-Mart Surveillance Video Shows Police Shooting and Killing John Crawford III*, WASH. POST (Sept. 25, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/09/25/ohio-wal-mart-surveillance-video-shows-police-shooting-and-killing-john-crawford-iii> [<https://perma.cc/6JU5-BTTY>].

police officer indicted for first degree murder only after a dashboard camera video of the incident—released 400 days after the shooting and only in response to a court order—showed that, contrary to police reports, McDonald, who was carrying a three-inch folding knife, did not attack or otherwise threaten the officer.⁹

Almost two years after the death of Michael Brown, a deadly series of events, all occurring within a period of less than two weeks, demonstrated how horrific the crisis had become.¹⁰ Alton Sterling was killed while he was selling CDs outside a convenience store in Baton Rouge, Louisiana,¹¹ and the very next day, Philando Castile was shot and killed, the aftermath of which was captured in an extraordinary video live-streamed on Facebook by his fiancée as he lay bleeding to death beside her during a traffic stop in a suburb of St. Paul, Minnesota.¹² These devastating events were quickly followed by retaliatory killings of police officers by African-American gunmen, first in Dallas¹³ and then in Baton Rouge.¹⁴ The shock and grief felt by all Americans brought a

9. Monica Davey, *Officers' Statements Differ from Video in Death of Laquan McDonald*, N.Y. TIMES (Dec. 5, 2015), <http://www.nytimes.com/2015/12/06/us/officers-statements-differ-from-video-in-death-of-laquan-mcdonald.html> [https://perma.cc/PAD2-GLPQ].

10. See Julie Hirschfield Davis, *Obama Urges Civil Rights Activists and Police to Bridge Divide*, N.Y. TIMES (July 13, 2016), <http://www.nytimes.com/2016/07/14/us/politics/tensions-between-police-and-blacks-are-likely-to-worsen-obama-says.html> [https://perma.cc/GEF7-BYNT] (President Obama, after a four-hour White House meeting in July 2016 with police and civil rights activists, described the meeting as “encouraging,” but expressed apprehension about “more tension between police and communities this month, next month, next year, for quite some time”).

11. Richard Fausset, Richard Perez-Pena & Campbell Robertson, *Alton Sterling Shooting in Baton Rouge Prompts Justice Department Investigation*, N.Y. TIMES (July 6, 2016), <http://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html> [https://perma.cc/T8Z4-MPRA]. Sterling was tackled and pinned to the ground by two officers responding to a call about a man brandishing a gun, and then shot multiple times at close range after one of them was heard shouting on one of the cell phone videos that recorded the incident, “He’s got a gun! Gun!” Subsequent reports confirm that Sterling had a pistol in his possession, but the evidence indicates that it was still in his pocket when the shots were fired. *Id.*

12. Pam Louwagie, *Falcon Heights Police Shooting Reverberates Across The Nation*, STARTRIBUNE (July 8, 2016), <http://www.startribune.com/aftermath-of-fatal-officer-involved-shooting-in-falcon-heights-is-captured-on-video/385861101> [https://perma.cc/RNW3-E5DY].

13. Joel Achenbach, William Wan, Mark Berman & Moriah Balingit, *Five Dallas Police Officers Were Killed by a Lone Attacker, Authorities Say*, WASH. POST (July 8, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/07/08/like-a-little-war-snipers-shoot-11-police-officers-during-dallas-protest-march-killing-five> [https://perma.cc/3DTA-L8NT]. On the night following the killing of Philando Castile, five Dallas police officers were murdered and seven others wounded by Micah Johnson, a twenty-five-year-old African American veteran, who fired on them from a parking garage while they were protecting hundreds of demonstrators peacefully protesting the killings of Castile and Sterling. In a standoff that lasted for hours before Johnson was killed by a robot-detonated explosive device, he told police he “was upset about the recent police shootings” and “wanted to kill white people, especially white officers.” *Id.*

14. Richard Fausset, Frances Robles & John Eligon, *Online Trail Illuminates Baton Rouge Gunman's Path to Violence*, N.Y. TIMES (July 18, 2016), <http://www.nytimes.com/2016/07/19/us/baton-rouge-shooting.html> [https://perma.cc/3SY9-9GSM]. Twelve days after the death of Alton Sterling in Baton Rouge, twenty-nine-year-old African American Gavin Long, a former Marine Corps sergeant, fatally shot three law enforcement officers and wounded three

measure of reflection and restraint to the debate about race and policing, as President Obama, in a poignant eulogy at a memorial service for the five slain Dallas officers, called for empathy and unity.¹⁵ Yet the murders of so many police officers may have irrevocably changed the context in which the national conversation about police accountability will continue, as law enforcement officials feel increasingly embattled, while civil rights activists express growing impatience with conversations that result in little meaningful change.¹⁶ The public attention generated in the last two years by the riots in Ferguson and Baltimore and by nonviolent protests in cities across the nation, along with the increasing availability of video evidence recorded by cell phones and body cameras, have begun to reverse the almost complete immunity of police officers from prosecution.¹⁷ The number of police officers charged with murder or manslaughter for on-duty shootings in 2015 was more than three times the yearly average for the preceding ten years.¹⁸ However, few of those recent prosecutions have resulted in convictions.¹⁹

others before being killed himself in a shootout with the police in the same city. Videos posted online by Long suggest that the officers were deliberately targeted in retaliation for police violence against Sterling and other African Americans. *Id.*

15. Gardiner Harris & Mark Landler, *Obama Tells Mourning Dallas: 'We Are Not as Divided as We Seem,'* N.Y. TIMES (July 11, 2016), http://www.nytimes.com/2016/07/13/us/politics/obama-dallas-attacks-speech.html?_r=speech.html?_r=0 [<https://perma.cc/ELU4-72JX>].

16. See Hirschfield, *supra* note 10.

17. See John V. Jacobi, *Prosecuting Police Misconduct*, 2000 Wis. L. Rev. 789, 804–06 & nn.107, 112–17 (summarizing results of a Human Rights Watch survey of fourteen American cities between 1995 and 1998, describing local prosecution of police misconduct in most of them either as “rare” or “extremely rare”).

18. While thousands of police shootings have occurred since 2005, only fifty-four of the officers involved have been charged—an average of about five per year—as compared to the prosecution of seventeen officers in 2015 alone. Brandon Ellison Patterson, *Here Are All of the Cops Who Were Charged in 2015 for Shooting Suspects*, MOTHER JONES (Dec. 17, 2015), <http://www.motherjones.com/politics/2015/12/year-police-shootings> [<https://perma.cc/SRF7-83F3>].

19. A research collaborative that tracks fatal police shootings found that of the 102 unarmed African Americans fatally shot by the police in 2015, only ten of those deaths resulted in prosecutions of one or more officers, and of these, only two prosecutions resulted in convictions. *Unarmed Victims Key Findings*, MAPPING POLICE VIOLENCE, <http://mappingpoliceviolence.org/unarmed> [<https://perma.cc/8DD3-8G2V>]. Of the six officers indicted in Baltimore for the death of Freddie Gray from a spinal cord injury sustained while being transported in a police van, three were acquitted after bench trials; a trial of the fourth officer resulted in a hung jury; and as the bench trial for the fifth officer was about to begin, the Baltimore prosecutor dropped all charges against the remaining defendants. Kevin Rector & Justin Fenton, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions Against Officers*, BALTIMORE SUN (July 27, 2016), <http://www.baltimoresun.com/new/maryland/freddie-gray/bs-md-ci-miller-pretrial-motions-20160727-story.html> [<https://perma.cc/2YQM-XLW7>]. Before the trials started, the Baltimore City Council had approved a \$6.4 million settlement with the family of Freddie Gray. Sheryl Gay Stolberg, *Freddie Gray Settlement Approved by Baltimore Officials*, N.Y. TIMES (Sept. 9, 2015), <http://www.nytimes.com/2015/09/10/us/freddie-gray-baltimore-police-death.html> [<https://perma.cc/EZX6-6CJL>]. Two weeks after the dismissal of the remaining charges, a Justice Department report of an investigation of the Baltimore City Police Department showed a pattern or practice of unconstitutional stops, arrests, searches, and excessive force. CIVIL RIGHTS DIVISION,

Even as police officers begin to be charged by local prosecutors, the problem of unwarranted police immunity seems to have migrated to a most unlikely place, making its appearance at the highest level of law enforcement in the nation. Despite a scathing report released by the U.S. Department of Justice on March 4, 2015, finding systematic racial bias in the Ferguson Police Department and “a pattern of unconstitutional policing,”²⁰ then-Attorney General Eric Holder, on the same day, issued another report, in the form of an eighty-six-page legal memorandum, explaining the decision not to convene a federal grand jury to indict Ferguson police officer Darren Wilson for depriving Michael Brown of his civil rights.²¹ Although the Justice Department Memorandum makes a convincing case for concluding that Brown did not have “his hands raised in an unambiguous signal of surrender” when he was killed,²² and the decision not to indict was widely accepted as a laudable exercise of prosecutorial discretion,²³ a careful reading of the document reveals a process of legal reasoning so deeply flawed as to cast serious doubt on its validity.

U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3 (Aug. 10, 2016), <http://www.justice.gov/opa/file/883366/download> [<https://perma.cc/3A8Y-27EF>].

20. CIVIL RIGHTS DIVISION, U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/G5JU-2LER>]. The investigation was conducted pursuant to 42 U.S.C. § 14141, which authorizes the Justice Department to bring suits for equitable remedies against police departments that are found to have engaged in “a pattern or practice” of unconstitutional misconduct. In March 2016, the Ferguson City Council, reversing an earlier decision, voted to accept a consent decree providing for implementation of reforms to end unconstitutional police and court practices. John Eligon, *Ferguson Approves a Federal Plan to Overhaul Police and Courts*, N.Y. TIMES (Mar. 15, 2016), <http://www.nytimes.com/2016/03/16/us/ferguson-approves-a-federal-plan-to-overhaul-police-and-courts.html> [<https://perma.cc/3HBU-DM6Z>].

21. U.S. DEP’T OF JUSTICE, MEMORANDUM, REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICE DARREN WILSON (Mar. 4, 2015), at 86, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [<https://perma.cc/5W5Y-EBD8>] [hereinafter MEMORANDUM].

22. *Id.* at 78.

23. See Ta-Nehisi Coates, *The Gangsters of Ferguson*, THE ATLANTIC (Mar. 5, 2015), <http://www.theatlantic.com/politics/archive/2015/03/The-Gangsters-Of-Ferguson/386893/> [<https://perma.cc/BV89-J2LP>] (“The Justice Department investigation reflects a department attempting to [give] . . . Officer Wilson the due process that he, and anyone else falling under our legal system, deserves.”); Cristian Farias, “*Hands Up, Don’t Shoot*” Was Not Built on a Lie, THE NEW REPUBLIC (Mar. 18, 2015), <http://www.newrepublic.com/article/121322/doj-ferguson-report-doesnt-mean-hands-dont-shoot-was-lie> [<https://perma.cc/RM2Y-QYX4>] (“If there’s a shining example of prosecutorial discretion, the DOJ report is it.”). Former Justice Department lawyers predicted there would be no indictment because the bar to federal charges was too high. See, e.g., Sari Horwitz & Kimberly Kindy, *Federal Civil Rights Charges Unlikely against Police Officer in Ferguson Shooting*, WASH. POST (Oct. 31, 2014), http://www.washingtonpost.com/world/national-security/federal-civil-rights-charges-unlikely-against-police-officer-in-ferguson-shooting/2014/10/31/56189d80-6055-11e4-8b9e-2ccdac31a031_story.html [<https://perma.cc/J6ZY-B23Z>] (“If Wilson genuinely believed he was acting in self-defense,” his actions were not “willful,” as civil rights statute requires) (quoting University of Virginia law professor Rachel Harmon)).

It would not be accurate to say that the Justice Department whitewashed the killing of Michael Brown. A whitewash involves a bad-faith effort to cover up incriminating evidence. What is fair to say is that the authors of the Memorandum acted with as much good faith as lawyers frequently act in ignoring or minimizing the evidence and the law against them, and exaggerating the evidence and the precedents in their favor. This is what the legal profession calls “zealous advocacy.” The problem with the Memorandum is the absence of any advocacy at all on behalf of the prosecution. The Memorandum reads like a brief written for the St. Louis Police Officers’ Association. In deciding whether to indict, prosecutors are supposed to assess the evidence and the law in the light most favorable to the government, not in the light most favorable to the defendant,²⁴ which is how Justice Department lawyers consistently viewed both the law and the facts in the Memorandum. By discrediting evidence and failing to consider judicial precedent against Wilson while exaggerating evidence and judicial precedent in his defense, the Justice Department acted so zealously on behalf of the accused that it breached its legal responsibility to vindicate the civil rights of the victim.

This Article concludes, first, that even if all of Wilson’s testimony before the St. Louis County grand jury is accepted as true and the evidentiary conflicts are resolved in his favor, there was sufficient evidence for the County prosecutor to obtain an indictment and conviction for manslaughter, and for a federal grand jury to indict Wilson for depriving Brown of his Fourth Amendment right to be free from the unreasonable use of deadly force. Second, while there is a higher bar to a federal civil rights prosecution than a state prosecution because of the necessity of proving that Wilson not only violated Brown’s Fourth Amendment rights, but that he did so “willfully,” the Justice Department’s conclusion that “seeking his indictment is not permitted by . . . the governing law”²⁵ is supported by neither the law nor the evidence.

24. A federal prosecutor should seek and recommend an indictment when there is sufficient admissible evidence to make it probable that a conviction can be obtained and sustained. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-27.220A (2014), <http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution> [<https://perma.cc/B5R6-EV4T>]. In deciding whether a conviction can be obtained, the U.S. Attorneys’ Manual directs prosecutors to follow Rule 29(a) of the Federal Rules of Criminal Procedure, which governs a motion for judgment of acquittal. *Id.* § 9-27.220B. In deciding whether the evidence is “insufficient to sustain a conviction” under Rule 29, the court views the evidence “in the light most favorable to the government, drawing all inferences in the government’s favor and deferring to the jury’s assessments of the witnesses’ credibility.” *United States v. Hawkins*, 547 F.3d 66, 70 (2nd Cir. 2008). The Justice Department should have viewed the evidence supporting an indictment in the same manner. While prosecutors properly rejected as not credible witness statements that Brown’s hands were raised in surrender, as such accounts were so clearly contradicted by other witness accounts as well as the relevant physical and forensic evidence, there were other evidentiary conflicts that should have been left to a jury to resolve. *See infra* notes 41 and 45.

25. Memorandum, *supra* note 21, at 79.

Part I presents a statement of facts that in all but one respect²⁶ adopts the Memorandum's narrative of the evidence, which credits virtually all of Wilson's testimony as well as most of the other witness accounts and forensic evidence supporting his story. Part II reviews the Justice Department's legal analysis. Section A questions the validity of the Department's argument that Wilson's use of deadly force was reasonable, challenging the Memorandum's interpretation of a line of cases decided by the Court of Appeals for the Eighth Circuit (which includes St. Louis, Missouri, where the case would have been tried had Wilson been indicted) to support the argument that, even if Wilson could have subdued Brown without killing him, this fact was not relevant to determining the reasonableness of his use of deadly force. The Section concludes that (1) Eighth Circuit precedent permits a jury to consider the availability of less lethal options in determining the reasonableness of an officer's use of deadly force; and (2) the question whether Wilson violated Brown's Fourth Amendment rights by failing to use his mace to subdue and arrest Brown and instead resorting to deadly force should have been left to a jury.

Sections B and C of Part II address the most important legal point in the case: the Justice Department's argument that even if Wilson's use of deadly force was unreasonable, the case against him "lacks prosecutive merit"²⁷ because he did not act "willfully" within the meaning of Section 242 of Title 18, as interpreted by the Supreme Court in *Screws v. United States*.²⁸ The Article explains how the puzzling opinion written by Justice William O. Douglas for a plurality of the Court in 1945 has been widely misinterpreted, and why it does not pose as high a hurdle to civil rights prosecutions as most lower federal courts and practitioners, including lawyers in the Civil Rights Division of the Justice Department, have long supposed.

The focus of Part III is the unanimous opinion of the Supreme Court in *Lanier v. United States*.²⁹ Written by Justice David Souter more than fifty years after *Screws* was decided, the opinion provides an authoritative interpretation of the Court's opinion in *Screws* and finally clarifies the ambiguities and contradictions that have made *Screws* such an enigma to so many practitioners and judges. Although *Lanier* does not specifically address the meaning of the willfulness requirement, Justice Souter's explanation of the due process principles of notice and fair warning articulated by *Screws* virtually dictates the conclusion that the Justice Department's argument that willfulness requires consciousness of wrongdoing—in the sense that a police officer not only acted unreasonably, but *knew* that he was acting unreasonably—is incorrect.

26. This Article rejects as unsupported by Wilson's own testimony the Department's finding that Wilson believed that "Brown was reaching for a weapon," MEMORANDUM, *supra* note 21, at 82, as he advanced toward Wilson. See *infra* Part III(A).

27. MEMORANDUM, *supra* note 21, at 86.

28. 325 U.S. 91 (1945).

29. 520 U.S. 259 (1997).

Part III explains that, considering *Lanier*, what is required for criminal liability is not, as the Justice Department maintains, proof that the officer *knew* his conduct was unreasonable. All that is needed is a showing that the unconstitutionality of his conduct had been “clearly established” by prior judicial decisions at the time the act was committed.³⁰ *Lanier*’s surprising conclusion is that the willfulness element of Section 242 imposes no more stringent a condition on criminal liability for constitutional violations by police officers than the Court has imposed in federal lawsuits under 42 U.S.C. § 1983 seeking to hold state officials civilly liable for the same violations.³¹ Police officers are not entitled to immunity, either from criminal or civil liability, if a reasonable officer would have understood that the allegedly unconstitutional conduct violated *clearly established law*. Part III concludes by applying this clearly-established-law standard to Wilson’s use of deadly force, demonstrating how a properly instructed jury could have reasonably returned a verdict of guilty.

The Conclusion suggests how a deeper understanding of the relevant law can enable civil rights groups, practitioners, and informed citizens to take the necessary first steps toward solving a problem that has remained as intractable and divisive as police accountability. The Article also proposes federal legislation that would eliminate the “willfulness” requirement from section 242 and replace it with *Lanier*’s clearly-established-law standard of liability.

II.

THE JUSTICE DEPARTMENT’S STATEMENT OF FACTS

The Justice Department’s Memorandum contains a comprehensive examination of the testimony of forty witnesses, including Officer Wilson, who testified before the St. Louis County grand jury. It also includes summaries of autopsy reports, DNA analysis, ballistic and other forensic evidence, and witness interviews. The following statement of facts is based on the Justice Department’s narrative of the evidence, which credits virtually all of Wilson’s testimony, as well as most of the other witness accounts and forensic evidence supporting his story.

The encounter, which lasted less than two minutes, began when Wilson, driving westbound on Canfield Drive in his department-issued SUV, observed

30. *Id.* at 270–71.

31. In 2015, the parents of Michael Brown filed a wrongful death suit and a civil action under 42 U.S.C. § 1983 in a Missouri state court against Wilson and the city of Ferguson. The case was removed to federal court and set for trial in the U.S. District Court for the Eastern District of Missouri. Valerie Schremp Hahn, *Michael Brown Wrongful Death Lawsuit Removed to Federal Court*, ST. LOUISE POST-DISPATCH (May 27, 2015), http://www.stltoday.com/news/local/crime-and-courts/michael-brown-wrongful-death-lawsuit-removed-to-federal-court/article_2a3ded57-22c8-5d70-a361-cb3e841c1e80.html [<https://perma.cc/BZY8-A7VL>]. As of January 27, 2017, the parties were still embroiled in disputes over the scope of discovery. See *Brown v. City of Ferguson*, 2017 U.S. DIST. LEXIS 11210 (E.D. Mo. 2017) (clarifying that order directing plaintiffs to disclose all social media of Michael Brown and his parents for five years preceding Brown’s death include personal communications on Facebook Messenger).

Brown and a friend, Darien Johnson, walking eastbound in the middle of the street. Brown and Johnson had just come from a nearby convenience store where Brown had strong-armed a clerk in shoplifting several packs of cigarillos, resulting in a dispatch call reporting a “stealing in progress”. Wilson was aware of this recent shoplifting incident when he observed the two.³²

When the two men failed to obey Wilson’s command to walk on the sidewalk,³³ Wilson, suspecting they fit the descriptions in the dispatch, called for backup and reversed his SUV at a forty-five-degree angle, blocking them from walking any further. Wilson then attempted to open the driver’s door of his SUV, but his vehicle had swerved so close to Brown that the door came into contact with Brown’s body and either rebounded closed, or Brown pushed it closed.³⁴

A struggle ensued, during which Brown reached into the SUV through the open driver’s window and punched Wilson twice in the jaw.³⁵ Wilson testified that because he was trapped in his vehicle and could not reach either his retractable baton or his mace,³⁶ he responded by withdrawing his .40 caliber semi-automatic pistol from its holster.³⁷ Brown then grabbed the pistol and momentarily gained control of it, preventing the gun from firing when Wilson twice pulled the trigger.³⁸ Wilson pulled the trigger a third time, striking Brown’s right hand at the base of his thumb.³⁹ Brown briefly backed up and then leaned into the driver’s window and assaulted Wilson again. Wilson fired another shot, which did not hit Brown and apparently struck the ground.⁴⁰ Brown then fled, running eastbound on Canfield Drive, with Wilson in pursuit, pistol in hand, pointed down. Brown ran for a distance of approximately 180 feet from the SUV, and then suddenly stopped and turned around.⁴¹

32. MEMORANDUM, *supra* note 21, at 6.

33. According to Darien Johnson’s testimony, Wilson said “Get the fuck on the sidewalk.” *Id.* at 44. Wilson denied using the obscenity and testified that in response to his saying “What’s wrong with the sidewalk?”, Brown replied, “Fuck what you have to say.” *Id.* at 12–13.

34. *Id.* at 6.

35. *Id.* at 13. Several witnesses testified that Wilson first reached out of the window and grabbed Brown by the neck. *Id.* at 6. The Memorandum rejects these accounts as inconsistent with the autopsy results, which showed no injuries to the neck. However, the private forensic pathologist retained by the family stated that while the lack of injury made strangling unlikely, it did not necessarily rule out a neck restraint. *Id.* at 20.

36. *Id.* at 6, 13. Wilson did not carry a taser. *Id.* at 13.

37. *Id.* at 13–14.

38. *Id.* at 14. Media reports of the Justice Department findings suggested that Brown reached for Wilson’s gun while it was still holstered, but the Memorandum makes clear that Brown did not grab the gun until Wilson withdrew it from his holster. *Id.* at 13–14.

39. *Id.* at 6 & 14.

40. *Id.* at 14.

41. *Id.* at 7. It remains unclear why Brown, having reached the intersection of Canfield Drive and the driveway into the parking lot of the apartment complex where he lived, would suddenly stop and turn around. When asked if he had an explanation, Witness 102, regarded by Justice Department lawyers as credible and reliable, replied: “No, I’m not sure To this day, [I ask] why would he turn around and not give himself up.” Transcript of Grand Jury Hearing at 177,

Although credible witnesses testified that when he turned to face Wilson, “Brown held his hands up at shoulder level with his palms facing outward,” these same witnesses said this was only “for a brief moment,” and described Brown as “then dropping his hands and ‘charging’ at Wilson” before any shots were fired.⁴² After reviewing all the testimony and forensic evidence, the Memorandum concludes with respect to this issue: “Witness accounts that suggest Brown was standing still with his hands raised in an unambiguous signal of surrender when Wilson shot Brown are inconsistent with the physical evidence . . . [or] are otherwise not credible.”⁴³ At the time Brown stopped fleeing and turned to face Wilson, he was twenty to thirty feet away, according to Wilson’s testimony.⁴⁴ While credible witnesses gave varying accounts of what happened next, describing Brown as “charging,” “running,” or “walking” toward Wilson, the Memorandum settles on a narrative that describes Brown as “moving” in Wilson’s direction when the first shots were fired.⁴⁵ Wilson testified that he did not begin firing until Brown started “running” at Wilson, closing the distance between them to about fifteen feet after failing to comply with Wilson’s repeated order to stop and get on the ground.⁴⁶ He then fired ten shots,⁴⁷ in three separate volleys, as Brown advanced, with the last volley being fired when Brown was about eight to ten feet from Wilson.⁴⁸ The shots hit Brown, according to the autopsy report, as few as five or as many as seven times (two of the entry wounds may have been re-entry wounds).⁴⁹ The final and fatal

State of Missouri v. Darren Wilson, Vol. VI, (Sept. 23, 2014), http://www.nytimes.com/interactive/2014/11/25/us/evidence-released-in-michael-brown-case.html?_r=0 [https://perma.cc/FJN9-48F5] [hereinafter TRANSCRIPT]. A searchable text of the grand jury transcript is available at, <http://apps.stlpublicradio.org/ferguson-project/evidence.html> [https://perma.cc/V45N-U2UU]. Whether Brown suddenly turned around because Wilson fired one or more shots at him while he was running is a question that should have been left to a jury, in view of credible testimony and forensic evidence that would have supported such a finding. *See infra* note 45.

42. MEMORANDUM, *supra* note 21, at 8.

43. *Id.* at 78.

44. *Id.* at 14.

45. *Id.* at 8. Although the autopsy confirmed that Brown did not sustain any gunshot wounds to his back, neither the autopsy results nor the ballistics analysis ruled out the possibility that Wilson fired one or more shots while Brown was running away, as several witnesses testified, but without hitting him. A spent bullet fragment was recovered from the exterior wall of an apartment building toward which Brown was running. *Id.* at 16–17. It is also possible that one or two of the shots struck Brown’s right arm before he turned around. The memo states: “Given the mobility of the arm, it is impossible to determine whether Brown was facing Wilson or had his back toward him [when those shots struck him].” *Id.* at 19. These are among the factual issues the Justice Department should have left to a jury.

46. *Id.* at 15.

47. Wilson fired a total of twelve shots, two from the SUV and ten on the roadway. *Id.* at 7.

48. *Id.*

49. *Id.* at 17. The memorandum states that Brown was shot “at least six and at most eight” times, but these figures include the earlier shot to the base of his right thumb at the SUV. *Id.*

shot to the apex of Brown's head was fired when Brown was two to three feet away.⁵⁰

III.

THE JUSTICE DEPARTMENT'S LEGAL ANALYSIS

A. Reasonableness of Officer Wilson's Use of Deadly Force

To obtain a conviction under the federal criminal statute imposing constitutional limits on the conduct of police officers and other state or local officials, 18 U.S.C. § 242, the government must prove beyond a reasonable doubt that the defendant deprived the victim of a right protected by the Constitution. The relevant constitutional right in the case against Officer Wilson is the Fourth Amendment right to be protected from unreasonable searches and seizures which includes the right to be free from the excessive use of force. Finding a Fourth Amendment violation, on the basis of the preceding statements of facts, turns on whether Wilson had reasonable grounds to use deadly force at the time he started shooting.

Had the killing of Michael Brown occurred prior to 1985, classifying the shooting as a reasonable use of lethal force would have been beyond dispute, even if Wilson had shot Brown in the back as he ran down Canfield Drive. Until the Supreme Court's 1985 decision in *Tennessee v. Garner*,⁵¹ the use of deadly force to prevent the escape of a fleeing felon was constitutionally permissible, without regard to the nature of the felony. Since Brown was classifiable as a felon both by reason of his assault on Wilson in the SUV,⁵² and his use of force in pushing the convenience store clerk who tried to stop him from leaving with the stolen cigarillos,⁵³ Brown was a "fleeing felon" when he ran down the street after the encounter at the SUV. In pre-*Garner* America, this would have provided sufficient grounds to justify killing him to prevent his escape.

In its decision in *Garner*, the Court announced that using deadly force to apprehend or prevent the escape of a suspected felon would no longer be tolerated under the Fourth Amendment's prohibition of unreasonable searches and seizures, unless there is probable cause to believe the suspect either (1) "has committed a crime involving the infliction or threatened infliction of serious physical harm,"⁵⁴ or (2) "poses a significant threat of death or serious physical

50. *Id.* at 18.

51. 471 U.S. 1 (1985).

52. An assault on a police officer, however slight the injury, is a Class C felony in Missouri. MO. ANN. STAT. § 565.082.7 (West 2015).

53. MO. ANN. STAT. § 569.030 (West 2015) ("A person commits the crime of robbery . . . when he forcibly steals property"; this is a class B felony). The force required to resist the owner's attempt to prevent the stealing is sufficient to make the taking a robbery. *See* 3 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 20.3(d)(1) (2d ed. 2003).

54. 471 U.S. at 11. Neither the use of force in the convenience store robbery nor the blows to Wilson's face qualified as "serious physical harm." The terms "serious physical harm," "serious

injury to the officer or others.”⁵⁵ Unless Wilson had reasonable grounds to believe that Brown would either kill him or cause him serious physical injury when Brown stopped fleeing and, suddenly turning around, headed back toward Wilson, Brown’s failure to raise his hands or otherwise clearly indicate his surrender was not sufficient to justify killing him.⁵⁶

The Justice Department argued that Wilson had reasonable grounds to fear for his life because, as Brown moved toward Wilson, he “reached toward his waistband, *causing Wilson to fear that Brown was reaching for a weapon.*”⁵⁷

physical injury,” and “serious bodily injury” are used interchangeably. For various statutory definitions of these phrases, *see, e.g.*, ARIZ. REV. STAT. § 13-105(39) (West 2016) (defining “serious physical injury” as “physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb”); CAL. PENAL CODE § 243(f)(4) (West 2015) (defining “serious bodily injury” as “a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement”). For a discussion of whether Brown’s effort to gain control of Wilson’s weapon constituted a crime involving the threatened infliction of serious physical harm, *see infra* note 70.

55. 471 U.S. at 3. More recently, the Court, in *Scott v. Harris*, which involved a high-speed car chase, rejected the *per se* rules articulated in *Garner* as a proper test for determining excessive-force issues, in favor of a “balancing” test of reasonableness. 550 U.S. 372, 383 (2007); *see* *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc) (“there are no *per se* rules in the Fourth Amendment excessive force context”) (citing *Scott*); Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1135–36 (2008) (“In a paragraph . . . the Supreme Court waved away what every federal court since *Garner* – including the Supreme Court itself – had taken to be clear criteria for determining the reasonableness of the use of deadly force.”). Nevertheless, *Garner* continues to retain its authority as a source of “factors” to be taken into account in determining reasonableness. *See Scott*, 550 U.S. at 383. These factors include “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Garner*); *see also Mattos*, 661 F.3d at 441 (recognizing that the *Garner* factors survived *Scott*).

56. St. Louis County prosecutors initially provided jurors with a copy of a Missouri statute authorizing police officers to use deadly force to apprehend *any* fleeing felon, MO. ANN. STAT. § 563.046.3(2)(a) (West 2015). *See* TRANSCRIPT, *supra* note 41, Vol. XXIV, (Nov. 21, 2014) at 134. The statute, as applied to non-violent felonies, is clearly unconstitutional under *Garner*. It was not until the end of the last day of testimony that jurors were informed by prosecutor Kathy Alizadeh that the Missouri statute “does not comply with United States Supreme Court cases” and were provided with a correct statement of the law. TRANSCRIPT, *supra* note 41, Vol. XXIV, at 134–35. When a grand juror sought clarification, Ms. Alizadeh replied, “As far as you need to know, just don’t worry about that . . . Just disregard that statute.” *Id.* at 136. Prosecutor Sheila Whirley cut off any further questions saying, “We don’t want to get into a law class.” *Id.* Jurors had thus heard testimony for three months under the mistaken impression that because Brown had committed the felony of assaulting a police officer while Wilson was seated in his SUV, Wilson had the right to kill him when he fled, without regard to whether he posed any threat of death or serious injury. Whatever the actual impact of this mistake on the deliberation of the jurors, it would seem sufficiently prejudicial to argue that, in addition to any violation of his Fourth Amendment rights by Officer Wilson, Michael Brown was also denied his due process right to have that question fairly determined by a grand jury properly instructed on the relevant law.

57. MEMORANDUM, *supra* note 21, at 82 (emphasis added); *see also id.* at 15 (“Wilson thought Brown might be reaching for a weapon.”).

This statement is not supported by Wilson's own grand jury testimony. Wilson testified that he observed Brown's right hand reaching "under his shirt in his waistband [as] he starts running at me,"⁵⁸ but he never stated that he believed Brown was reaching for a weapon.⁵⁹ The detective who interviewed Wilson the day after the shooting, when called to testify, was specifically asked by one of the prosecutors, "Did he [Wilson] ever tell you that he thought Michael Brown was going for a weapon?"⁶⁰ The detective replied that Wilson made three references to Brown's hand being in his waistband, and that, "as a police officer knowing that if an individual has his hand in his waistband, that is of concern to me personally. And so it was *implied, in my opinion* . . . that Darren Wilson was making reference to believing that there could have been a weapon in Michael Brown's waistband. [H]owever, as you said, he never specifically mentioned the word weapon."⁶¹

The Memorandum proceeds to argue that even if Brown had never reached into his waistband, the mere fact that he continued to move toward Wilson, instead of complying with his command to get on the ground, was alone sufficient to give Wilson reasonable grounds to use deadly force.⁶² In support of this statement, the Justice Department cites the decision of the Eighth Circuit Court of Appeals in *Loch v. City of Litchfield*,⁶³ which the Memorandum says

58. TRANSCRIPT, *supra* note 41, Vol. V, (Sept. 16, 2014) at 227.

59. A grand juror asked Wilson whether, when Brown stopped running and headed back toward him, "did you ever think that okay, maybe he don't have a gun, I need to stop shooting?" *Id.* at 267. Wilson said that when he was seated in his SUV, "I wasn't thinking about that at that time," but because another grand juror interrupted with a question about what happened at the SUV, Wilson did not complete his answer to the original question. *Id.* at 268.

60. TRANSCRIPT, *supra* note 41, Vol. XXIV, (Nov. 21, 2014) at 93.

61. *Id.* at 94 (emphasis added). An FBI agent who also interviewed Wilson testified that Wilson stated, "[Brown] put his right hand in his waistband." TRANSCRIPT, *supra* note 41, Vol. V, (Sept. 16, 2014) at 166. The agent further testified that "at the time Officer Wilson didn't know whether or not he was armed. *He thought that perhaps Michael Brown was armed and that's what he was going for.*" *Id.* (emphasis added). The prosecutor who had asked the St. Louis detective for clarification of his testimony regarding Wilson's statement about Brown reaching into his waistband, *supra* note 60 and accompanying text, did not seek similar clarification from the FBI agent. The law of self-defense in most states requires not only reasonable grounds to believe in the existence of circumstances that would justify defensive force; the defendant must also have an *actual* belief. 2 LAFAYETTE, *supra* note 53, § 9.4(c). However, Fourth Amendment law is not identical to the law of self-defense. Insofar as the Fourth Amendment imposes a standard that is entirely objective, *see* *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("the 'reasonableness' inquiry in an excessive force case is an objective one . . . without regard to [the officer's] underlying intent or motivation"), Wilson's failure to actually believe that Brown was reaching for a weapon arguably would not preclude a jury from finding in a federal prosecution that there was no Fourth Amendment violation if a reasonable police officer would have believed it. *See* Harmon, *supra* note 55, at 1183 n.287. Whether it was objectively reasonable to believe that Brown was reaching for a weapon, rather than pulling up his pants, as witnesses testified, MEMORANDUM, *supra* note 21, at 8, is a question that should have been left to a jury.

62. MEMORANDUM, *supra* note 21, at 84.

63. 689 F.3d 961 (8th Cir. 2012).

“is dispositive on this point.”⁶⁴ This assertion is not supported by the court’s opinion in *Loch*.

While the Court of Appeals in *Loch* found that the officer in that case acted reasonably by shooting the suspect as he “continued toward [the officer] despite the officer’s repeated orders to get on the ground,”⁶⁵ the Justice Department failed to recognize that the court regarded that use of deadly force as reasonable only because the suspect’s brother-in-law had told the officer that the suspect “was armed with a firearm.”⁶⁶ Although the suspect had thrown the gun in the snow before he started to move toward the officer, the court noted that the officer “did not observe that action”. The court concluded, therefore, that “*having just been told that [the suspect] had a gun, [the officer] acted reasonably in drawing his firearm and ordering [the suspect] to the ground to prevent harm to [the brother-in-law] or others at the scene.*”⁶⁷ In these circumstances, the court concluded, the suspect’s continued movement toward the officer despite the officer’s repeated orders to get on the ground justified killing him. Had Wilson believed, as the officer in *Loch* believed, that the suspect attacking him was armed, Wilson’s use of deadly force would have been justified under *Loch*. Absent that belief, *Loch* is not the “dispositive” bar to conviction that the Justice Department says it is.

It appears that Wilson believed his life was in danger not because he thought Brown was reaching for a gun, but because of what had happened earlier in the encounter at the police vehicle. Wilson believed he had to use deadly force because Brown had previously attempted to overpower him in his SUV⁶⁸ and gain control of his weapon, and he feared that if Brown reached him, Brown would succeed this time and kill Wilson with his own weapon.⁶⁹ Whatever justification there may have been for Wilson’s use of deadly force while still

64. MEMORANDUM, *supra* note 21, at 84.

65. 689 F.3d at 966, *quoted in* MEMORANDUM, *supra* note 21, at 84.

66. 689 F.3d at 966.

67. *Id.* (emphasis added).

68. Wilson described Brown as looking “like a demon” and as appearing “Hulk Hogan-like” during this altercation at the SUV. MEMORANDUM, *supra* note 21, at 14, 36. Wilson believed that Brown “could have easily overpowered [him].” *Id.* at 36. Wilson also testified that while he was shooting at Brown, “it looked like he was almost bulking up to run through the shots.” TRANSCRIPT, *supra* note 41, Vol. V, (Sept. 16, 2014) at 228. Wilson is six-feet-four and weighs 215 pounds. Brown was six-feet-five and weighed nearly 300 pounds. On the unconscious racial bias implicit in the attribution by whites of superhuman physical and mental qualities to blacks, see Adam Waytz, Kelly Marie Hoffman & Sophie Trawalter, *A Superhumanization Bias in Whites’ Perceptions of Blacks*, 6 PSYCHOL. & PERS’Y SCI. 352 (2015). For the argument that racially stereotyped perceptions of African American men, even if shared by most police officers, should not be part of the jury’s calculus of reasonableness, see Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787–90, 784–85 (1994).

69. Wilson testified that he had no doubt that Brown presented an imminent risk of death. TRANSCRIPT, *supra* note 41, Vol. V, (Sept. 16, 2014) at 229 (“I know if he reaches me, he’ll kill me.”).

seated in his SUV, Brown no longer posed a threat to Wilson after the struggle had ended and Brown had run 180 feet down the street.⁷⁰

The question remains whether Brown posed a reasonable threat of death or serious bodily injury when he turned around and started to move in Wilson's direction. Unlike the situation Wilson faced in his SUV, where he was unable to reach his mace or baton, both of these less-lethal alternatives were available to him in the subsequent confrontation with Brown in the roadway, although he used neither. A full shot of mace, the brand name for pepper spray, is powerful enough to stop a charging grizzly bear,⁷¹ and has been shown, in a study of use of the spray by the Baltimore Police Department, to be effective in subduing dangerous or violently resisting suspects in eighty-four percent of the cases surveyed.⁷² Even if a police officer has reasonable grounds to fear death or

70. It is arguable that Brown's grabbing of Wilson's weapon at the SUV qualified as a crime involving the "threatened infliction of serious physical harm" and thus provided a predicate for using deadly force to prevent the escape of a dangerous felon, as *Garner* permits, see *supra* Parts III(A). The argument is not without merit, although the Justice Department Memorandum does not make it in Wilson's defense, and the rejection by the Supreme Court of per se rules for determining reasonableness in the excessive force context, see *supra* note 55, means that the question of whether Brown's conduct at the SUV qualified as a violent felony is not dispositive. However, insofar as the Supreme Court has said that "culpability is relevant . . . to the reasonableness of the seizure," *Scott*, 550 U.S. at 384 n.10, the issue of Brown's culpability in trying to gain control of Wilson's weapon is an important factor in determining reasonableness. Wilson testified that he regarded Brown's punching him in the face as sufficient to justify the use of deadly force while seated in his SUV, and that he withdrew his pistol with the intent to kill Brown even before Brown reached for it. TRANSCRIPT, *supra* note 41, Vol. V, (Sept. 16, 2014) at 236-37. In response to a prosecutor's question whether Wilson would have used deadly force if Brown had not grabbed his gun, Wilson replied: "My gun was already being presented as a deadly force option while he was hitting me in the face." *Id.* at 237. Therefore, any effort by Brown to gain control of Wilson's gun and prevent it from being fired at him must be viewed as a justifiable act of self-defense. Although most states, by statute or case law, prohibit resistance to an unlawful arrest, see *State v. Valentine*, 935 P.2d 1294, 1302 (Wash. 1997) (resisting an unlawful arrest prohibited in thirty states), the law in every state, including in Missouri, allows a defendant to use force to defend himself against an officer's excessive use of force. See *State v. Thomas*, 625 S.W.2d 115, 122 (Mo. 1982); *State v. Mulvihill*, 270 A.2d 277, 279 (N.J. 1970); *People v. Curtis*, 450 P.2d 33, 39 (Cal. 1969); 2 LAFAVE, *supra* note 53, § 9.4(h).

71. A study of Alaskan bear-human encounters found that pepper spray halted aggressive bear behavior in 92% of the cases for brown bears and 90% for black bears. Tom S. Smith, Stephen Herrero, Terry D. Debruyne & James M. Wilder, *Efficacy of Bear Deterrent Spray in Alaska*, 72 J. WILDLIFE MGMT. 640 (2008). In comparison, the success rate for long guns was 76%, and for handguns, 84%. Tom S. Smith, Stephen Herrero, Cali Strong Layton, Randy T. Larson & Kathryn R. Johnson, *Efficacy of Firearms for Bear Deterrence in Alaska*, 76 J. WILDLIFE MGMT. 1021 (2012).

72. Research conducted on over 1,000 incidents of the use of pepper spray by officers in the Baltimore Police Department over a three-and-a-half-year period from 1993 to 1996 found an effectiveness rate of 84.3 percent, defining "effectiveness" to include the categories of: "totally incapacitated" (full and immediate immobilization); "submissive" (no resistance); and "resistive" (physically uncooperative but not assaultive or combative). Robert J. Kaminski & Steven M. Edwards, *Assessing the Incapacitative Effects of Pepper Spray During Resistive Encounters with the Police*, 22 POLICING: INT'L J. OF POL. STRAT. & MGMT. 7, 10-11 (1999). An earlier study on pepper spray use by the Baltimore Police Department showed that of 174 suspects sprayed by officers, 156 (or ninety percent) were sufficiently incapacitated to be arrested. See CHARLES M.

serious bodily injury, his use of deadly force is unlawful if it is not *necessary* to kill the suspect in order to subdue him or prevent his escape.⁷³ This judgment is to be made from the perspective of a reasonable police officer, and includes consideration of “the availability of alternative methods of capturing or subduing a suspect.”⁷⁴ The quoted language is from *Retz v. Seaton*, a 2014 decision of the U.S. Court of Appeals for the Eighth Circuit,⁷⁵ which governs federal cases in Missouri. The Justice Department’s Memorandum, without mentioning the decision, says just the opposite, arguing categorically that the law bars any consideration of alternative methods: “Even if, with hindsight, Wilson could have done something other than shoot Brown, the Fourth Amendment does not second-guess a law enforcement officer’s decision on how to respond to an advancing threat.”⁷⁶

Although the Justice Department cites previously decided Eight Circuit cases in support of its argument,⁷⁷ the Court of Appeals, in its 2014 decision, explains that any interpretation of earlier cases that would prohibit a jury from assessing whether a police officer should have used a less-lethal method to subdue a suspect is “incorrect.”⁷⁸ Those cases, the court explains, “protect police officers from Monday-morning quarterbacking,” but “do not preclude consideration of the range of available choices when such evidence is relevant and necessary to determining . . . whether the particular method selected was

GREINSKY, SHERI HOLLAND & JULES MARTIN, NEW YORK CIVILIAN COMPLAINT REVIEW BOARD, REPORT OF THE PEPPER SPRAY COMMITTEE at 7 (2000), <http://www.nyc.gov/html/ccrb/downloads/pdf/pepper2000.pdf> [<https://perma.cc/DM5U-J7KZ>]. Other studies report pepper spray as being effective between eighty-five and 100 percent of the time, but effectiveness is either not defined or the definition is too vague to impute a precise meaning. See Kaminski & Edwards, at 8–9.

73. *Garner*, 471 U.S. at 3, 11. The determination of whether a particular use of force is necessary is governed by the standard of “reasonableness,” and may take into account various factors “including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade the arrest by flight.” *Graham*, 490 U.S. at 396. Although the Court did not specifically include less-lethal alternatives as a relevant factor, its list of factors, introduced by the word “including,” has been construed by the Fifth, Eighth, Ninth, and D.C. Circuits to be non-exhaustive. See *Retz v. Seaton*, 741 F.3d 913, 918 (8th Cir. 2014) (citing the cases from the other Circuits).

74. *Retz v. Seaton*, 741 F.3d 913, 918 (8th Cir. 2014).

75. 741 F.3d 913 (8th Cir. 2014).

76. MEMORANDUM, *supra* note 21, at 85.

77. *Id.* The Memorandum cites *Estate of Morgan v. Cook*, 686 F.3d 494, 497 (8th Cir. 2012), which relies on and quotes from *Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993).

78. *Retz*, 741 F.3d at 918. Referring to the Eighth Circuit’s earlier decision in *Cole*, 993 F.2d 1328 and the Supreme Court’s decision in *Graham v. Connor*, 490 U.S. 386, the *Retz* court stated: “[Defendant] argues that the rule established in *Graham* and *Cole* bars any consideration of alternative courses of action as irrelevant. This interpretation is incorrect.” 741 F.3d at 918. This is not a matter of conflict among different panels in the Eight Circuit which, like a conflict among Circuits, may leave the law uncertain. Judge Wollman, who wrote the earlier opinion in *Cole*, joined the opinion in *Retz* and is presumably the most qualified to provide the correct interpretation of his own opinion.

objectively reasonable.”⁷⁹ Because the availability of a less-lethal alternative was a factor that jurors would have been instructed to take into account in assessing the reasonableness of Wilson’s use of deadly force, there was sufficient evidence for a jury to find that Brown was killed unnecessarily and in violation of his Fourth Amendment rights. So, even if we accept Wilson’s testimony as true, the Justice Department’s conclusion that there was insufficient evidence to convince twelve jurors beyond a reasonable doubt that Wilson used unreasonable force⁸⁰ was supported by neither the law nor the evidence.⁸¹

79. *Retz*, 741 F.3d at 918. Ferguson Police Department regulations state that before using lethal force an officer must “exhaust every alternative means of apprehension known to be available at the time” unless they “would clearly be ineffective under a particular set of circumstances.” City of Ferguson, Office of the Chief of Police, General Order 410.01 (July 6, 2010), <https://assets.documentcloud.org/documents/1393036/general-order-410-00.pdf> [<https://perma.cc/4YPJ-M6MR>]. Violation of a departmental regulation does not necessarily constitute a violation of the Fourth Amendment. *See* *Davis v. Scherer*, 468 U.S. 183, 194 & n.12 (1984). One factor to be taken into account in determining the reasonableness of Wilson’s failure to use his mace is whether an approximate sixteen percent failure rate in the use of pepper spray to subdue suspects, *see supra* note 72, made it reasonable for Wilson to use his firearm. In this connection, it should be noted that firearm force is surprisingly ineffective in immediately incapacitating a suspect. *See* *Harmon*, *supra* note 55, at 1175–76 & nn.257 & 262. Wilson had to fire a total of ten shots before Brown’s forward motion was finally stopped; further, to prevent Brown from reaching him while shooting, Wilson kept “backpedaling” to maintain a minimum distance between them. *See* TRANSCRIPT, *supra* note 41, Vol. V, (Sept. 16, 2014) at 228–29. The same evasive tactic that Wilson used to keep Brown at a distance could have been used in combination with his mace had he failed to stop Brown with the first spray. Indeed, pepper spray, which has a range of up to fifteen feet, *see* GREINSKY, HOLLAND & MARTIN, *supra* note 72, at 4, might have been more effective in stopping Brown sooner, and might have also lessened the risk to Wilson of having Brown disarm him (since his pistol would then have been locked in its holster). *See* JEROME H. SKOLNICK & JAMES. F. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 41–42 & n.49 (1993) (officers are generally discouraged from approaching dangerous suspects too closely while carrying unholstered weapons because twenty-five percent of police officers shot in the line of duty are wounded or killed by people who have disarmed them and used their weapons against them).

80. MEMORANDUM, *supra* note 21, at 85.

81. The law applicable to the determination in a federal civil rights prosecution of the question whether a suspect’s Fourth Amendment rights have been violated is similar in most respects to the law governing self-defense in a state prosecution of a police officer for criminal homicide in the killing of the suspect. An unreasonable belief in the necessity of using deadly force generally results in a verdict of second-degree murder in a state prosecution (first-degree being ruled out in most cases of self-defense because of the absence of any opportunity to premeditate). However, in those states that have adopted the doctrine of imperfect self-defense, an honestly held belief in the necessity of using deadly force, even though unreasonable, mitigates murder to voluntary manslaughter. 2 LAFAVE, *supra* note 53, § 14.3(a); *see, e.g.*, *People v. Flannel*, 25 Cal.3d 668, 603 P.2d 1, 4 (1979). Missouri courts have adopted the doctrine, but have concluded, without any analysis or elaboration, that the only appropriate verdict in cases of imperfect self-defense is involuntary manslaughter. *See* *State v. Beeler*, 12 S.W.3d 294, 298–99 (Mo. banc 2000) (discussing imperfect self-defense in the context of “reckless” manslaughter which is classified as *involuntary* manslaughter under Missouri law, MO. ANN. STAT. § 563.046.3(2)(a) (West 2015)); *State v. Frost*, 49 S.W.3d 212, 220–21 (Mo. Ct. App. 2001) (purposeful homicide committed with an honest but unreasonable belief in the necessity for self-defense qualifies for a jury instruction on involuntary manslaughter). Requiring mitigation to reckless or negligent manslaughter, rather than voluntary manslaughter, is the position taken by the Model Penal Code. “To convict for a belief arrived at on unreasonable grounds is . . . to convict for negligence. Where the crime otherwise

B. The Willfulness Requirement of 18 U.S.C. § 242

Proving that Wilson violated Brown's Fourth Amendment rights is only the first step in deciding whether there was sufficient evidence to file federal civil rights charges against Wilson. A federal prosecutor faces the additional hurdle of having to prove that Wilson "willfully" deprived Brown of his Fourth Amendment rights, as required by Section 242 of Title 18.⁸² The great source of controversy in civil rights prosecutions lies in discerning what "willfully" means and how high a bar it sets.

None of the Reconstruction Era civil rights statutes,⁸³ from which Section 242 derives, contained the word "willfully." It was added in 1909⁸⁴ with no explanation, except for a statement on the floor of the Senate by Virginia's John Daniel, a veteran of the Civil War known for his oratory in praise of the Confederacy and white supremacy.⁸⁵ Although he had no responsibility for the insertion,⁸⁶ Senator Daniel said that the word was added to make the statute

requires greater culpability for conviction, it is neither fair nor logical to convict when there is only negligence as to the circumstances that would establish a justification." AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, PART I, GENERAL PROVISIONS, Comment to § 3.09, at 78. The only states other than Missouri in which courts have required mitigation all the way down to reckless or negligent manslaughter are those in which the legislature has enacted the Model Penal Code. 2 LAFAYETTE, *supra* note 53, § 14.3(a); *see, e.g.,* Harshaw v. State, 39 S.W.3d 753, 756–57, 756 n.1 (Ark. 2001). Missouri has not adopted the Model Penal Code and is thus an outlier state. In the absence of a more thorough consideration of imperfect self-defense by Missouri courts, the issue whether Wilson's honest belief in the need to use deadly force would mitigate his offense to involuntary (reckless) manslaughter, rather than voluntary manslaughter, remains an open question.

82. Section 242 provides in pertinent part: "Whoever, under color of any law . . . 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, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens . . . [is guilty of a crime]." 18 U.S.C. § 242 (2012) (emphasis added). The same requirement of willfulness also applies to federal prosecutions for conspiracies to deprive individuals of their civil rights under Section 241. 18 U.S.C. § 241 (2014). Although Section 241 does not contain the word "willfully," the Supreme Court has construed the statute to incorporate the same willfulness requirement as Section 242. *See* United States v. Price, 383 U.S. 787, 806 n.20 (1966); United States v. Ehrlichman, 546 F.2d 910, 921 (D.C. Cir. 1976). The penalty for violation of Section 242 is an unspecified fine and/or a prison term of not more than one year or, if bodily injury results, a maximum of 10 years, or if death results, imprisonment of any term of years (including life), or capital punishment. 18 U.S.C. § 242 (2012).

83. Section 242 is a product of the consolidation in 1874 of three Reconstruction statutes: Sections 1 and 2 of the Civil Rights Act of 1866, 14 Stat. 27; Sections 16 and 17 of the Civil Rights Act of 1870, 16 Stat. 144; and Section 1 of the Civil Rights Act of 1871, 17 Stat. 13. *See Screws v. United States*, 325 U.S. at 98–99.

84. Act of March 4, 1909, ch. 321, § 20, 35 Stat. 1088, 1092.

85. *See* William Bland Whitley, *John Warwick Daniel (1842–1910)*, ENCYCLOPEDIA VIRGINIA, http://www.encyclopediavirginia.org/Daniel_John_Warwick_1842-1910#start_entry [<https://perma.cc/CM3X-9BEU>].

86. *See* Screws v. United States, 325 U.S. 91, 155 (Roberts, Frankfurter & Jackson, JJ., dissenting).

“less severe.”⁸⁷The Justice Department’s Memorandum states that acting “willfully” requires a prosecutor to prove not only that Wilson intended to kill Brown, but that he killed him “knowing that it was a wrongful act.”⁸⁸ (The press release that accompanied the Memorandum describes the requirement as “knowing it was wrong and against the law.”⁸⁹) The Justice Department’s interpretation of the willfulness requirement has startling implications. It means that if Wilson believed in good faith that he was lawfully acting in self-defense, he cannot be found guilty of “willfully” violating Brown’s civil rights, even if the evidence were sufficient for a jury to find that Wilson’s belief was unreasonable and he was therefore guilty of murder.⁹⁰ This interpretation would be laughable if it did not have such grave consequences. The assertion that, even if Wilson’s use of deadly force constituted murder, civil rights charges could not be filed against him as long as he honestly believed such force was necessary to defend himself, reads like a headline from the satirical news site *The Onion*: “Police May Not Murder Citizens Unless They Feel It’s Necessary.”

To make this argument, the Justice Department relies on *Screws v. United States*,⁹¹ which is the leading Supreme Court decision on the meaning of the willfulness requirement in civil rights prosecutions.⁹² The Memorandum’s statement that willfulness requires proof that Wilson killed Brown “knowing that it was a wrongful act” or “wrong and against the law,”⁹³ however, is not language that appears in *Screws*. It is merely an interpretation of Justice William

87. 43 CONG. REC., 60th Cong., 2d Sess. 3583, 3599 (1909), quoted in *Screws*, 325 U.S. at 100.

88. MEMORANDUM, *supra* note 21, at 11, 86.

89. OFFICE OF PUBLIC AFFAIRS, U.S. DEP’T OF JUSTICE, Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri (Mar. 4, 2015), <http://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri> [<https://perma.cc/H5XY-W565>].

90. See *supra* note 81 (explaining that an unreasonable use of deadly force warrants a conviction for second-degree murder except in states recognizing imperfect self-defense, where the jury can return a verdict for voluntary manslaughter).

91. 325 U.S. 91 (plurality opinion) (construing the term “willfully” in 18 U.S.C. § 52, the predecessor of 18 U.S.C. § 242). The opinion was written by Justice Douglas, and joined by Chief Justice Stone and Justices Black and Reed, while Justice Rutledge concurred in a separate opinion. *Id.* at 113. Although it is only a plurality opinion, its reasoning has been adopted by a majority of the Court in subsequent decisions. See *United States v. Price*, 383 U.S. 787, 806 n.20; *United States v. Reese*, 2 F.3d 870, 880 n.16 (9th Cir. 1993).

92. The indispensable legal and historical analysis is Frederick Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TULANE L. REV. 2113 (1993). “*Screws* is the most significant criminal civil rights case since the end of Reconstruction and still represents the touchstone for federal criminal civil rights doctrine.” *Id.* at 2120. For an illuminating view of *Screws* by Ninth Circuit Court of Appeals Judge Paul J. Watford, see *Screws v. United States and the Birth of Federal Civil Rights Enforcement*, 98 MARQ. L. REV. 465 (2014). Judge Watford was one of the three finalists considered by President Obama to replace Justice Antonin Scalia. See Julia Edwards & Jeff Mason, *White House Narrows Search to Three for Supreme Court*, REUTERS (Mar. 12, 2016, 2:05 PM), <http://www.reuters.com/article/us-usa-court-obama-idUSKCN0WD2LE> [<https://perma.cc/F2US-R5FW>].

93. See *supra* notes 88–89 and accompanying text.

O. Douglas's plurality opinion in *Screws*, in which he construes the willfulness requirement "as connoting a purpose to deprive a person of a specific constitutional right"⁹⁴ or "a specific intent to deprive a person of a federal right made definite by decision or other rule of law."⁹⁵ The exact meaning of this language has never been made clear by the Court, as many commentators have long complained.⁹⁶ As one federal appeals judge has observed, "judges and lawyers in Section 242 cases have struggled to formulate comprehensible jury instructions explaining it."⁹⁷ Indeed, *Screws* may be one of the most obscure and baffling cases ever decided by the Supreme Court, and because its complexity permits diverse interpretations, the opinion warrants analysis in considerable depth.

C. *Screws v. United States: The Anatomy of a Legal Horror*

"[A] shocking and revolting episode in law enforcement" is how Justice Douglas's plurality opinion described the case.⁹⁸ Claude Screws was sheriff of Baker County, Georgia.

On the night of January 29, 1943, he dispatched two officers to the home of the victim, Robert Hall, to arrest him on a warrant charging him with stealing a tire.⁹⁹ Hall was a thirty-year-old African American with whom Screws had a history of conflict.¹⁰⁰ The dispute had started earlier in the year when Screws, describing Hall as a "biggety [arrogant] negro,"¹⁰¹ directed one of his deputies to seize Hall's pearl-handled semi-automatic pistol.¹⁰² Screws later explained his unlawful act by saying, "[I]f any of these damn negroes think they can carry pistols, I am going to take them."¹⁰³ Hall had the temerity to take legal action to recover his firearm, which required the Sheriff to appear before a grand jury and explain his conduct,¹⁰⁴ after which Hall retained a local attorney who sent Screws a letter requesting return of the pistol.¹⁰⁵ This was the last straw for Screws, who ordered Hall to be arrested on an apparently forged warrant

94. 325 U.S. at 101.

95. *Id.* at 103.

96. See Jacobi, *supra* note 17, at 808–09; Lawrence, *supra* note 92, at 2120; Watford, *supra* note 92, at 482.

97. Watford, *supra* note 92, at 482. For a discussion of the ambiguous and confusing jury instructions formulated by federal courts in prosecutions under Section 242, see *infra* Part IV(C).

98. 325 U.S. at 92. Even the dissenting judge on the Court of Appeals panel that affirmed the judgment, while urging reversal, expressed "[h]orror" at what happened in the case. 140 F.2d 662, 666 (5th Cir. 1944) (Sibley, J., dissenting).

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

100. Watford, *supra* note 92, at 467 (citing Transcript of Record at 64, 172, *Screws v. United States*, 325 U.S. 91 (1945) (No. 42) (hereinafter Tr.)).

101. *Id.* (citing Tr. at 64).

102. *Id.* (citing Tr. at 37).

103. *Id.* (citing Tr. at 40–42, 194–95).

104. *Id.* at 467–68 (citing Tr. at 40).

105. *Id.* at 468 (citing Tr. at 43–44).

charging the tire theft.¹⁰⁶ Screws stated that “he was going to go and get the black [SOB] and going to kill him, and that he had lived too long then.”¹⁰⁷ Hall was arrested and handcuffed in his home by the two officers after midnight and driven by car to the local courthouse where Screws was waiting.¹⁰⁸ As Hall stepped out of the vehicle, the three men proceeded to beat him with their fists and “a solid-bar blackjack about eight inches long and weighing two pounds.”¹⁰⁹ The defendants claimed self-defense, stating that Hall had reached for a gun. In fact, he was unarmed, and after he had been knocked to the ground, still handcuffed, the defendants continued to beat him for “fifteen to thirty minutes until he was unconscious,”¹¹⁰ leaving “a pool of blood three feet by four feet” after crushing the back of his skull.¹¹¹ Hall was then dragged feet first through the courthouse yard into the jail where he was thrown onto the floor.¹¹² Screws eventually summoned an ambulance, but Hall died shortly after arriving at the hospital, without regaining consciousness.¹¹³ When the local district attorney failed to bring charges against Screws and the other two officers, the Justice Department presented the case to a federal grand jury in Georgia, which returned a three-count indictment, including a count under a statute now codified as 18 U.S.C. § 242, charging the three men with acting under color of the law of Georgia to “willfully” deprive Hall of his federal constitutional right under the Fourteenth Amendment “not to be deprived of his life without due process of law.”¹¹⁴ The jury found the defendants guilty after a three-day trial, and the judge imposed a fine of \$1,000 and a prison term of three years.¹¹⁵ The convictions were affirmed by a divided panel of the Fifth Circuit, but were subsequently reversed by the Supreme Court and remanded for a new trial.¹¹⁶ The court’s instruction to the jury on retrial, which carefully tracked the language from Justice Douglas’s plurality opinion, resulted in the acquittal of all three defendants.¹¹⁷

106. *Id.* (citing Tr. at 122–35).

107. Lawrence, *supra* note 92, at 2172 (citing Tr. at 46).

108. Watford, *supra* note 92, at 468 (citing Tr. at 80, 170).

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

110. *Id.* at 92–93.

111. Watford, *supra* note 92, at 469 (citing Tr. at 87, 92, 110–11, 114).

112. *Id.* (citing Tr. at 86, 96–97, 101–02, 105–06).

113. *Screws*, 325 U.S. at 93.

114. *Id.*; Lawrence, *supra* note 92, at 2174–75.

115. Lawrence, *supra* note 92, at 2176–77.

116. *Screws v. United States*, 140 F.2d 662 (5th Cir. 1944), *rev’d*, 325 U.S. 91 (1945).

117. See Harry H. Shapiro, *Limitations in Prosecuting Civil Rights Violations*, 46 CORNELL L. REV. 532, 534–35 (1961) (quoting from the jury instruction on retrial) (“I want you to be sure to understand that even though they (defendants) might violate the law so as to commit manslaughter or murder . . . under the law of the state, it still would not be an offense under the laws of the United States, unless excessive force was used for the purpose of depriving the prisoner of the rights guaranteed to him by the Constitution.”) (emphasis added).

How a conviction for what was clearly a premeditated, racially motivated, and horrifically brutal murder could have been transformed into an acquittal remains one of the great mysteries of criminal and constitutional jurisprudence. Reversal was required, Douglas wrote, because of the failure of the trial court to instruct the jury that the use of the word “willfully” in the statute required jurors to find that the defendants had “the purpose to deprive the [victim] of a constitutional right.”¹¹⁸ Elsewhere in the opinion, Douglas referred to “a purpose to deprive a person of a *specific* constitutional right.”¹¹⁹ The very concept of a purpose-to-deprive-a-person-of-a-constitutional-right is highly problematic. No police officer leaves home and says, “I think I’ll violate someone’s constitutional rights today.” Recognizing this, Douglas makes it clear that it is not necessary for the officer to have been “thinking in constitutional terms.”¹²⁰ But if the officer is not thinking in constitutional terms, how can he have a purpose to deprive a person of a specific constitutional right? Douglas suggests that the dilemma can be resolved by requiring proof of a “bad purpose” or “evil motive,”¹²¹ but later asserts that “the presence of a bad purpose or evil intent alone may not be sufficient.”¹²² As if this were not confusing enough, Douglas adds recklessness to the mix, observing that when civil rights violators “act willfully in the sense in which we use the word, they act in . . . reckless disregard of a constitutional requirement which has been made specific and definite.”¹²³ Civil rights scholar Frederick Lawrence has pointed out, however, that “Justice Douglas’s use of the term reckless correlates more closely to the concept of negligence.”¹²⁴ The only part of the *Screws* opinion that is crystal clear is the statement that “something more is required than the doing of the act proscribed by the statute.”¹²⁵ Thus it is not sufficient to prove that Wilson intended to kill Brown and that the killing resulted in the violation of a right protected by the Fourth Amendment. Douglas uses the term “specific intent”¹²⁶ to refer to the “something more” that is required, but his use of the term is ambiguous, only adding to the confusion.¹²⁷ Ascertaining the content of that “something more” has become a legal puzzle that has bedeviled generations of lawyers and judges.

118. 325 U.S. at 107.

119. *Id.* at 101 (emphasis added).

120. *Id.* at 106.

121. *Id.* at 101.

122. *Id.* at 103.

123. *Id.* at 105.

124. Lawrence, *supra* note 92, at 2185 n.327.

125. 325 U.S. at 101.

126. *Id.* at 103 (requiring “a specific intent to deprive a person of a federal right”); *id.* at 104 (noting “the specific intent required by the Act”).

127. “Specific intent” generally connotes a blameworthy state of mind or mens rea beyond the intent to commit the actus reus of the crime. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §10.06, at 138–39 (7th ed. 2015). However, it appears from the context of the opinion that what Douglas meant by the term is not a specific state of mind, but a state of the law “made specific either by the express terms of the Constitution or laws of the United States or by decisions

The various discussions in *Screws* about purpose, evil motive, reckless disregard, and specific intent seem to make *Screws* a case about the state of mind of a civil rights violator. Indeed, Douglas's discussion of the meaning of "willfully" at the outset of Part II of his opinion seems to construe the term as a heightened standard of *mens rea* requiring not only an intent to kill or injure the victim, but also the additional burden of proving that the defendant acted with knowledge of the unlawfulness of his conduct.¹²⁸ This part of the opinion thus appears to confirm the Justice Department's interpretation of *Screws*. However, the remainder of the opinion manifests a concern not with *mens rea*, but with the constitutional difficulties presented by a vague statute that does not give adequate notice of the conduct subject to punishment.¹²⁹ Indeed, it is the entire task of the plurality opinion to devise an interpretation of the willfulness requirement that "will save it from the infirmity of vagueness."¹³⁰ As Douglas explains, concerns about vagueness are particularly relevant to a statute making it a federal crime to violate constitutional rights that are constantly "changing and uncertain."¹³¹ Given "the character and closeness of decisions of this Court," Douglas asks, how can a police officer be expected to know that he is violating a person's constitutional rights?¹³² What "saves the [statute] from any charge of unconstitutionality on the grounds of vagueness,"¹³³ Douglas says, is the requirement that the right the defendant is alleged to have violated is "a right which had been *made specific* either by the express terms of the Constitution or

interpreting them." 325 U.S. at 104; *see also id.* at 105 (referring to "a constitutional requirement which has been made specific and definite"). For a comprehensive analysis of the critical difference between these two meanings of "specific intent," *see infra* Part IV(A)

128. *See* 325 U.S. at 101–02. The first paragraph of Section II of the opinion, 325 U.S. at 101, cites a number of Supreme Court decisions interpreting the term "willful," including *Spies v. United States*, 317 U.S. 492 (1943) and *United States v. Murdock*, 290 U.S. 389 (1933). *Spies* and *Murdock*, using the language of "evil motive," *Spies*, 317 U.S. at 498, and "bad purpose," *Murdock*, 290 U.S. at 394, construed willfulness to require proof of knowledge of unlawfulness. *See* Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 366 (1998) (describing how the Court, through a series of cases beginning with *Murdock* and culminating in *Cheek v. United States*, 498 U.S. 192 (1991), gradually refined the "evil motive" or "bad purpose" formulation and turned it into a "voluntary and intentional violation of a known legal duty" test). The *Murdock-Cheek* line of decisions, however, are all tax evasion cases in which the Court has stressed the "great complexity" of the tax code, *Spies*, 317 U.S. at 496, as the justification for construing willfulness as requiring knowledge of unlawfulness. The other cases cited by Justice Douglas requiring the element of a knowing violation involved knowledge of facts, not law. *Spurr v. United States*, 174 U.S. 728 (1879) (statute penalizing willful certification of check drawn on account with insufficient funds required that defendant have actual knowledge of insufficiency); *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925) (requiring knowledge of the fact that a given meat product was not "kosher" as defined in the trade).

129. The opinion refers to the problem of "vagueness" and the lack of "notice" or "fair warning" associated with vague statutes no less than fourteen times. *See* 325 U.S. at 100–07.

130. *Id.* at 104.

131. *Id.* at 96.

132. *Id.* at 97.

133. *Id.* at 103.

laws of the United States or by decisions interpreting them.”¹³⁴ In other words, if judicial decisions interpreting the relevant constitutional right have made the contours of the right sufficiently “specific and definite”¹³⁵ at the time of the alleged offense to show that the right was clearly violated, defendants “are in no position to say they had no adequate advance notice that they would be visited with punishment.”¹³⁶ Yet, even as Douglas appears to finally elucidate the meaning of willfulness, he leaves the reader in doubt as to whether the due process requirement of adequate notice requires – in addition to conduct in violation of a clearly defined constitutional right . . . actual knowledge by the defendant that he violated that right.¹³⁷ It would take over fifty years for the Court to finally resolve this and other vexing questions, and to set the stage for a whole new approach to civil rights prosecutions.

IV.

RETHINKING THE WILLFULNESS REQUIREMENT

A. Lanier v. United States

In 1997, the Supreme Court returned to *Screws* and, in a breathtakingly clear unanimous opinion written by Justice David Souter in *United States v. Lanier*,¹³⁸ resolved many of the questions left open by Justice Douglas’s enigmatic analysis. Daniel Lanier was a Chancery Court judge for two rural counties in Tennessee. He was convicted of violating the constitutional rights of five women he had sexually assaulted in his chambers, including a potential litigant in his court, who was forced to perform oral sex on him on two separate occasions. Defense counsel argued that whether or not Lanier acted “willfully,” he could not be convicted of violating their constitutional rights because freedom from sexual assault was not a right protected by the Constitution, at least not at the time the alleged offenses were committed. Were the Court to interpret the Constitution to create such a right and retroactively apply it to him, Lanier argued, Section 242 would be rendered unconstitutionally vague. The Court agreed that Section 242 would present a vagueness problem were it not for the

134. *Id.* at 104 (emphasis added).

135. *Id.* at 105.

136. *Id.*

137. For language in the opinion suggesting that actual knowledge is required, see *id.* at 107 (“To convict it was necessary for [jurors] to find that [defendants] had the purpose to deprive the [victim] of a constitutional right, e.g., the right to be tried by a court rather than by ordeal.”). For language suggesting that actual knowledge of violating a constitutional right is *not* required, see *id.* at 105 (“[T]he only other alternative, if we are to avoid grave constitutional questions is to construe [willfulness] as applicable only to those acts which [violate specifically defined rights] . . . and which are knowingly done within the rule of *Ellis v. United States*, [206 U.S. 246 (1907) (requiring knowledge of relevant facts, not knowledge of unlawfulness)]”).

138. 520 U.S. 259 (1997).

saving interpretation that *Screws* had given to the statute, and so the Justices were obliged, after more than half a century, to clarify the meaning of *Screws*.¹³⁹

Lanier finally makes clear that (1) *Screws* is about the constitutional difficulty of vagueness and fair notice, not about the mental state required for a civil rights prosecution, and (2) the fair notice necessary to avoid vagueness does not require actual knowledge of the relevant law. Referring to the problem of “fair warning about the scope of criminal liability,” Souter explained: “The *Screws* plurality . . . recognized that this constitutional difficulty does not arise when the accused is charged with violating a ‘right which has been *made specific* either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.’”¹⁴⁰ A right had been “made specific,” Souter continued, when it had been “clearly established”¹⁴¹ at the time the alleged offense occurred. This interpretation, Souter wrote, was dictated by the “fair warning requirement”¹⁴² of the Due Process Clause, which prohibits any person from being held “criminally responsible for conduct which he could not reasonably understand to be proscribed.”¹⁴³ Fair warning does not require the defendant to have had actual knowledge of the unlawfulness of his conduct at the time the alleged offense was committed,¹⁴⁴ as the Justice Department Memorandum contends, and as some language in the *Screws* opinion suggested.¹⁴⁵ All that is required, Souter says, are judicial decisions interpreting the right in question so that “the contours of the right violated are sufficiently clear that a reasonable official would understand that what he is doing violates

139. *Id.* at 261.

140. *Id.* at 267 (quoting *Screws*, 325 U.S. at 104) (emphasis added).

141. *Id.* at 270.

142. *Id.* at 266.

143. *Id.* at 265 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964)).

144. Prior to *Lanier*, the fair warning requirement of the vagueness doctrine had not been thought to require actual knowledge of illegality. *See, e.g.*, John Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 207 (1985). The leading case on the meaning of the due process requirement of fair warning is *Bouie v. City of Columbia*, 378 U.S. 347 (1964), in which the Court declared that a defendant is denied fair warning if “a judicial construction of a criminal statute is *unexpected and indefensible* by reference to the law which had been expressed prior to the conduct in issue.” *Id.* at 354 (emphasis added). *Bouie* was cited by Justice Souter in *Lanier* as authority for the fair-warning principle that “no man shall be held criminally responsible for conduct *which he could not reasonably understand to be proscribed.*” 520 U.S. at 265 (emphasis added). Even if actual knowledge were required to cure vagueness, it is hard to see how knowledge of unlawfulness in general, which is what the Justice Department says is necessary to establish willfulness, *see supra* notes 88–89 and accompanying text, would provide the requisite notice to the defendant that a *federal* right, as distinguished from a right granted by state law, was being violated. The defendant might know that his killing the suspect constituted murder under state law, but it doesn’t necessarily follow that he knew he was violating the suspect’s Fourth Amendment rights. The only kind of knowledge that would cure the vagueness of a statute that failed to make clear that the defendant’s conduct constituted a violation of the Fourth Amendment is knowledge that he was violating the Fourth Amendment.

145. *See supra* note 128.

that right.”¹⁴⁶ Souter added: “*We applied this standard in Screws v. United States.*”¹⁴⁷ In recognizing that *Screws* required the constitutional right to have been “clearly established” by prior judicial decisions, Souter equated the “made-specific standard of fair warning” articulated in *Screws*¹⁴⁸ to the “clearly established” standard applicable to qualified immunity in cases of civil liability under 42 U.S.C. § 1983.¹⁴⁹

Although *Lanier* did not directly address the issue of willfulness,¹⁵⁰ the interpretation of the willfulness requirement by the *Screws* opinion is inseparable

146. 520 U.S. at 270 (quoting from *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (brackets and internal quotation marks omitted)). The standard is the same as the standard for qualified immunity in civil suits for damages under 42 U.S.C. § 1983. See *infra* note 149 and accompanying text.

147. *Id.* at 267 (emphasis added). The classic statement of the constitutional principle of fair warning is contained in *Bouie*, 378 U.S. 347:

The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime . . . is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

378 U.S. at 350–51, quoted in part in *Lanier*, 520 U.S. at 265.

148. 520 U.S. at 268.

149. Justice Souter took the fair-notice requirement for criminal prosecutions directly from one of the leading cases on qualified immunity in civil suits under 42 U.S.C. § 1983, *Anderson v. Creighton*, 483 U.S. 635, noting that “the object of the ‘clearly established’ immunity is not different from that of ‘fair warning’ as it relates to law ‘made specific’ for the purpose of validly applying § 242.” *Lanier*, 520 U.S. at 270. Quoting from *Anderson*, Souter declared that criminal, like civil, liability attaches “only if ‘the contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.’” *Id.* at 270 (quoting *Anderson*, 483 U.S. at 640) (brackets in the original). For a discussion of the relationship between the clearly-established-law standard in civil liability cases and the fair notice requirement in civil rights prosecutions, see Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 666–67 (1998). Even before *Lanier* reached the Supreme Court, the similarity between the “made specific” standard of *Screws* and the “clearly established” standard for qualified immunity had been recognized by the Sixth Circuit in overturning *Lanier*’s conviction. *United States v. Lanier*, 73 F.3d 1380, 1393 (6th Cir. 1996) (en banc). The Supreme Court vacated the judgment not because the Sixth Circuit had failed to apply the “clearly established” standard, but because its interpretation of the standard was unduly narrow insofar as it required a Supreme Court precedent with fundamentally similar facts. See 520 U.S. at 268. A circuit precedent will generally be sufficient, the Court declared, unless “disparate decisions in various Circuits . . . leave the law insufficiently certain,” and only in rare cases will “a very high degree of prior factual particularity . . . be necessary” *Id.* at 269, 271. In the absence of controlling authority from the same circuit, the majority of circuits will consider decisions from other circuits. See Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 955 & n.287 (2014).

150. See *Lanier*, 520 U.S. at 264 (listing the three elements of a Section 242 prosecution as acting “(1) ‘willfully’ and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States,” and stating that the Court was concerned “only with the last of these elements”). It is clear from the record that Judge Lanier did not act “willfully” in the sense that he knew his sexual misconduct constituted a violation of a federal constitutional right. See *Lanier*, 73 F.3d at 1392 (“The defendant certainly knew his conduct violated the [state] law,” but “it is not publicly known or understood that this right rises to the level of a ‘constitutional

from its analysis of the vagueness issue. If, as *Screws* indicates, its interpretation of willfulness derives from concerns about vagueness and fair notice, and the problem of vagueness is to be solved by reference to “clearly established” law, as the Supreme Court declared in *Lanier*, then it would seem to follow logically that the willfulness requirement must also be defined by the “clearly established” standard.¹⁵¹ This is the argument the Justice Department could have, and should have, made in support of the conclusion that a jury could reasonably have found that Wilson willfully violated Brown’s Fourth Amendment rights. A jury finding of willfulness would have been warranted because the law permitting a jury to consider the availability of less lethal alternatives when determining the reasonableness of the use of deadly force had been “clearly established” at the time the fatal shooting occurred.¹⁵²

It is of course arguable, given the failure of *Lanier* to specifically address the issue of willfulness, that the complexity of the *Screws* opinion allows for the interpretation that willfulness still requires something more than a clearly established right. However, it is difficult to understand why federal prosecutors, in adopting a definition of willfulness that requires a defendant to recognize the unlawfulness of his conduct, would choose an interpretation that not only poses the highest hurdle to prosecution, but also is directly contradicted by a federal

right.”). Several of the dissenting judges would have found willfulness in “the defendant’s reckless disregard of [Section 242’s] prohibition of the deprivation of a defined constitutional or other federal right.” *Id.* at 1413 (Daughtrey, J., dissenting, joined by Moore, Keith, & Jones, JJ.) (quoting *Screws*, 325 U.S. at 104). The reckless-disregard theory of willfulness was also supported by U.S. Deputy Solicitor General, Seth P. Waxman, in urging the Supreme Court to reverse the Sixth Circuit. Transcript of Oral Argument at 11–12, 52, *United States v. Lanier*, 520 U.S. 259 (1997) (No. 95-1717) (arguing that the willfulness requirement could be satisfied by proving the defendant “acted in reckless disregard of a right which has been made so specific that the unlawfulness under that right ‘would be apparent.’”).

151. “That the Supreme Court now understands *Screws* in this manner is confirmed by its unanimous decision in *United States v. Lanier*.” Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2094 (2015) (discussing the interpretation of the willfulness requirement in the *Screws* opinion). See also Armacost, *supra* note 149 at 667 (“The *Lanier* Court concluded that the requirement of ‘clearly established law’ provides the ‘same protection’ from civil damages liability that the requisite of fair notice guarantees to criminal defendants.”). While it may be argued that the bar for a criminal prosecution should be set higher than the standard for civil liability, the *Lanier* Court thought there was no problem with making the standards the same. 520 U.S. at 270 (“The fact that one has a civil and the other a criminal law role is of no significance; *both serve the same objective.*”) (emphasis added). To require something more for a criminal prosecution, the Court said, “would . . . call for something beyond ‘fair warning.’” *Id.* at 271. Of course, the burden of proof in civil rights prosecutions remains proof beyond a reasonable doubt, while a preponderance of the evidence standard prevails in civil suits under Section 1983. MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, FED. JUDICIAL CTR., SECTION 1983 LITIGATION 5 (3d ed. 2008). The prevailing view is that the burden of persuasion in Section 1983 is on the plaintiff to show that the defendant violated the plaintiff’s clearly established federal right. *Id.* at 154. The Third Circuit places the burden on the defendant. *Kopec v. Tate*, 361 F.3d 772, 776 (3d Cir. 2004).

152. For a discussion of what is required to show a violation of a “clearly established” right and how the clearly-established-law standard applies to the killing of Michael Brown, see *infra* Parts IV(B–C).

appeals court decision that provides the most thorough analysis of the willfulness requirement since *Screws* was decided more than seventy years ago. In *United States v. Ehrlichman*, which affirmed a conviction for one of the most notorious civil rights violations in United States history, the U.S. Court of Appeals for the District of Columbia Circuit declared that “[t]here is no requirement under section [242] that a defendant recognize the unlawfulness of his acts.”¹⁵³ *Ehrlichman* is critical to understanding the evolution of the meaning of willfulness because it is the only federal appellate decision that applies the fair-notice analysis adopted by *Lanier* to the task of interpreting the meaning of willfulness, which was left open in *Lanier*. Most significantly, the *Ehrlichman* opinion was written more than twenty years before *Lanier* was even decided, making clear as early as 1976 that *Screws* did not pose as high a bar to civil rights prosecutions as federal judges and civil rights lawyers, including prosecutors in the Civil Rights Division of the Justice Department, have long supposed.¹⁵⁴

In this Watergate era case, John Ehrlichman, Assistant to the President for Domestic Affairs in the Nixon White House, had been convicted for conspiring to violate the constitutional rights of Daniel Ellsberg’s psychiatrist by authorizing a burglary of the psychiatrist’s office after Ellsberg had leaked the Pentagon Papers, a Top Secret study of the Vietnam War. Ehrlichman contended that he did not act “willfully” because he sincerely believed the break-in was lawful. That belief was based on Ehrlichman’s good faith but mistaken assumption that warrantless searches by members of the Executive Branch were permissible in matters of national security.¹⁵⁵

In analyzing the *Screws* opinion, the Court of Appeals for the District of Columbia treated the willfulness requirement as a “cure [for] the problem of vagueness presented by the statute.”¹⁵⁶ Focusing on the term “specific intent” in Justice Douglas’s definition of willfulness, the D.C. Circuit construed the

153. 546 F.2d 910, 922 (D.C. Cir. 1976). Ehrlichman was prosecuted under Section 241 of Title 18, for a conspiracy to violate civil rights, rather than under Section 242, but insofar as Section 241 has been construed by the Supreme Court to impose the same willfulness requirement as Section 242, the same principles apply to both. *Id.* at 921; see *supra* note 82.

154. For a discussion of other federal cases interpreting the willfulness requirement and how the Justice Department has construed the requirement since *Screws* was decided, see *infra* Parts III(B–C).

155. Prior to the break-in, the Supreme Court had ruled that while there might be a “national security” exception for warrantless searches and surveillance in cases involving foreign agents or domestic collaborators with foreign powers, there was no such exception for threats to national security from purely domestic sources, like Ehrlichman and his co-conspirators. *United States v. United States District Court (Keith)*, 407 U.S. 297, 308–09 (1972) (delineating the distinction). Ehrlichman sought to bring himself within the national security exception by arguing that he believed the covert operation could yield “significant foreign intelligence information.” 546 F.2d at 925. The Court of Appeals rejected the argument on the ground that even if foreign powers were implicated, the national security exception applied only if the President or the Attorney General had specifically authorized the search, and Ehrlichman had obtained no such authorization. *Id.*

156. 546 F.2d at 920.

requisite intent to mean acting “with a purpose to deprive a person of a specific constitutional right made definite by decision or other rule of law.”¹⁵⁷ The Court of Appeals declared that the requisite specificity is satisfied if, at the time the offense was committed, the protected right was “clear and firmly established,”¹⁵⁸ anticipating by more than twenty years the *Lanier* standard of fair notice. Since judicial decisions clearly established that, in the absence of an explicit authorization by the President or Attorney General, warrantless searches, even in national security matters, violated the Fourth Amendment, and Ehrlichman had no such authorization, the court concluded he had acted “willfully” in authorizing the burglary.¹⁵⁹ For reasons that are not entirely clear, the Justice Department’s Memorandum does not mention *Ehrlichman*, and refers to *Lanier* only as a source of the quotation from *Screws* about willfulness requiring the defendant to have acted with the purpose “to deprive a person of a right made specific either by the express terms of the Constitution or laws of the

157. *Id.* (quoting *Screws*, 325 U.S. at 101, 103) (internal quotation marks omitted). For *Ehrlichman*’s extensive analysis of the meaning of “specific intent,” see *id.* at 917–23.

158. *Id.* at 922; see also *id.* at 921 (“clearly delineated and plainly applicable”); *id.* at 923 (“firmly established and plainly applicable”). The clearly-established-law standard applied by *Ehrlichman* to the meaning of willfulness was articulated by the D.C. Circuit before the standard was applied by the Supreme Court to qualified immunity in civil suits under 42 U.S.C. § 1983. The qualified-immunity version of the clearly-established test was announced in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and elaborated in *Anderson v. Creighton*, 483 U.S. 635 (1987), discussed *supra* note 149.

159. 546 F.2d at 924–28. Regarding specific intent the Court of Appeals concluded:

Under the circumstances of this case, the law is clear that Dr. Fielding’s Fourth Amendment rights were breached when the defendants broke into and searched his office without the requisite judicial authorization . . . As we observed above in connection with our discussion of *Screws* and its progeny, ‘specific intent’ under section 241 does not require an actual awareness on the part of the conspirators that they are violating constitutional rights. It is enough that they engage in activity which interferes with rights which as a matter of law are clearly and specifically protected by the Constitution.

Id. at 928. *Ehrlichman* is cited with approval by the Ninth Circuit in a 1993 opinion that concludes, after reviewing other federal appellate cases interpreting the meaning of specific intent under *Screws*: “[T]he weight of authority among the courts of appeals supports the view that ‘[t]here is no requirement under 241 [or 242] that a defendant recognize the unlawfulness of his acts.’” *Reese*, 2 F.3d at 886 (brackets in the original). A reading of the cases cited by *Reese* indicates that the assertion about “the weight of authority” is overstated and that the cases are far more ambiguous than the court’s statement suggests; further, none actually refer to *Ehrlichman*. See, e.g., *United States v. Gwaltney*, 790 F.2d 1378, 1386 (9th Cir. 1986) (approving an instruction that “reckless disregard for a person’s constitutional rights is evidence of specific intent to deprive that person of those rights[,]” which implicitly dispensed with the need to prove knowledge of unlawfulness); *Apodaca v. United States*, 188 F.2d 932, 937 (10th Cir. 1951) (approving contradictory instructions stating that specific intent “does not require knowledge that such act is a violation of the law” but also stating that specific intent requires “conscious purpose to do wrong”); *United States v. McClean*, 528 F.2d 1250, 1255 (2d Cir. 1976) (approving an instruction, contrary to *Screws*, that the jury need only find that defendant intended to commit the underlying act, and that the act violated constitutional rights of the victim; this erroneous instruction relieved the jury of the duty to find knowledge of unlawfulness).

United States or by decisions interpreting them,”¹⁶⁰ without explaining that *Lanier* interpreted this language to mean what a “clearly established” right means in the context of qualified immunity from civil liability. Whatever else the authors of the Memorandum might say about these cases, the one thing that cannot fairly be said, as long as these judicial precedents stand, is that indicting Wilson “is not *permitted* by . . . the governing law.”¹⁶¹

B. Applying the New Willfulness Requirement to Ferguson

If we view the willfulness element of Section 242 as requiring only a right that was clearly established at the time the alleged violation occurred, the standard can be readily met in the case against Officer Wilson. His use of deadly force was governed by a thirty-year-old Supreme Court precedent that clearly established a Fourth Amendment right of a fleeing felon to be free from a police officer’s use of deadly force unless necessary for the officer to protect himself or others from death or serious bodily injury.¹⁶² If the relevant constitutional standard is stated with greater specificity,¹⁶³ it can be articulated as requiring not simply that deadly force was necessary to protect Wilson from death or serious bodily injury, but more specifically, that the reasonableness of his use of lethal force was to be determined in light of the availability and effectiveness of less-lethal alternatives. There was controlling circuit precedent for this proposition in the form of an Eighth Circuit decision that required consideration of such alternatives,¹⁶⁴ and the precedent was sufficient to satisfy the clearly-established-law standard.¹⁶⁵

160. MEMORANDUM, *supra* note 21, at 79 (quoting *Lanier*, 520 U.S. at 267).

161. *Id.* (emphasis added).

162. *Garner*, 471 U.S. 1, discussed *supra* Part III(A).

163. The Supreme Court has repeatedly cautioned against defining clearly established law at too high a level of generality. *See, e.g.*, *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2023 (2014).

164. The Eighth Circuit precedent, *Retz v. Seaton*, 741 F.3d 913, discussed *supra* Part III(A), was decided on March 12, 2014, approximately five months before Wilson killed Brown.

165. Clearly-established-law can be shown by controlling circuit precedent. *See Wilson v. Layne*, 526 U.S. 603, 617 (1999) (“any cases of controlling authority in the . . . jurisdiction at the time of the incident”); *Carroll v. Carman*, 135 S.Ct. 348, 350 (2014) (assuming without deciding that “a controlling circuit precedent could constitute clearly established law”). The rule permitting less-lethal alternatives to be considered in determining the reasonableness of a police officer’s use of deadly force is also followed in the Ninth Circuit, where, in *Gonzalez v. City of Anaheim*, 747 F.3d 789, 797 (9th Cir. 2014), the Court of Appeals, noting that the “officer had a police baton, pepper spray, and a taser,” stated: “[T]he jury may consider the availability of other methods to subdue a suspect. He could have used any of them, or he could have shot Gonzalez in a nonlethal area of the body to try to stop him from driving further.” The Ninth Circuit rule is embodied in a standard jury instruction on excessive force. *See infra* note 169 and accompanying text. A contrary rule apparently prevails in the Tenth Circuit, *Tanberg v. Sholtis*, 401 F.3d 1151, 1163 (10th Cir. 2005) (“The reasonableness standard does not *require* that officers use alternative less intrusive means”) (emphasis added), and in the Seventh Circuit, *Plakas v. Drinski*, 19 F.3d 1143, 1149 (7th Cir. 1994) (“We do not believe the Fourth Amendment *requires* the use of the least or even a less deadly alternative so long as the use of deadly force is reasonable under *Garner v. Tennessee* and *Graham v. Connor* . . .”) (emphases added); COMMITTEE ON PATTERN JURY INSTRUCTIONS,

In a civil rights prosecution governed by a clearly-established-law standard of liability, existing instructions on willfulness would be replaced by a two-step process. The first step would inquire whether a general principle of constitutional law—*e.g.*, the standard permitting a jury to consider the availability of less-lethal alternatives in assessing the reasonableness of a police officer's use of deadly force—was clearly established at the time the alleged offense was committed. A constitutional principle is “clearly established,” even without a Supreme Court decision on point, if there is either controlling Circuit precedent¹⁶⁶ or, in the absence of such precedent, “a consensus of cases of persuasive authority” such that a reasonable officer would have been aware of the principle.¹⁶⁷ This would be a question of law for the trial judge to decide.

The second step in the process would address the application of a clearly established general principle to the particular facts of a case and inquire whether a reasonable police officer would have understood that his or her conduct violated the general principle. This would be a mixed question of law and fact to be determined by the jury.¹⁶⁸ Jurors deliberating Wilson's guilt or innocence would receive an instruction directing them to consider whether his use of force was unreasonable in light of the availability and effectiveness of less-lethal options:

In determining whether the defendant's use of deadly force was unreasonable, consider all the circumstances known to him at the time, including the availability and effectiveness of alternative methods to subdue the suspect or take him into custody.¹⁶⁹

SEVENTH CIRCUIT, FEDERAL CIVIL JURY INSTRUCTIONS, No. 7.09 (2009 rev. ed.), http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_civ_instruc_2009.pdf [<https://perma.cc/E2U2-RD5T>] (“An officer is not *required* to use all practical alternatives to avoid a situation where deadly force is justified.”) (emphasis added). The apparent conflict between the circuits can be reconciled by reference to the use of the word “require” in the Seventh and Tenth Circuit cases. These cases are not inconsistent with the Eighth and Ninth Circuit cases which say only that the availability of less-lethal alternatives *should* be taken into account by the jury in determining reasonableness, not that the jury is *required* to find unreasonableness.

166. *Wilson v. Layne*, 526 U.S. at 617.

167. *Id.*

168. The reasonableness test has been characterized by the Court, in the context of Section 1983 litigation, as “a pure question of law” to be decided by the trial court and, ultimately, by the Supreme Court itself. *Mullenix v. Luna*, 136 S.Ct. 305, 307 (2015) (quoting *Scott*, 550 U.S. at 381 n.8). This aspect of the qualified immunity doctrine has been criticized as “usurping the role of jurors.” Blum, *supra* note 149, at 941 (suggesting the Court may be changing its view on this issue). The question of reasonableness is best characterized as “a mixed question of law and fact.” *Ornelas v. United States*, 517 U.S. 690, 696 (1996), which is typically decided by the jury, *United States v. Gaudin*, 515 U.S. 506, 514 (1995) (“[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence.”).

169. This instruction is based on a Ninth Circuit pattern jury instruction for excessive use of force in civil suits under 42 U.S.C. § 1983. JURY INSTRUCTIONS COMMITTEE, NINTH CIRCUIT, MANUAL OF MODEL CIVIL JURY INSTRUCTIONS, No. 9.25 (2007 ed. last updated Jan. 2017),

Wilson's grand jury testimony indicates that he *knew* he had a legal duty to consider less-lethal alternatives before escalating to deadly force. He testified that during his struggle with Brown while seated in his SUV, he considered using his mace, retractable baton, and flashlight (he did not carry a taser), but that he was either unable to reach a particular weapon, or the chances of it being effective in such a confined space were "slim to none."¹⁷⁰ Referring to this procedure for considering less-lethal alternatives as a "use of force triangle" or "continuum,"¹⁷¹ Wilson said that he reviewed the triangle "in [his] head" while in his vehicle.¹⁷² Wilson did not say whether he recognized his duty to consider less-lethal options during his subsequent encounter with Brown in the roadway, but there is clearly a basis for such an inference. However, even if Wilson believed he had no duty to use his mace because of the risk that it might have failed to prevent Brown from overpowering him and killing him with his own weapon, the question remains whether that belief was unreasonable.¹⁷³ This presents a mixed question of law and fact that should have been left to a jury to decide.

C. The Persistence of the Jurisprudence of Police Impunity

Civil rights prosecutors face an uphill battle in trying to prove willfulness, as most lower federal courts have treated the term as a subjective *mens rea* standard, interpreting *Screws* to require an intent to deprive the victim of a federal constitutional right¹⁷⁴ and approving jury instructions that condition a guilty verdict on a finding that the defendant acted with "intent to deprive another of a right guaranteed by the Constitution or other federal law"¹⁷⁵ or,

http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Civil_Instructions_2017_1.pdf [<https://perma.cc/BVH4-C6G7>]. While a clearly-established-law standard will make criminal prosecutions easier, there should be no illusions about the problems that will remain. The law governing the application of the clearly-established-law standard in Section 1983 suits has become increasingly stringent, creating substantial obstacles to proving liability. See Blum, *supra* note 149, at 945–61. For a discussion of these troublesome problems as they apply to criminal prosecutions, see *infra* Part IV(C).

170. TRANSCRIPT, *supra* note 41, Vol. V, (Sept. 16, 2014) at 212–14.

171. *Id.* at 274.

172. *Id.* See also MEMORANDUM, *supra* note 21, at 13.

173. See Kaminski & Edwards, *supra* note 72, at 22 (pepper spray had failure rate of sixteen percent in cases studied, but study does not indicate that any officer was killed or seriously injured as a result of the failure of the spray to incapacitate the suspect).

174. *E.g.*, *United States v. Sipe*, 388 F.3d 471, 480 n.21 (5th Cir. 2004) ("the term 'willfully' implies conscious purpose to do wrong and intent to deprive another of a right guaranteed by the Constitution or other federal law"); *United States v. Kerley*, 643 F.2d 299, 302 (5th Cir. 1981) ("a purpose to deprive a person of a specific constitutional right"); *Pullen v. United States*, 164 F.2d 756, 759 (5th Cir. 1947) ("willful implies not merely 'a conscious purpose to do wrong,' . . . but that there must be a specific intent to deprive him of a federal right").

175. *Sipe*, 388 F.3d at 480 n. 21; COMMITTEE ON PATTERN JURY INSTRUCTIONS, FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES), DEPRIVATION OF CIVIL RIGHTS, No. 2.12 (2015), <http://www.lb5.uscourts.gov/juryinstructions/fifth/crim2015.pdf> [<https://perma.cc/2CTC-ED4V>].

more generally, with a “bad purpose or evil motive to disobey or disregard the law.”¹⁷⁶ While some federal appeals courts have construed the language of “specific intent” to require actual knowledge by the defendant that he violated a federal right,¹⁷⁷ at least one court has said that a knowing violation of state law is sufficient.¹⁷⁸ Other courts add to the confusion by stating that the government need not prove any knowledge of unlawful conduct,¹⁷⁹ allowing a jury to find willfulness on the theory that a clear violation of a constitutional right shows a “reckless disregard” for that right, which *Screws* treats as satisfying the requirement of willfulness.¹⁸⁰ Adding to the confusion of the case law is the perplexing nature of jury instructions that often put jurors through the kind of mental gymnastics that stymie even legal scholars. A standard instruction for the Fifth Circuit informs jurors that to find the defendant was acting willfully, “it is not necessary for you to find the defendant knew the specific Constitutional provision or federal law that his conduct violated”; the instruction then appears to contradict itself in the next sentence, which states: “But the defendant must have a specific intent to deprive the person of a right protected by the Constitution or federal law.”¹⁸¹ While juries return guilty verdicts despite the restrictive and confusing instructions,¹⁸² and the convictions are almost always

176. *Sipe*, 388 F.3d at 480; *United States v. Stokes*, 506 F.2d 771, 776 (5th Cir. 1975); *United States v. Dise*, 763 F.2d 586, 590 (3d Cir. 1985) (“a specific intent to do something that the law forbids”); *United States v. Garza*, 754 F.2d 1202, 1210 (5th Cir. 1985) (same); see *Kerley*, 643 F.2d at 303 (reversing conviction for failure to instruct jury that willfulness means “acting with a bad purpose or evil motive”).

177. *Lynch v. United States*, 189 F.2d 476, 481 (5th Cir. 1951) (it is a question for the jury whether defendant “knew that a person arrested for an offense had the constitutional right to a trial under the law” and “willfully failed to accord these victims the opportunity for such a trial . . . [by] turn[ing] them over to this mob to suffer trial by ordeal.”); compare *Crews v. United States*, 160 F.2d 746, 750 (5th Cir. 1947) (an officer of the law “undoubtedly knows” that a person arrested has the right to a trial and if the officer “substituted his own trial by ordeal” by intentionally killing the suspect, the jury could find a willful violation of a constitutional right as “an inexorable and concomitant consequence of a willful homicide.”).

178. *Dise*, 763 F.2d at 592 (approving instruction that jury could find defendant acted willfully if “he knew he was using excessive . . . force beyond that which was permitted to him under the law of the State of Pennsylvania”) (emphasis added).

179. *United States v. Johnstone*, 107 F.3d 200, 210 (3d Cir. 1997) (“the government does not need to show that the defendant knowingly violated any right) (emphasis added); *Reese*, 2 F.3d at 885–86 (9th Cir.) (approving instruction that “an act is done willfully if it is done . . . with a specific intent to do something the law forbids,” but stating “there is no requirement . . . that a defendant recognize the unlawfulness of his acts.”); *Apodaca v. United States*, 188 F.2d at 937 (10th Cir. 1951) (“use of the word willful and willfully implies a conscious purpose to do wrong” but “does not require knowledge that such act is a violation of law”).

180. *Reese*, 2 F.3d at 881 (“intentionally wrong conduct, because it contravenes a right definitely established in law, evidences a reckless disregard for that right; such reckless disregard, in turn, is the legal equivalent of willfulness”). On use of the reckless-disregard standard to prove willfulness, see *infra* Part IV(C).

181. COMMITTEE ON PATTERN JURY INSTRUCTIONS, FIFTH CIRCUIT, *supra* note 175, No. 2.12.

182. During the year ending June 2016, 112 out of the 145, or 77 percent, of the defendants prosecuted for civil rights violations were convicted after trial or by guilty plea. Of the twenty-two defendants who were tried by a jury, 50 percent were found guilty. DIRECTOR OF THE

affirmed on appeal,¹⁸³ they are affirmed by opinions that rarely engage in more than a recitation of the specific-intent language from *Screws*.¹⁸⁴ It has been almost twenty years since the Supreme Court made clear in *Lanier* that “specific intent” refers not to the state of a defendant’s mind and whether it was specifically focused on violating a constitutional right, but rather to the objective clarity of a right made specific—in the sense of having been “clearly established”—by prior judicial decisions. Yet *Lanier* remains unrecognized by lower federal courts¹⁸⁵ as part of the mainstream legal narrative explaining the standard of proof in civil rights prosecutions.¹⁸⁶

ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT 2016, CRIMINAL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, U.S. DISTRICT COURTS, TABLE D-4 AT 4 (June 30, 2016), <http://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary> [<https://perma.cc/5ZRW-Y6XL>]. During the preceding year ending June 2015, 124 out of 148 defendants, or eighty-four percent, were convicted. Juries returned guilty verdicts in eighteen out of the twenty-six, or seventy percent, of the cases that went to trial. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT 2015, CRIMINAL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, U.S. DISTRICT COURTS, TABLE D-4 AT 4 (June 30, 2015), <http://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary> [<https://perma.cc/5ZRW-Y6XL>]. A survey of civil rights prosecutions during the period 1965–1974 shows a much lower conviction rate, suggesting that prosecutors were less selective in filing charges, with almost seventy percent of those charged winning either dismissals or acquittals after trial. In those cases that went to trial, eighty-four defendants were convicted and 305 were acquitted, yielding a mere twenty-two percent conviction rate. Robert L. Spurrier Jr., *McAlester and After: Section 242, Title 18 of the United States Code and the Protection of Civil Rights*, 11 TULSA L. REV. 347, 357 & tbl. I (1976).

183. For a rare decision reversing a conviction for failure to give a proper willfulness instruction, see *Kerley*, 643 F.2d at 303 (reversing conviction for failure to instruct jury that willfulness means acting “with a bad purpose or an evil motive”).

184. See, e.g., *Sipe*, 388 F.3d at 479–80 & n.21; *United States v. Bradley*, 196 F.3d 762, 769–71 (7th Cir. 1999); *United States v. Messerlian*, 832 F.2d 778, 789–90 (3d Cir. 1987).

185. For rare examples of post-*Lanier* applications of the clearly-established-law standard in Section 242 prosecutions, but without making clear whether willfulness is a separate requirement, see *United States v. Morris*, 494 Fed. App’x. 574 (6th Cir. Aug. 16, 2012); *United States v. Cossette*, 2013 U.S. Dist. LEXIS 133326 (D. Conn. Nov. 22, 2013), *aff’d by summary order*, 593 Fed. App’x. 28 (2d Cir. Nov. 24, 2014).

186. A significant body of legal scholarship has evolved recognizing the significance of *Lanier* as making the *Screws* standard of criminal liability the same as the clearly-established-law standard of civil liability. Low & Johnson, *supra* note 151 at 2094; Armacost, *supra* note 149, at 667; Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2211–13 (2002). Before *Lanier* was decided, Frederick Lawrence had discerned that the *Screws* concept of specific intent could be interpreted to require “the deprivation of a clearly established constitutional right,” Lawrence, *supra* note 92, at 2185, but thought this was insufficient to solve the notice problem, assuming that fair notice required actual knowledge, *id.* at 2184—an assumption that *Lanier* would later rebut. In a post-*Lanier* law review article, Ninth Circuit Judge Paul Watford noted that the fair-notice problem in *Screws* “could have been addressed” by requiring the right in question “to have been established with sufficient clarity and specificity at the time the defendants acted,” but thought this was not the mode of analysis actually adopted by Justice Douglas in *Screws*. Watford, *supra* note 92, at 479–80. It may be that *Lanier* has failed to find recognition among lower-court judges and civil rights practitioners as part of the mainstream legal narrative of civil rights prosecutions because its analysis by law professors has occurred in the context of qualified immunity in civil cases or as part of an exposition of the doctrine of vagueness, rather than in the context of

Even without recognizing the significance of *Lanier*, the Justice Department, prior to Ferguson, vigorously opposed a request by defense counsel for jury instructions construing willfulness to require proof that the defendant “acted with knowledge that his conduct violated the law.”¹⁸⁷ Despite its success in resisting such defense-friendly instructions, the Justice Department decided in Ferguson to make defense lawyers’ arguments for them, accepting defeat in the legal battle over one of the most important civil rights issues of our time without lifting a musket of resistance, as if Supreme Court precedent so clearly dictated the Department’s interpretation of willfulness that no other interpretation was possible.

Assuming that Justice Department lawyers somehow felt constrained by judicial precedent to interpret willfulness to require some kind of *mens rea* with respect to the relevant law, the requisite blameworthiness could have been satisfied by applying the “reckless disregard” standard approved in *Screws*. When a police officer acts in violation of a constitutional right that is obvious in the sense that it is clearly established by judicial precedent, he acts with the kind of culpable mental state described in *Screws* as a “reckless disregard of a constitutional requirement which has been made specific and definite.”¹⁸⁸ When defendants act with such recklessness, the Court said, “they act willfully in the sense in which we use the word.”¹⁸⁹ This would give recklessness the same meaning as negligence. A person who acts in the face of an obvious risk or, as the *Lanier* opinion put it, in the face of a risk of unlawfulness that is

prosecutions of civil rights violations. Perhaps of greatest significance is the fact that *Lanier* did not specifically address the willfulness requirement of Section 242.

187. *United States v. Warren*, 2013 U.S. Dist. LEXIS 174067, at *3 (E.D. La. Dec. 10, 2013). The case involved the retrial of a New Orleans police officer charged with killing an African-American man suspected of looting in the aftermath of Hurricane Katrina. Federal prosecutors argued successfully that the requested instruction would “confuse the jury as to the mental state at issue.” *Id.* at *4. Requests by defense counsel for such an instruction are based on the general instruction for defining “willfully,” and even the general instruction found in pattern jury instructions omits any specific definition, containing only a comment written by the drafting committee. These comments typically limit the interpretation of “willfully” as requiring knowledge of unlawfulness to cases involving tax evasion, fraudulent banking transactions, and other white collar crimes, not crimes of violence. *See, e.g.*, COMMITTEE ON PATTERN JURY INSTRUCTIONS, FIFTH CIRCUIT, *supra* note 175, No. 1.38, Note (citing *Cheek v. United States*, 498 U.S. 192 (1991) (tax evasion), and *Ratzlaf v. United States*, 510 U.S. 135 (1994) (structuring of cash transactions to avoid bank reporting requirements)). The Eight Circuit, which governs Missouri, has no specific pattern instruction for 18 U.S.C. § 242, and its general instruction on willfulness contains a similar comment specifically limiting consciousness of wrongdoing to tax cases, odometer fraud, health care anti-kickback statutes, certain securities cases, and failure to pay child support. COMMITTEE ON MODEL JURY INSTRUCTIONS, EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS, No. 7.02, Comments (2014), http://www.juryinstructions.ca8.uscourts.gov/Manual_of_Model_Criminal_Jury_Instructions_New_and_Revised%208_5_2014.pdf [https://perma.cc/6AAA-MZC7]. For a discussion of the rationale for requiring consciousness of wrongdoing in certain types of cases, see *infra* Part IV(C).

188. 325 U.S. at 105.

189. *Id.*

“apparent,”¹⁹⁰ is reckless in an objective sense because the implication is that the unlawfulness of the conduct is “so obvious that it *should be known*” to a reasonable person.¹⁹¹

Use of an objective reckless-disregard instruction was originally advocated, unsuccessfully, by Robert Carr, Executive Secretary of President Truman’s Committee on Civil Rights and one of the first legal scholars to advise the Justice Department on *Screws*.¹⁹² The 1961 Report of the U.S. Civil Rights Commission criticized the failure of the Justice Department’s Civil Rights Division to develop a consistent policy on proposing an instruction based on the reckless-disregard standard, which the Commission referred to as “constructive intent.” The Report attributed the failure to “differences of opinion among Division attorneys as to the meaning of the *Screws* doctrine on specific intent.”¹⁹³ Notwithstanding the reluctance of the Justice Department to use it, the reckless-disregard standard has continued to be approved by the Supreme Court¹⁹⁴ and federal appeals courts¹⁹⁵ as satisfying the willfulness requirement.

No legislature has ever enacted a statute, and no court has ever devised an interpretation of a statute, that has permitted a defendant charged with a violent crime to avoid criminal liability on the grounds that he committed the act

190. 520 U.S. at 272.

191. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (emphasis added). The problem with treating the reckless-disregard formulation of willfulness as a negligence standard is that recklessness in criminal cases is generally understood to require proof of subjective awareness of the risk. See DRESSLER, *supra* note 127, § 10.04 [D] [3].

192. Robert K. Carr, *Screws v. United States: The Georgia Brutality Case*, 31 CORNELL L. REV. 48, 65 (1945). The standard continued to be advocated by some Justice Department lawyers. See Shapiro, *supra* note 117, at 541.

193. UNITED STATES COMM’N ON CIVIL RIGHTS, REPORT, BOOK V: JUSTICE 50–51 & n.55 (1961), <https://www.law.unmaryland.edu/marshall/usccr/documents/cr11961bk5.pdf> [<https://perma.cc/VRS7-TLHY>]. For a comprehensive review of early Justice Department strategy and divisions within the department over use of the reckless-disregard standard, see Mia Teitelbaum, *Willful Intent: The Shooting of Willie Lee Davis, the Screws Ruling, and Legal Strategies of the Department of Justice and NAACP* (Northeastern University Project on Civil Rights & Restorative Justice, Working Document, Feb. 4, 2015), <http://nuweb9.neu.edu/civilrights/wp-content/uploads/Willie-Lee-Davis-Screws-Decision.pdf> [<https://perma.cc/JN35-NLXF>].

194. See *United States v. Guest*, 383 U.S. 745, 786 (1966) (concurring and dissenting opinion of Brennan, J., joined by Warren, C.J. & Douglas, J.) (“We have construed [willfulness] to require proof that the persons charged . . . [acted] in reckless disregard, of an announced rule making the federal right specific and definite.”).

195. See *United States v. Figueroa*, 729 F.3d 267, 277 (3d Cir. 2013) (“You may find a particular defendant acted willfully if he performed an act in open defiance or reckless disregard of a constitutional [right] which has been made specific and definite”); *United States v. Johnstone*, 107 F.3d 200, 208 (3d Cir. 1997) (“[*Screws*] reconciles [its] facially inconsistent [language] by recognizing that willfulness includes reckless disregard.”); *United States v. House*, 684 F.3d 1173, 1199 (11th Cir. 2012) (“A person acts willfully . . . when he acts in reckless disregard of a constitutional requirement which has been made specific and definite.”); *Reese*, 2 F.3d at 881, 899 (finding that the reckless-disregard standard resolves the “paradox” presented by *Screws* by treating “reckless disregard for a person’s constitutional rights [as] evidence of a specific intent to deprive that person of those rights”).

without knowing it was criminal or wrongful.¹⁹⁶ To be sure, criminality requires a culpable state of mind known as *mens rea* or “guilty mind.”¹⁹⁷ This does not mean, however, that a defendant must have known that his conduct was illegal for him to be found guilty.¹⁹⁸ It is generally sufficient to prove that the defendant intentionally or knowingly inflicted harm on the victim, even if the defendant did not know that doing so was unlawful. This principle is expressed in the venerable maxim, “Ignorance of the law is no excuse.”¹⁹⁹ Although exceptions to this principle can be found in the Model Penal Code’s recognition of a mistake-of-law defense for reasonable reliance by the defendant on a statute or judicial decision or other authoritative interpretation of the law by an official charged with its enforcement,²⁰⁰ and in the Supreme Court’s recent recognition of a mistake-of-law defense for police officers in the Fourth Amendment itself,²⁰¹ the mistake must be reasonable.²⁰²

Another exception, which excuses even an *unreasonable* mistake of law, has been recognized in a relatively small but growing number of cases where federal criminal statutes that use the term “willfully” have been construed to manifest a congressional intent to require proof that the defendant knew he was acting

196. Requiring consciousness of wrongdoing for violent crimes would have intolerable legal and moral consequences for prosecuting individuals generally regarded as some of our most dangerous and evil offenders. For example, terrorists, religious extremists, war criminals, and other morally committed killers, all of whom act without appreciating the wrongfulness of their conduct, would fall outside the scope of the criminal law. See GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 9.4, at 748–49 (1978). The political philosopher Hannah Arendt, in her book about the war crimes trial in Israel of Adolph Eichmann, for his role in organizing the Holocaust, stated incorrectly, that “the assumption current in all modern legal systems [is] that *intent to do wrong* is necessary for the commission of a crime.” HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 27 (Penguin Books 2006) (1963) (emphasis added). Her erroneous assumption that consciousness of wrongdoing is required for criminal liability led her to suggest that Eichmann’s conviction was problematic because he had committed his terrible crimes “under circumstances that ma[d]e it well-nigh impossible for him to know or to feel that he [was] doing wrong.” Such an assertion understandably caused backlash against the book like “no book within living memory,” as Amos Elon put it in his introduction to the revised edition. *Id.* at vii.

197. *Morisette v. United States*, 342 U.S. 246, 252 (1952) (the principle seeks to protect “those who [are] not blameworthy in mind” from conviction for serious crimes).

198. *Elonis v. United States* 135 S.Ct. 2001, 2009 (2015).

199. *Id.*

200. MODEL PENAL CODE § 2.04(3)(b) (1985).

201. *Heien v. North Carolina*, 135 S.Ct. 530, 540 (2014) (holding that a reasonable mistake about a brake-light provision in state vehicle code made traffic stop lawful under Fourth Amendment).

202. The reasonable-mistake-of-law defense embodied in the Fourth Amendment is triggered only when the mistake is about a violation of state law, not when the mistake involves a violation of the Fourth Amendment itself. *Id.* at 539 (mistake of law defense does not apply when “we ha[ve] already found or assumed a Fourth Amendment violation.”) Mistakes about Fourth Amendment violations are governed by separate doctrines, depending on whether the remedy being sought is the exclusionary rule, *id.* (citing “good faith exception” cases), or a civil suit for damages, *id.* (citing qualified-immunity cases), or a federal criminal prosecution, where the question whether a mistake of law bars liability depends on the meaning of the willfulness requirement under 18 U.S.C. § 242.

unlawfully. However, these cases have been confined to tax laws and to regulatory statutes prohibiting conduct not generally known to be criminal.²⁰³ The rationale for requiring knowledge of illegality in federal tax cases has been based on the complexity of the Internal Revenue Code,²⁰⁴ which has the potential for criminalizing the errors of “the well-meaning, but easily confused mass of taxpayers.”²⁰⁵ Other cases construing willfulness to require consciousness of wrongdoing have expressed a concern with criminalizing conduct that is “apparently innocent”²⁰⁶ or “not inevitably nefarious,”²⁰⁷ like the unauthorized possession of food stamps²⁰⁸ or the “structuring” of banking transactions by making cash deposits in amounts of less than 10,000 dollars to avoid bank reporting requirements.²⁰⁹

While the corpus of constitutional law governing police procedure has been ridiculed as a constitutional “code of criminal procedure” by critics of its complexity,²¹⁰ the Fourth Amendment has not yet become an Internal Revenue Code of Criminal Procedure, and the fatal shooting of citizens by police officers can hardly be characterized as “apparently innocent” or “non-nefarious.” Whatever the reasons for shielding police officers from criminal liability—whether it is yielding a measure of discretion to officials acting in good faith to enforce a constantly evolving body of law,²¹¹ or recognizing that “police officers are often forced to make split-second judgments”²¹²—these legitimate interests can be served by replacing the term “willfully” in 18 U.S.C. § 242 with language adopting the “clearly established law” requirement announced by the Court in *Lanier*, which uses a standard of reasonableness to determine when judicial decisions have defined a right with sufficient clarity.

203. See Davies, *supra* note 128, at 344–46 (listing a variety of federal laws including Internal Revenue Code, bank reporting requirements, Medicare and Medicaid anti-kickback statutes, and Occupational Safety and Health Act). Professor Davies strongly criticizes the Court for extending the knowledge-of-illegality requirement beyond the tax cases because of the absence of any consistent rationale. *Id.* at 369–87.

204. See *Cheek v. United States*, 498 U.S. 192 (1991); *United States v. Murdock*, 290 U.S. 389 (1933).

205. *United States v. Bishop*, 412 U.S. 346, 361 (1973).

206. *Liparota v. United States*, 471 U.S. 419, 426–28 (1985) (food stamp regulations) (interpreting the term “knowingly”).

207. *Ratzlaf v. United States*, 510 U.S. 135, 144 (1994) (prohibiting “structuring” of cash transactions to avoid bank reporting requirements).

208. *Liparota*, 471 U.S. 419.

209. *Ratzlaf*, 510 U.S. 135. Compare *Bryan v. United States*, 524 U.S. 184 (1998) (“willful” violation of Firearm Owners’ Protection Act required proof that the defendant knew his sale of firearms with sawed-off serial numbers on a street corner was generally illegal, but not that he knew of the specific federal licensing requirement he was violating).

210. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 953–54 (1965) (cautioning against interpreting the Supreme Court’s declaration of fundamental principles of constitutional law in criminal cases as “a detailed code of criminal procedure”).

211. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982).

212. *Graham v. Connor*, 490 U.S. 386, 397 (1989).

The difficulty with formulating such language is that there are two meanings of “reasonable,” as the term has been used by the Court in defining the clearly-established-law standard. The first is the meaning given to it by the Court in *Lanier* and in *Anderson v. Creighton*,²¹³ a pre-*Lanier* case defining qualified immunity in the context of civil liability under 42 U.S.C. § 1983, and on which the *Lanier* opinion relied. *Anderson* defines a right as *clearly established* if it is “sufficiently clear that a reasonable official would understand that what he is doing violates that right.”²¹⁴ This is the fair-notice meaning of reasonableness.²¹⁵ The second meaning emerged from Justice Scalia’s 2011 majority opinion in *Ashcroft v. al-Kidd*, a Section 1983 case in which Scalia quotes the *Anderson* language in a slightly altered form, asserting that qualified immunity protects public officials unless the law is “‘sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’”²¹⁶ This was not simply a shift in tone. By replacing the word “a” in *Anderson*’s reference to “a reasonable official” with the word “every” to produce the phrase “every ‘reasonable official,’”²¹⁷ Scalia generated a substantive change in the reasonableness standard, embraced and embroidered by subsequent opinions,²¹⁸ that has had the effect of transforming *Anderson*’s fair-notice requirement into an unprecedented *mens rea* standard of “super-negligence” that comes close to requiring consciousness of wrongdoing.

Section 1983 litigation has thus resulted in the Court replacing a standard that originally granted qualified immunity to a public official unless “a reasonable official” would have understood that his conduct violated a constitutional right, with a new formulation that grants immunity unless “every reasonable official” would have understood that what he did violated a constitutional right. In other words, if there is a disagreement among reasonably well-trained officers about the unlawfulness of the defendant’s conduct, the

213. 483 U.S. 635 (1987).

214. *Lanier*, 520 U.S. at 270 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640) (1987)).

215. *Id.* at 265–67 (discussing the fair-notice requirement); see *Hope v. Pelzer*, 536 U.S. 730, 739–41 (2002) (explaining qualified immunity as a fair-notice rule applicable to both civil and criminal proceedings, citing and quoting from *Lanier*) (per Stevens, J.). *Hope* would have made the standard for qualified immunity the same as *Lanier*’s constitutional standard of fair notice. However, Justice Stevens’ majority opinion in *Hope* has been ignored by subsequent decisions of the Court giving the concept of reasonableness a far more stringent meaning than it was given in *Lanier*.

216. 563 U.S. 731, 741 (2011) (emphasis added) (quoting *Anderson*, 483 U.S. at 640).

217. See Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633, 656 (2013) (suggesting that the reason no Justice has challenged this alteration is perhaps because “Justice Scalia did not call attention to the shift and the other Justices simply did not notice the change in the law”).

218. *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012); *San Francisco v. Sheehan*, 135 S.Ct. 1765, 1774 (2015); *Mullenix*, 136 S.Ct. at 308 (per curiam); see Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 *MINN. L. REV. HEADNOTES* 62, 65–66 (2016).

defendant is immune from civil liability under the *al-Kidd* standard.²¹⁹ But if there is a disagreement among reasonably well-trained officers, this means there is at least one reasonable officer who would have understood that the defendant's conduct was rendered unconstitutional by judicial precedent as it existed at the time the offense was committed. This should be sufficient to provide the kind of fair notice contemplated by *Lanier*, which requires only that "a reasonable official would understand that what he is doing violates that right."²²⁰

The metamorphosis of Section 1983 jurisprudence has produced a concept of reasonableness so rigorous that it requires agreement among *all* reasonable jurists and police officers about what is reasonable before a defendant can be found liable—an almost impossible burden for plaintiffs to meet.²²¹ What must be proved in Section 1983 cases for plaintiffs to prevail is a state of mind of an officer so deluded in his belief that his conduct was lawful that *no* serious police officer would regard it as reasonable—a *mens rea* bordering on consciousness of wrongdoing.²²² It is therefore important to understand that any effort to enact legislation to reduce the standard of proof in civil rights prosecutions by replacing the existing willfulness requirement of 18 U.S.C. § 242 with language that meets *Lanier*'s due process requirement of fair notice should avoid terminology that incorporates the Court's later and more police-friendly definitions of "clearly established law" and "reasonableness" in Section 1983 cases.²²³

219. See *al-Kidd*, 563 U.S. at 741 ("existing precedent must have placed the statutory or constitutional question beyond debate"); *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (same) (citing *al-Kidd*); Kinports, *supra* note 218, at 66 (noting that the "beyond debate" language has appeared in eight out of the eleven decisions following *al-Kidd* that upheld a claim of qualified immunity).

220. 528 U.S. at 270.

221. It is as if in ordinary tort cases, juries were not permitted to find negligence in any case in which the defendant's expert witnesses disagreed with the plaintiff's experts on whether there was a breach of the relevant standard of care. Or if, in the federal trial of the two officers charged with beating Rodney King, the jury was not allowed to find an unreasonable use of force if the testimony of the government's use-of-force expert on non-compliance with standard police practices was contradicted by the defense's expert. See Jim Newton, *All Baton Blows Received Were Necessary, Expert Testifies*, L.A. TIMES (Mar. 20, 1993), http://articles.latimes.com/1993-03-20/local/me-13079_1_me-13079_1_police-sergeant [<https://perma.cc/4L5Y-JJ99>] (describing conflicting testimony). The jury in the Rodney King case resolved the conflict in expert testimony in favor of the prosecution, and the conviction was upheld on appeal. *United States v. Koon*, 34 F.3d 1416 (9th Cir.), *aff'd in part, rev'd in part*, 518 U.S. 81 (1996) (remanded on sentencing issues).

222. *Sheehan*, 135 S.Ct. at 1774 (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"; *Mullenix*, 136 S.Ct. at 308, 310 (same). The Court's radical expansion of the concepts of reasonableness and clearly-established-law has been sharply criticized. See Blum, *supra* note 149, at 914 (summarizing the critical literature and describing the state of the law as "unintelligible, incoherent, inconsistent, and nonsensical").

223. With respect to enacting new legislation, Congress is free to limit the definition of "clearly established" law to the due-process meaning the Supreme Court assigned to it in *Lanier*. As long as legislation satisfies minimum constitutional requirements, Congress is not bound by the Court's more rigorous definitions of clearly-established-law and reasonableness in civil cases brought under Section 1983, the meaning of which is governed by congressional intent, *Malley v.*

President Nixon famously said, “When the President does it, that means that it is not illegal.”²²⁴ The principle of federal criminal liability adopted by the Justice Department in its Memorandum says, in effect, “When a public official does it *and believes it is not illegal*, that means it is not illegal.” No society based on the rule of law can tolerate a legal principle that makes the President, or a White House aide, or a police officer the ultimate judge of the criminality of his own conduct. The germinal idea at the core of the rule of law is that we do not allow people to make up their own rules.²²⁵ The law is what the legislature and the courts say it is, not what the defendant thought it was when he committed the alleged offense. No court would take seriously the argument that a gang member who responded to a punch in the face with a gunshot to the head should be exonerated because he honestly believed he had a right to use deadly force against any physical attack by an aggressor. Adherence to the rule of law has long been thought to mean holding public officials to a higher—not a lower—standard than private citizens. “In a government of laws,” Justice Louis Brandeis wrote in a famous dissent, “existence of the Government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”²²⁶

Briggs, 475 U.S. 335, 342 (1986), and policy considerations, *id.* at 340, not the Constitution. For a draft of a proposed amendment to 18 U.S.C. § 242, which lowers the standard of proof, see Appendix.

224. Transcript of Interview by David Frost with Richard Nixon (May 1977), <http://www.theguardian.com/theguardian/2007/sep/07/greatinterviews1> [<https://perma.cc/6LG2-Y7QA>].

225. The classic statement of this principle of the rule of law is by Jerome Hall in *Ignorance and Mistake in Criminal Law*, 33 INDIANA L.J. 1, 19 (1957):

[T]here is a basic incompatibility between asserting that the law is what [courts] declare it to be, after a prescribed analysis, and asserting, also, that those [courts] *must* declare it to be . . . what defendants or their lawyers believed it to be. A legal order implies the rejection of such contradiction.

“Courts” has been inserted in brackets as a replacement for “officials,” which appears in the original text, in order to accurately convey the meaning of Professor Hall’s statement in the context of a judicial proceeding *against* a public official.

226. *Olmstead v. United States*, 277 U.S. 438, 485 (1928). The principle that police officers are to be held to a higher standard of criminal culpability than ordinary citizens is embodied in federal sentencing guidelines that enhance sentences for civil rights violations by public officials beyond those for private misconduct in violation of civil rights. U.S. SENTENCING GUIDELINES MANUAL § 2H1.1(b) (2011) (“If (A) the defendant was a public official at the time of the offense or (B) the offense was committed under color of law, increase by 6 levels.”). The enhancement was applied to the sentencing of the two police officers convicted of beating Rodney King. *See Koon*, 518 U.S. at 101–02 (1996) (describing application by sentencing judge of USSG § 2H1.4, which has since been consolidated with § 2H1.1).

V. CONCLUDING THOUGHTS: THE WAY FORWARD

Whether Wilson should have been prosecuted undoubtedly presented a hard case, as the foregoing analysis demonstrates. But the Justice Department's Memorandum makes the case for *not* prosecuting seem so easy that it gives rise to a variation of Holmes' dictum about hard cases making bad law: *Making hard cases look easy makes bad law*. The Memorandum makes the case for not charging Wilson seem beyond dispute by resolving conflicts in the evidence that should have been left to a jury;²²⁷ by asserting the critical fact that Brown's reaching for his waistband "caus[ed] Wilson to fear that Brown was reaching for a weapon," which is not supported by Wilson's own testimony;²²⁸ by citing a decision of the Court of Appeals for the Eight Circuit as "dispositive" authority for a statement about the use of deadly force that the case does not support;²²⁹ by stating, contrary to controlling Eighth Circuit precedent, that the availability of less-lethal options is irrelevant in assessing the reasonableness of a police officer's use of deadly force;²³⁰ and, with respect to the most important legal issue in the case, by failing to consider an important federal appellate opinion that contradicts the Justice Department's conclusion about willfulness requiring knowledge of unlawfulness,²³¹ exposing the fallacy in the kind of reasoning that led to the Department's interpretation of *Screws*.

Perhaps the single greatest fallacy in the Memorandum is a misconception that is shared by almost all judges and practitioners of civil rights law on both the prosecution and defense sides of the courtroom: the perception of *Screws* as a greater obstacle to conviction than it actually is. From its very inception, *Screws* was seen not just as a thorn in the side of the newly created Civil Rights Section of the Justice Department, the predecessor of the present-day Civil Rights Division, but as a threat to its very existence. The fear was not only that jury instructions requiring a finding that the defendant acted with a specific intent to violate a protected right would make it difficult to obtain convictions,²³² but, even worse, that if a conviction were obtained on the basis of a weak record, an appeal could reach the Supreme Court and a majority might overrule *Screws* or impose an even more restrictive interpretation, making Section 242, in the words of then-Attorney General Tom Clark, "a dead letter on the statute books."²³³ Clark nevertheless described *Screws* as "definitely a victory for the

227. See *supra* notes 41 and 45.

228. See *supra* Part III(A).

229. *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012), discussed *supra* Part III(A).

230. *Retz v. Seaton*, 741 F.3d 913 (8th Cir. 2014), discussed *supra* Part III(A).

231. *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976), discussed *supra* Part IV(A).

232. See Tom C. Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 47 COLUM. L. REV. 175, 182–83 (1947) ("No matter how heinous is the conduct of the defendant, it is not easy to prove beyond a reasonable doubt that he acted for the purpose of denying the victim a federally secured right.")

233. *Id.* at 183.

government”²³⁴ because Douglas’s opinion had rescued the statute from invalidation. However objectionable the opinion might be, the worst thing that could happen to the cause of civil rights would be for a majority of the Court to agree with the three dissenters in *Screws* that judicial interpretation cannot cure the vagueness problem,²³⁵ and to strike down Section 242 as facially unconstitutional.

If ever there was a case with the potential for realizing that catastrophic expectation, it was *Lanier v. United States*, which reached the Supreme Court after the Sixth Circuit, sitting en banc, had reversed the defendant’s conviction in a majority opinion that expressed stronger objections to Section 242 as “too indefinite and vague to meet due process standards”²³⁶ than any court had ventured since *Screws* was decided. Yet the Supreme Court not only declined to declare the statute unconstitutionally vague; the Court upheld it in a unanimous opinion that might be thought of as *Screws Lite*—an opinion that could have provided a predicate for federal prosecutors in *Ferguson* to convince a trial court to adopt the clearly-established-law standard of willfulness,²³⁷ instead of coming up with an interpretation that may have delivered Tom Clark’s “dead letter.”

Foremost among the issues at stake is the extent to which the Justice Department Memorandum is not just about *Ferguson*. It announces a general standard of liability that signals the end of federal indictments of police officers for civil rights violations, except in cases where there is no doubt that the officer knows he is acting unlawfully, as in the case of the forcible sodomy of Abner Louima with a broken-off broom handle in a bathroom of a New York City police station,²³⁸ or where a cell phone or body camera captures a suspect being shot in the back multiple times as he flees from a routine traffic stop,²³⁹ or in

234. *Id.*

235. *Screws*, 325 U.S. at 149–57 (Roberts, Frankfurter, & Jackson, JJ., dissenting).

236. *United States v. Lanier*, 73 F.3d 1380, 1383 (6th Cir. 1996); *id.* at 1395 (Wellford, J., concurring and dissenting) (describing the majority opinion’s view of the statute).

237. No doubt this is easier said than done. Few trial judges will depart from the language of standard jury instructions, and even when inclined to do so, they will be reluctant to deviate from the literal language of *Screws*. See Shapiro, *supra* note 117, at 541 n.29. However, in fairness to trial judges, federal prosecutors have yet to present the argument for a clearly-established-law standard of willfulness, and without obtaining a conviction based on such a standard, there will be no opportunity for federal appeals courts and, ultimately the Supreme Court, to ratify a more rational theory of civil rights prosecutions.

238. The principal perpetrator, Justin Volpe, was convicted and sentenced to thirty years in prison after a federal trial prosecuted by a team of lawyers from the U.S. Attorney’s Office in Brooklyn that included the then-future Attorney General Loretta Lynch. Sewall Chan, *The Abner Louima Case, Ten Years Later*, N.Y. TIMES (Aug. 9, 2007), <http://cityroom.blogs.nytimes.com/2007/08/09/the-abner-louima-case-10-years-later> [https://perma.cc/ZN92-49QL]; U.S. DEP’T OF JUSTICE, Meet the Attorney General, <http://www.justice.gov/ag/meet-attorney-general>.

239. See Mark Berman & Wesley Lowery, *Former South Carolina Police Officer Who Fatally Shot Walter Scott Indicted on Federal Civil Rights Violation*, WASH. POST (May 11, 2016), http://www.washingtonpost.com/news/post-nation/wp/2016/05/11/former-north-charleston-officer-who-shot-walter-scott-indicted-on-federal-civil-rights-violation/?utm_term=.d1abdf300206 [https://perma.cc/3P83-EGRS] (describing cell phone video of Walter Scott running across a tree-

cases in which a prosecutor can prove that the officer was motivated by racial animus.²⁴⁰ It makes no sense for advocates of policing reform to call for the Justice Department to take over all investigations of officer-involved shootings, as the 2016 Democratic National Platform proposed,²⁴¹ as long as the Department continues to construe willfulness to require consciousness of wrongdoing. Unless the Attorney General withdraws the Ferguson Memorandum, it is unlikely that federal civil rights charges will be filed in cases in which the Justice Department has intervened, like the shooting death of Alton Sterling in Baton Rouge²⁴² where the officers believed they were “completely justified” in killing Sterling.²⁴³ Given the Justice Department’s legal interpretation, the officers’ belief at the time of the shooting that they were acting lawfully, even though that belief may have been unreasonable, is alone sufficient to preclude a conviction on civil rights charges. Similarly, in the Staten Island case in which a New York City police officer is seen on a cellphone video applying a chokehold to Eric Garner as he says “I can’t breathe” eleven times

lined patch of grass as he is shot in the back multiple times by North Charleston, South Carolina police officer Michael Slager). The Justice Department, in an unusual move, obtained a federal civil rights indictment against Slager even though he had already been indicted on a state murder charge. *Id.* The state prosecution resulted in a hung jury after Slager testified that Scott grabbed his taser and that he shot Scott because he felt “total fear” for his life, even though Scott was running away from Slager and, according to expert testimony, was at least seventeen feet from him when the first shot was fired. Alan Blinder, *Mistrial for South Carolina Officer Who Shot Walter Scott*, N.Y. TIMES (Dec. 5, 2016), <http://www.nytimes.com/2016/12/05/us/walter-scott-michael-slager-north-charleston.html> [https://perma.cc/RBY4-U765]. A retrial is scheduled to begin on March 1, 2017. Dustin Waters, *Retrial for Michael Slager Scheduled for March*, CHARLESTON CITY PAPER (Dec. 29, 2016), <http://www.charlestoncitypaper.com/TheBattery/archives/2016/12/29/retrial-for-michael-slager-scheduled-for-march> [https://perma.cc/Y65U-WAAK].

240. The Matthew Shepard and James Byrd, Jr., Hate Crimes Act, 18 U.S.C. § 249(a)(1) (2015), criminalizes the conduct of any individual who “willfully causes bodily injury to any person . . . because of the actual or perceived race, color, religion, or national origin” of the victim. The term “willfully” requires only proof of an intent to injure, with no additional requirement of knowledge of wrongdoing, but a prosecutor must show more than unconscious racial bias; there must be evidence of racial animus directed toward the victim. *See United States v. Cannon*, 750 F.3d 492, 507 (5th Cir. 2014) (“So long as the jury heard evidence that indicated Defendants had the necessary race-based motivation at the time they inflicted or attempted to inflict bodily injury on [the victim], we cannot say that there was insufficient evidence for the jury to find them guilty under § 249(a)(1).”).

241. 2016 DEMOCRATIC PARTY PLATFORM 15 (July 21, 2016), http://www.presidency.ucsb.edu/papers_pdf/117717.pdf [https://perma.cc/M9ZH-DG9M] (“We will require the Department of Justice to investigate all questionable or suspicious police-involved shootings”). The Democratic Platform Drafting Committee ignored a recommendation by former Attorney General Eric Holder, in testimony before the Committee, to adopt a plank lowering the standard of proof in civil rights prosecutions, which he described as requiring proof of “a willful intention to affect somebody’s civil right, the specific intent to do that,” and criticized this standard as “unnecessarily high.” Democratic Platform Drafting Committee Hearing, Day 1, Part 1, C-Span (June 8, 2016), <http://www.c-span.org/video/?c4603065/e-holder> [https://perma.cc/L92Q-AFKQ].

242. *See supra* note 11.

243. German Lopez, *Alton Sterling Was Shot and Killed by Baton Rouge Police Officers: Here’s What We Know*, VOX.COM (July 10, 2016) <http://www.vox.com/2016/7/6/12105380/alton-sterling-police-shooting-baton-baton-rouge-louisiana> [https://perma.cc/C5FP-W5PC] (quoting East Baton Rouge District Attorney, Hillar Moore).

before expiring, the legal position of the Justice Department, which still had not decided whether to file criminal charges by the time Attorney General Loretta Lynch left office,²⁴⁴ bars a federal prosecution if the officer acted without consciousness of wrongdoing. This seems an almost impossible burden to meet in the Garner case, in which the officer testified before a grand jury in Staten Island that even though he had his arm around Garner's neck, he did not intend the move to function as a "chokehold," which is banned by the New York City Police Department, but rather as a permissible "takedown" maneuver, which he learned in the Police Academy.²⁴⁵ Unless federal prosecutors can prove beyond a reasonable doubt that the officer is lying, his lack of consciousness of wrongdoing would dictate an acquittal. No Justice Department Trial Attorney or Assistant U.S. Attorney can expect to win hard cases of officer-involved shootings with such a radically subjective standard of liability.²⁴⁶

Reform-minded elected officials, police chiefs, and law enforcement experts will no doubt continue to respond to the ongoing crisis with proposals for better training, including education about implicit racial bias; new policies for body cameras and other technology; and the adoption of strategies to promote community policing, all of which are among the 2015 recommendations of *The President's Task Force on 21st Century Policing*.²⁴⁷ In the absence of voluntary reform, pattern-or-practice lawsuits filed by the Justice Department²⁴⁸ or consent

244. See Feuer & Apuzzo, *supra* note 6.

245. See J. David Goodman & Michael Wilson, *Office Daniel Pantaleo Told Grand Jury He Meant No Harm to Eric Garner*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/officer-told-grand-jury-he-meant-no-harm-to-eric-garner.html> [<https://perma.cc/4DPS-UDT7>]; Feuer & Apuzzo, *supra* note 6 (prosecutors in U.S. Attorney's Office in Brooklyn, whose jurisdiction extends to Staten Island, doubt they can convict while prosecutors in the Justice Department believe they have sufficient evidence). The dispute between the two legal teams led to a decision by then-Attorney General Loretta Lynch to remove the Brooklyn prosecutors from the case. Alan Feuer, *Staffing Change in Eric Garner Inquiry Pushes it into 'Strange Territory'*, N.Y. TIMES (Oct. 25, 2016), <http://www.nytimes.com/2016/10/26/nyregion/staffing-change-in-eric-garner-inquiry-pushes-it-into-strange-territory.html> [<https://perma.cc/LFY3-YM9H>].

246. See, e.g., OFFICE OF PUBLIC AFFAIRS, U.S. DEP'T OF JUSTICE, *Federal Officials Decline Prosecution in the Death of Jamar Clark* (June 1, 2016), <https://www.justice.gov/opa/pr/federal-officials-decline-prosecution-death-jamar-clark> [<https://perma.cc/LX36-UJ3F>] (difficulty of disproving credibility of Minneapolis Police Department officers (who stated that the suspect, who was not handcuffed, grabbed the officer's gun and tried to pull it out of its holster, when other officer shot him) was fatal to satisfying both objective standard of reasonableness and subjective standard of willfulness).

247. FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (May 2015), 51–60 (training and education), 31–39 (new technology including body cameras), 41–50 (community policing), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [<https://perma.cc/QTb2-9LNG>].

248. 42 U.S.C. § 14141 authorizes the Justice Department to bring lawsuits to compel structural reform of police departments that exhibit a "pattern or practice" of constitutional violations by their officers. Although initially hailed as one of the most important innovations in reforming police misconduct, "structural reform suits against police departments have had only modest success" and "even if the Special Litigation Section's budget were doubled or tripled, the Section still could not be expected to examine more than a tiny fraction of large police

decrees induced by such litigation (like the judicially enforceable agreement entered into between the city of Ferguson and the Special Litigation Section of the Civil Rights Division),²⁴⁹ can compel departmental reconstruction. But, as essential as these remedies may be, they obscure the gravamen of the complaint by African-American communities about policing in their neighborhoods: the failure of the rule of law. Even if more effective police training and programs to improve police-community relations were to result in officers acting lawfully in ninety-nine percent of citizen encounters, but in the remaining one percent no officers were prosecuted when unlawful conduct resulted in death or serious bodily injury, this impunity would constitute a 100 percent failure to enforce the rule of law. The most important ingredient in building the “trust between law enforcement agencies and the people they protect,” cited by the President’s Task Force as “the key” to solving the problem of race and policing,²⁵⁰ is for African Americans to believe that when police officers use force unlawfully, the legal system will punish them accordingly.

The Justice Department endures as one of the few law enforcement agencies trusted by communities of color, and if that bond is broken, whatever faith remains in the legitimacy of the criminal justice system will shatter. The first step toward preserving that confidence would be for a future Attorney General to withdraw the Ferguson Memorandum and its baleful interpretation of *Screws* as requiring knowledge of unlawfulness. Federal prosecutors should pursue a new policy of advocacy in lower federal courts, aimed at lowering the standard of proof by elevating *Lanier* to its rightful place at the center of the constitutional canon governing civil rights prosecutions, and at making the argument that willfulness does not require a specific intent to violate a right, but only a violation of a right that was “clearly established,” as that term was originally defined in *Lanier*.

Although the political obstacles are daunting, the ultimate goal should be to lower the standard of proof by calling upon Congress to amend 18 U.S.C. § 242.²⁵¹ This Article proposes legislation²⁵² that would make it less onerous to prosecute a civil rights violation by striking from the statute the word

departments.” Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 12, 21–22 (2009). *See id.* at 36–37 (proposing a new litigation strategy designed to motivate proactive reform in more departments than can be sued by suing worst departments first and providing “safe harbor” for departments that voluntarily adopt reforms).

249. *See* INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 20, at 2.

250. FINAL REPORT, *supra* note 247, at 1.

251. Former Attorney General Eric Holder, in an interview shortly before leaving office and prior to announcing the Ferguson decision, stated his intention to propose legislation lowering the “standard of proof that has to be met before federal involvement is appropriate” so that the Justice Department could be a “better backstop” for civil rights enforcement. Mike Allen, *Eric Holder’s Parting Shot: It’s Too Hard to Bring Civil Rights Cases*, POLITICO, (Feb. 27, 2015) <http://www.politico.com/story/2015/02/eric-holder-civil-rights-interview-mike-allen-115575> [<https://perma.cc/U772-2U97>].

252. *See infra* Appendix.

“willfully,” and replacing it with *Lanier*’s clearly-established-law standard, using language that does not run afoul of the newly restrictive concept of reasonableness in the Court’s qualified-immunity jurisprudence.²⁵³ Until such an amendment can be passed, civil rights groups, grassroots organizations, and other advocates of law reform should bear in mind that the President and the Attorney General have the power to act unilaterally. In much the same way that President Obama used his executive power to revise the law governing enhanced interrogations by repudiating a notorious Justice Department memorandum on torture,²⁵⁴ a future Administration, even without congressional legislation, can change the law governing civil rights prosecutions.²⁵⁵

The Confederate flag may have been removed from the statehouse grounds in South Carolina, but in the dawn’s early light of surrender of the Attorney General on the battlefield of Ferguson, it still flies over the place in that Reconstruction-era statute where, thirty-five years after its original enactment, Congress inserted the term “willfully”—a word that may live as infamously in the history of civil rights as the words of interposition and nullification.

VI.
APPENDIX

The Michael Brown, Jr., Civil Rights Enforcement Act of 2017

18 U.S.C. § 242

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

(a) Whoever, under color of any law, statute, ordinance, regulation, or custom, ~~willfully~~ subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any clearly established rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens shall be fined under this title or imprisoned not more

253. See *supra* Part IV(C).

254. Exec. Order No. 13,491, 3 C.F.R. § 13,491 (2010), *codified as* 42 U.S.C. § 2000dd-2(a) (2016) (effectively annulling the 2002 torture memorandum authored by former Justice Department Office of Legal Counsel attorneys).

255. The kind of legal memorandum written by the Justice Department in the Ferguson case not only makes “law” by exempting from criminal punishment a class of persons who might otherwise be convicted of a serious felony. It is, more disturbingly, an unreviewable form of lawmaking and, in cases in which such a memorandum is not released to the public, it constitutes an unknown and unknowable law—a secret law of police impunity that citizens are incapable of challenging. Cf. Joseph Goldstein, *Police Discretion not to Invoke the Criminal Process*, 69 YALE L.J. 543, 543 (1960) (“police decisions not to invoke the criminal process” are “of extremely low visibility and consequently are seldom the subject to review[,]” but opportunities for review and appraisal are essential to the functioning of the rule of law).

than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

(b) Any right protected under subsection (a) is clearly established if, at the time the offense is alleged to have occurred, the right was sufficiently defined by judicial decisions that a reasonable person would have understood that the official's conduct violated the right.²⁵⁶

256. The two-step process contemplated by this inquiry is described *supra* Part IV(C). To avoid the Supreme Court's overly police-friendly interpretation of a "clearly established" right in Section 1983 cases, which requires "every reasonable official" to have understood that the defendant's conduct violated that right, *see supra* Part IV(C), the statute requires only that "a reasonable official" would understand that his or her conduct violated the right. This formulation of reasonableness conforms to *Lanier*'s due-process standard of fair warning which requires that "the contours of the right must be sufficiently clear that a reasonable person would understand that what he is doing violate that right." 528 U.S. at 270 (emphasis added). As long as the proposed standard of proof satisfies the minimum constitutional requirement of due process, Congress is free to enact a less forgiving meaning of "clearly established" law than the definition that has evolved under Section 1983, which is a product of the Court's interpretation of congressional intent and policy considerations, not its interpretation of the Constitution.