

2022 Update: Prosecuting Sexual Misconduct by Government Actors

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I. Introduction

Two women housed in the same cell in a small jail in Arizona each report that, when they were transported to that jail during separate transports, their private prisoner transport officer sexually assaulted them at gunpoint.¹ A woman in Tennessee reports that, after she was arrested for drug possession, her arresting officer, instead of transporting her directly to the county jail, first drove to a secluded parking lot and raped her.² A woman in New Mexico reports that, during an office visit with her probation officer, that probation officer groped her breasts and demanded naked photos of her.³

In each of those examples, the subject officers were successfully prosecuted for violating 18 U.S.C. § 242 because, when government actors, including those contracted to do government work, engage in sexual misconduct, they violate the constitutional rights of their victims,⁴ just as government actors do when they use excessive force. But unlike excessive force cases that may be captured on video or witnessed by fellow officers or civilians, sexual assaults often occur in secluded locations with no one to bear witness, like the remote dirt roads where the private prisoner transport officer drove his victims, the desolate church parking lot where the arresting officer in Tennessee took his victim, or the otherwise empty office where the probation officer in New Mexico groped his victim.

¹ See [Superseding Indictment at 3–5, United States v. Kindley, No. 17-cr-267 \(E.D. Ark. Jan. 8, 2019\), ECF No. 31.](#)

² [Plea Agreement at 3, United States v. Logan, No. 19-cr-125 \(E.D. Tenn. Sept. 4, 2019\), ECF No. 2.](#)

³ [Plea Agreement at 3–4, United States v. Chavez, No. 12-cr-3290 \(D.N.M. Sept. 3, 2013\), ECF No. 87 \[hereinafter *Chavez* Plea Agreement\].](#)

⁴ [United States v. Lanier, 520 U.S. 259 \(1997\).](#)

Subjects expect to get away with their crimes precisely because of the isolated manner in which their sexual assaults are committed. They also assume that no one will believe their victims because they view their own societal status as superior to that of their victims—be it because of a victim’s criminal history, addiction, or as was true in the examples above, because their victims were women.

To that point, although anyone can be a victim of sexual misconduct, as evidenced by section 242 prosecutions throughout the past decade, men are more often the victims of physical assaults by law enforcement and other government actors, whereas women, including transgender women, are more often the victims of sexual assault. It is, therefore, incumbent upon federal investigators and prosecutors to recognize when sexual misconduct falls within the jurisdiction of section 242 and investigate and, where appropriate, charge such violations with applicable statutory enhancements. Otherwise, we may not only fail to hold accountable those who have committed this type of particularly egregious conduct, but we may also disproportionately fail to vindicate the constitutional rights of women.

To ensure that those rights are appropriately vindicated, we must guard against the two most common reasons for inappropriate declinations of sexual misconduct allegations: one, the misconception that, because these crimes happen in seclusion, they cannot be proven; and two, the failure to recognize the continuum of sexual misconduct that section 242 covers, as well as the wide array of actors subject to prosecution under it.

With that in mind, this article has five objectives: first, it will discuss initial considerations when opening a section 242 sexual misconduct investigation, including applicable Federal Rules of Evidence.⁵ Second, it will provide a comprehensive description of who acts under color of law, what conduct constitutes a constitutional deprivation, and how to establish lack of consent for the purpose of proving a constitutional deprivation. Third, it will provide a legal update about a circuit split regarding the definition of “force” and

⁵ This article supplements a 2018 article from this journal that addressed effectively investigating and prosecuting sexual misconduct committed by law enforcement and included a comprehensive discussion of applicable law, the nuances of the statutory enhancements of 18 U.S.C. § 242, and evidentiary rules. See [Fara Gold, *Investigating and Prosecuting Law Enforcement Sexual Misconduct Cases*, 66 DOJ J. Fed. L. & Prac., no. 1, 2018, at 77.](#)

“fear” when proving the aggravated sexual abuse statutory enhancement. Fourth, it will address the Sentencing Guidelines and the effect of the victim’s account on sentencing calculations as a means to lessen sentencing disparities between sexual assaults and physical assaults in section 242 prosecutions.⁶ Fifth, it will discuss the practical impact of developing strong federal and state partnerships, as well as the overlap of civil jurisdiction, to most effectively ensure public safety and provide additional relief for victims.

II. Initial considerations when commencing a sexual misconduct investigation

Proving a violation of section 242 where sexual misconduct is the underlying constitutional deprivation is nuanced and, sometimes, counterintuitive. Most notably, as discussed in more detail below, actual consent is a defense, and absent an enumerated felony enhancement, most sexual assaults committed in violation of section 242 (before the enactment of 18 U.S.C. § 250)—even coerced vaginal penetration—can be charged only as misdemeanors.⁷ Therefore, to properly charge sexual misconduct as a felony, carefully considering the applicability of the enhancements is essential.

An investigation should not be automatically closed or a case declined just because there is no apparent physical evidence or eyewitness testimony. Corroboration of the victim’s account can be

⁶ On March 16, 2022, 18 U.S.C. § 250 (Civil Rights Offenses Involving Sexual Misconduct) was signed into law. That statute, in making all sexual assaults felonies, brings parity to the sentencing structure for violations of 18 U.S.C. § 242 involving sexual assault. The discussion that follows applies to sexual assaults that occurred before the enactment of 18 U.S.C. § 250. For those sexual assaults that occurred after, prosecutors are encouraged to charge violations of 18 U.S.C. § 242 in conjunction with the applicable subsection of 18 U.S.C. § 250.

⁷ The elements of a misdemeanor violation of 18 U.S.C. § 242 are (1) actions taken under color of law; (2) deprivation of a constitutional or federally protected right; and (3) willfulness. To prove a felony violation, there are various applicable statutory enhancements. The most common statutory enhancement in sexual misconduct cases are: that the act resulted in bodily injury or included the use or threatened use of a dangerous weapon (subject to up to 10 years in prison); or that the act included kidnapping or aggravated sexual abuse, or attempts thereof (subject to up to life in prison).

established in other ways. Most significant are the defendant's prior conduct and the victim's prior consistent statements. To the former point, Federal Rule of Evidence 413 permits the admission of other acts of sexual assault as propensity evidence, a rarity in criminal prosecutions.⁸ And Rule 404(b) permits the admission of similar fact evidence to show, for example, pattern, motive, and intent.⁹ To the latter point, Rule 801(d)(1)(B) permits the admission of the victim's prior consistent statements as non-hearsay to rebut a defense of improper motive or recent fabrication,¹⁰ which is almost always the defense in law enforcement sexual misconduct cases.

Because sex offenders rarely get caught the first time, and because victims often disclose their sexual assaults well before the advent of a federal investigation, those three rules of evidence—413, 404(b), and 801(d)(1)(B)—are crucial to building a case. A purpose-driven, victim-centered investigation that focuses on corroborating the victim's account and minimizing unfair impeachment by using those rules will make for a stronger case by increasing the likelihood of vindicating the victim's constitutional rights and securing a guilty plea or getting a conviction at trial.

Applying those principles is why even though the allegations against the private prisoner transport officer, mentioned above, began with two women housed together in the same cell in a jail in Arizona and little else, the investigation uncovered 18 women whom he victimized in just a five-year period.¹¹ After a jury convicted him, he was sentenced to two concurrent life sentences plus a consecutive five-year sentence.¹² Likewise, the investigation of the arresting officer in Tennessee uncovered that he sexually assaulted at least four women, one of whom previously reported him, but because the authorities did not believe her on account of her custody status, that officer was not held accountable until his most recent victim came forward. Upon entering a guilty plea, that officer was sentenced to 20 years in prison.¹³ And the probation officer in New Mexico who groped a probationer, he also lied to federal agents when he denied ever

⁸ See [FED. R. EVID. 413\(a\)](#).

⁹ See [FED. R. EVID. 404\(b\)\(2\)](#).

¹⁰ See [FED. R. EVID. 801\(d\)\(1\)\(B\)](#).

¹¹ See [United States' Notice of Intent to Use Other Acts Evidence Pursuant to Rules 413 and 404\(b\) at 63–66, *Kindley*, No. 17-cr-267, ECF No. 35.](#)

¹² [Judgment, *Kindley*, No. 17-cr-267, ECF No. 177.](#)

¹³ [Judgment, *Logan*, No. 19-cr-125, ECF No. 34.](#)

engaging in sexual misconduct with any probationer during his career.¹⁴ Because that investigation uncovered five other women with whom he engaged in similar misconduct, and whose accounts would have been admissible pursuant to Rule 413 despite being outside the statute of limitations, he entered a guilty plea and was sentenced to 18 months in prison.¹⁵

Keeping in mind this guidance will ensure that allegations of sexual misconduct by government actors are not declined too quickly nor charges brought too soon, thereby increasing the likelihood of a successful prosecution.

III. Color of law and the constitutional deprivation: considering all the possibilities

A. Acting under color of law: the “obvious” and the “less obvious”

The threshold question in proving a section 242 violation is “Who is considered to be acting under color of law?” To act under “color of law” means to use government-sanctioned authority to facilitate one’s conduct, regardless of whether on or off duty.¹⁶ There are those government actors that fall into the “obvious” category, such as police officers, probation officers, corrections officers, and other prison employees. But there are also those who fall into the “less obvious” category, like judges and other public officials, tribal officers,¹⁷ private prisoner transport officers, private prison employees,¹⁸ state employees like teachers and athletic trainers,¹⁹ medical professionals

¹⁴ *Chavez Plea Agreement*, *supra* note 3, at 3–4.

¹⁵ See *United States’ Sentencing Memorandum at 2, Chavez*, No. 12-cr-3290, ECF No. 104; *Judgment, Chavez*, No. 12-cr-3290, ECF No. 111.

¹⁶ See *United States v. Classic*, 313 U.S. 299, 326 (1941); *Screws v. United States*, 325 U.S. 91, 111 (1945).

¹⁷ See, e.g., *United States v. Davis*, 855 F. App’x 362 (9th Cir. 2021) (affirming conviction of tribal officer for violating 18 U.S.C. §§ 242, 1153, 2244(b), and 1519 by sexually assaulting an arrestee and destroying evidence).

¹⁸ See, e.g., *Gwynn v. TransCor Am., Inc.*, 26 F. Supp. 2d 1256, 1265–66 (D. Colo. 1998) (privately contracted transport officer acted under color of law when he sexually assaulted an inmate in his custody).

¹⁹ See, e.g., *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 297 (2001) (state university is “undoubtedly [a] state actor”);

or staff assigned to work at shelters that contract with the Department of Health and Human Services to house unaccompanied children, as well as others who have government-contracted employment.²⁰ Additionally, just as Bureau of Prisons corrections officers act under color of law, so do other federal employees, like agents with the Department of Homeland Security or employees of the Department of Veterans Affairs.²¹

B. Constitutional deprivation: the “obvious” and the “less obvious”

Just as there is the “obvious” and the “less obvious” for color of law, the same is true for the continuum of sexual misconduct that may constitute a constitutional deprivation. Sexual assaults, including forced or coerced penetration, groping, and unwanted sexual acts and sexual contact, as defined under 18 U.S.C. §§ 2246(2) and (3), respectively, are all more obvious forms of sexual misconduct that trigger constitutional protections when perpetrated by government actors. But other examples of sexual misconduct, while still amounting to a constitutional deprivation, may be less obvious. For example, unnecessarily watching a probationer give a urine sample,²²

[Jennings v. Univ. of N.C.](#), 482 F.3d 686, 701 (4th Cir. 2007) (en banc) (crediting evidence that defendant acted “in his capacity as a coach” at state university was evidence that defendant was a state actor); [Hayut v. SUNY](#), 352 F.3d 733, 744 (2d Cir. 2003) (“We think it clear that a professor employed at a state university is a state actor.”); [Krynicky v. Univ. of Pittsburgh](#), 742 F.2d 94, 99 (3d Cir. 1984) (“[A]ctions of the University are actions taken under color of state law for purposes of section 1983.”); [Popat v. Levy](#), 328 F. Supp. 3d 106, 127 (W.D.N.Y. 2018) (“[A] professor employed at a state university is a state actor.” (citation omitted)); [Watson v. Richmond Univ. Med. Ctr.](#), 412 F. Supp. 3d 147, 165 (E.D.N.Y. 2017) (“[S]tate employment is generally sufficient to render a defendant a state actor under section 1983.” (internal citation omitted));

²⁰ See, e.g., [West v. Atkins](#), 487 U.S. 42, 54 (1988) (finding that a physician who was under contract with a state prison hospital to provide medical services to inmates acted under color of law); [Jury Instructions, Kindley, No. 17-cr-267, ECF No. 123](#) [hereinafter *Kindley* Jury Instructions].

²¹ See, e.g., [United States v. Yates, No. 20-cr-75 \(S.D.W. Va. Mar. 22, 2021\)](#) (Veterans Affairs doctor convicted of multiple counts of section 242 for sexually assaulting patients under the pretext of medical exams).

²² See [Sepulveda v. Ramirez](#), 967 F.2d 1413, 1416 (9th Cir. 1992) (noting that the right to bodily privacy is a clearly established right and holding that a

gratuitously watching an inmate shower or change clothes,²³ or escorting a homeowner to the bathroom and watching her urinate during the execution of a search warrant may all be constitutional violations.²⁴ The conduct, whether it be in the “obvious” or “less obvious” categories, need not be repetitive or occur skin to skin to rise to the level of a constitutional deprivation.²⁵

Additionally, it is not necessarily obvious which constitutional right is being violated when such conduct occurs. When an officer physically assaults an arrestee or detainee, the Fourth Amendment applies.²⁶ When, however, that same officer sexually assaults an arrestee (or anyone else for that matter, other than those serving prison sentences),²⁷ in most circuits, the Due Process Clause of the

male parole officer violated a female parolee’s right to privacy when he observed her give a urine sample).

²³ See [Vazquez v. County of Kern](#), 949 F.3d 1153, 1162–63 (9th Cir. 2020) (holding officer’s conduct, if proven, would violate right to bodily integrity where officer referred to female ward as “babe,” told her she had a “big butt,” touched her face and shoulders without her consent, told her he had seen her in the shower, told her that she should leave her boyfriend and “find someone better like him,” told her that he had a sexual dream about her, and told her “to get close to him...to the point where he had opened his knees and [she] was right in the middle of him, and he told [her] that he wanted his dream to come true” (internal citations omitted)).

²⁴ See [Ioane v. Hodges](#), 939 F.3d 945, 954–56 (9th Cir. 2018) (holding Fourth Amendment right to bodily privacy was implicated when, during lawful execution of a search warrant at her home, an agent escorted plaintiff into the bathroom and monitored her while she relieved herself).

²⁵ See [Crawford v. Cuomo](#), 796 F.3d 252, 257 (2d Cir. 2015) (“A corrections officer’s intentional contact with an inmate’s genitalia or other intimate area, which serves no penological purpose and is undertaken with the intent to gratify the officer’s sexual desire or to humiliate the inmate, violates the Eighth Amendment,” and it need not occur more than one time.); [Hayes v. Dahlke](#), 976 F.3d 259, 265, 275 (2d Cir. 2020) (finding inmate alleged sufficient facts to survive summary judgment challenge where pat frisk, lasting five to eight minutes, was always through his clothing, and where officer pressed his genitals up against the inmate’s back, ran his hand down the inmate’s back to his buttocks, and around his waist, lifting up his testicles).

²⁶ [Graham v. Connor](#), 490 U.S. 386, 394 (1989).

²⁷ See, e.g., [Bearchild v. Cobban](#), 947 F.3d 1130, 1144 (9th Cir. 2020) (holding sexual assault of prisoner by corrections officer violates Eighth Amendment’s prohibition against cruel and unusual punishment).

Fourteenth Amendment applies.²⁸ That may be counterintuitive because a sexual assault during an arrest seems like a per se unreasonable seizure. While the Ninth Circuit, for example, takes that view,²⁹ most other circuits do not. In fact, those circuits distinguish between a sexual assault of an arrestee as a Fourteenth Amendment violation³⁰ and a gratuitous search of that same arrestee as a Fourth Amendment violation.³¹ It is, therefore, advisable to check circuit law to ensure that the indictment charges the correct constitutional violation, particularly when the victim is an arrestee.

C. Proving the constitutional deprivation: lack of consent and no legitimate purpose

In practice, the evidence needed to prove a sexual assault is the same evidence needed to prove a constitutional deprivation, and likewise, will be the same regardless of which constitutional right is implicated. The jury instructions will also define the constitutional rights similarly, regardless of the right implicated. That is because the ultimate inquiry to prove the constitutional deprivation is whether the victim consented and, if the victim did not, whether the offender acted with a legitimate government purpose.³²

²⁸ See, e.g., [Rogers v. City of Little Rock](#), 152 F.3d 790, 797 (8th Cir. 1998) (sexual assault by police officer violates the victim’s substantive due process right to bodily integrity); see also [Jones v. Wellham](#), 104 F.3d 620, 628 (4th Cir.1997); [Guillot v. Castro](#), No. 17-6117, 2018 WL 3475294, at *7 (E.D. La. July 19, 2018) (citing *Rogers* and noting that “a number of circuit courts have found due process violations when state actors have inflicted sexual abuse on individuals” (citation omitted)).

²⁹ See [Fontana v. Haskin](#), 262 F.3d 871, 878–80 (9th Cir. 2001) (applying the Fourth Amendment to sexual assault during the course of an arrest).

³⁰ See [Rogers](#), 152 F.3d at 796 (referring to sexual assault by police officer) (“This case is not about excessive force, but rather about nonconsensual violation of intimate bodily integrity which is protected by substantive due process . . . The violation here is different in nature from one that can be analyzed under the fourth amendment reasonableness standard.”).

³¹ See [United States v. Morris](#), 494 F. App’x 574, 580–81 (6th Cir. 2012) (evaluating officer’s sexual assault of an arrestee under the Fourteenth Amendment and officer’s strip search of another arrestee under the Fourth Amendment).

³² Compare [Kindley Jury Instructions](#), *supra* note 20, at 11, 19 (jury instructions for Fourteenth Amendment violation: “[T]o be unlawful, it must have been unauthorized and without the consent of [the victim]. You must

To be sure, however, there is no legitimate purpose for sexual assault, and the issue of a legitimate government purpose will only arise as a defense in the context of such conduct as gratuitous searches and medical exams. Simply put, a constitutional deprivation hinges on the victim's consent; that is, whether the victim made a voluntary decision as to what they wanted to do with their body.³³ A thorough interview is the key to that determination. The interview often reveals that, because of the offender's physical size, authority over the victim, access to a weapon, the remote location where the encounter occurred, the fact that the offender threatened the victim in some manner, or a host of other factors, the victim believed they had no choice but to submit. Submission, acquiescence, acceding to, being coerced, or "giving in" is not consent. Likewise, a victim may say that they were "forced to consent" or "didn't say no." Just because a victim did not use the word "no" during the assault or uses the word "consent" to describe coercive conduct does not mean that a constitutional violation did not occur. The Supreme Court's definition of consent is particularly instructive. "Consent that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse."³⁴

If, on the other hand, an individual chooses to engage in sexual conduct and does so freely and voluntarily, then there is no constitutional violation.³⁵ This may arise, for example, when a victim

decide whether this alleged conduct occurred and, if so, whether it occurred freely and voluntarily or whether it was against [the victim's] will."), *with Final Jury Instructions at 22, United States v. Davis, No. 19-cr-8008 (D. Ariz. Oct. 16, 2019), ECF No. 114* (jury instructions for Fourth Amendment violation: "The Constitution forbids intrusions on bodily integrity or bodily privacy that serve no objectively reasonable law enforcement purpose . . . [f]or any of these acts to be unlawful . . . the act must have been objectively unreasonable and done without [the victim's] free and voluntary consent.").

³³ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (recognizing the right to engage in sexual activity based on "full and mutual consent").

³⁴ *Florida v. Bostick*, 501 U.S. 429, 438 (1991) (internal quotation omitted).

³⁵ In the prison context, however, due to the inherently coercive nature of the prison system, "there is no consensus in the federal courts on whether, or to what extent, consent is a defense to [a section 1983] Eighth Amendment claim based on sexual contact with a prisoner." *Graham v. Sheriff of Logan Cnty.*, 741 F.3d 1118, 1125 (10th Cir. 2013); see also *Wood v. Beauclair*, 692

voluntarily chooses to engage in sexual conduct in exchange for a benefit, like getting out of a lawful arrest or obtaining extra privileges in prison. Importantly, though, getting a benefit for engaging in sexual conduct does not necessarily convert an otherwise involuntary act into a voluntary, consensual one. That benefit may be the offender’s attempt at a hush payment to keep the victim from reporting him.³⁶ The ultimate question, therefore, is not what the victim received after the conduct was completed, but rather, whether the victim voluntarily chose to engage in the conduct in the first place.

IV. Defining aggravated sexual abuse: a circuit split

Section 242 of Title 18 treats all acts of misconduct as misdemeanors, including both physical and sexual misconduct, unless one or more of the enumerated felony statutory enhancements is applicable. This is true whether the misconduct is an unreasonable use of force, like an unjustifiable shove (that does not result in pain) or a sexual assault, like coerced sexual intercourse.

For a violation of section 242 to be a felony, there must be evidence to sustain one of the enumerated statutory enhancements, or evidence to support charging a violation of 18 U.S.C. § 250 in conjunction with a section 242 violation, for those offense occurring after March 16, 2022.³⁷ One such enhancement is the aggravated sexual abuse enhancement. Plainly stated, if the underlying constitutional

[F.3d 1041, 1048–49 \(9th Cir. 2012\)](#) (establishing rebuttable presumption that a prisoner cannot consent); [Freitas v. Ault, 109 F.3d 1335, 1338–39 \(8th Cir. 1997\)](#) (recognizing consent is a defense); [Hall v. Beavin, 202 F.3d 268, 1999 WL 1045694, at *1 \(6th Cir.1999\)](#) (unpublished decision) (finding no merit to plaintiff’s Eighth Amendment claim where the “evidence establishe[d] that [plaintiff] voluntarily engaged in a sexual relationship with [defendant]”); [Fisher v. Goord, 981 F. Supp. 140, 174 \(W.D.N.Y. 1997\)](#) (“[C]onsensual sexual interactions between a correction officer and an inmate . . . do not constitute cruel and unusual punishment under the Eighth Amendment.”).

³⁶ See, e.g., [Hale v. Boyle Cnty., 18 F.4th 845, 855 \(6th Cir. 2021\)](#) (“[Officer] provided [inmate] with sunshine, detours, cigarettes, sodas, and his mobile number. Each of these gifts, favors, and privileges is indicative of coercion.”); [Brown v. Flowers, 974 F.3d 1178, 1185 \(10th Cir. 2020\)](#) (acknowledging that a gift of cigarettes to an inmate could be evidence of coercion).

³⁷ For a comprehensive discussion of the applicability of these enhancements to sexual misconduct allegations, see [Gold, supra note 5](#).

deprivation—that is, the sexual assault itself—meets the definition of aggravated sexual abuse, then the enhancement applies, the maximum penalty increases from one year in prison to life in prison, and there is no statute of limitations.³⁸

The aggravated sexual abuse enhancement is defined “by reference to the federal aggravated sexual abuse statute, 18 U.S.C. § 2241, excluding its jurisdictional requirements.”³⁹ As a preliminary matter, to meet the aggravated sexual abuse enhancement, and as required under the definition of section 2241, the underlying constitutional deprivation must include a “sexual act,” as defined in 18 U.S.C. § 2246(2). Generally, a “sexual act” is either some form of oral sex or penetration (however slight).⁴⁰ “Sexual contact,” like groping or unwanted touching, as defined in 18 U.S.C. § 2246(3), is insufficient to establish the enhancement, and the inquiry for the enhancement stops.⁴¹

In most cases where there is a sexual act, the aggravated sexual abuse enhancement is established in one of two ways, as defined by section 2241(a), either: “(1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping.”⁴²

To date, there is a circuit split as to the meaning of “force” and “threat” as used in 18 U.S.C. § 2241(a). The Eighth Circuit defines force as, “the use of a threat of harm sufficient to coerce or compel submission by the alleged victim. Force can also be implied from a disparity in size and coercive power between the defendant and the alleged victim.”⁴³ The Tenth Circuit Court of Appeals has similarly held that, “force may be inferred by such facts as disparity in size between victim and assailant, or disparity in coercive power.”⁴⁴

³⁸ 18 U.S.C. §§ 242, 3281 (“An indictment for any offense punishable by death may be found at any time without limitation.”); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding death penalty for rape is unconstitutional).

³⁹ *United States v. Shaw*, 891 F.3d 441, 447 (3d Cir. 2018).

⁴⁰ 18 U.S.C. § 2246(2).

⁴¹ *See* 18 U.S.C. § 2246(3).

⁴² 18 U.S.C. § 2241(a).

⁴³ EIGHTH CIR. MODEL JURY INSTRUCTIONS § 6.18.242 (JUD. COMM. ON MODEL JURY INSTRUCTIONS 2021).

⁴⁴ *United States v. Holly*, 488 F.3d 1298, 1302 (10th Cir. 2007); *see also United States v. Reyes Pena*, 216 F.3d 1204, 1211 (10th Cir. 2000) (holding force may be inferred from a disparity in size or power).

In 2018, however, the Seventh and Third Circuits struck down aggravated sexual abuse instructions that permitted the jury to infer “force” from a disparity in size and power or find that aggravated sexual abuse was established via a generalized fear of harm.⁴⁵ Instead, both circuits held that “force” meant that the defendant “actually” forced the victim, and that the fear required to sustain the aggravated sexual abuse enhancement had to be the heightened fear of “death, serious bodily injury, or kidnapping.”⁴⁶ In so holding, the Third Circuit did a legislative and statutory analysis of 18 U.S.C. § 2241, comparing it to 18 U.S.C. § 2242, the less stringent federal sexual abuse statute.⁴⁷ It concluded that force “may be satisfied by a showing of ... the use of such physical force as is sufficient to overcome, restrain, or injure a person.”⁴⁸

Therefore, although other circuits have a broader definition of aggravated sexual abuse, given what appears to be a trend toward narrowing the standard, it may be more prudent to use the Third Circuit’s language in jury instructions. Disparities in power and size are factors better suited for the jury’s consideration of the underlying constitutional deprivation of bodily integrity, that is, lack of consent, rather than whether the conduct meets the aggravated sexual abuse enhancement.

That said, the aggravated sexual abuse enhancement does not require brute violence, and it is not uncommon for government actors and, more particularly, law enforcement officers to use “such physical force as is sufficient to overcome, restrain, or injure a person,”⁴⁹ in order to effectuate a sexual assault. For example, the enhancement is met where the defendant holds the victim in place to gain submission (be it over the hood of a vehicle or against the wall), is physically

⁴⁵ See [Cates v. United States](#), 882 F.3d 731 (7th Cir. 2018) (reversing conviction of a police officer who sexually assaulted a woman, citing error in the jury instruction for aggravated sexual abuse); [Shaw](#), 891 F.3d at 441 (upholding corrections officer’s conviction for sexually assaulting an inmate, but concluding that aggravated sexual abuse instruction about size disparity and fear was problematic); see also [Eighth Cir. Model Jury Instructions § 6.18.242](#), *supra* note 43.

⁴⁶ [Shaw](#), 891 F.3d at 448 (citing [Cates](#), 882 F.3d at 737) (quoting 18 U.S.C. § 2241(a)(2)).

⁴⁷ See *id.* at 448–49.

⁴⁸ *Id.* at 449 (quoting [United States v. Lauck](#), 905 F.2d 15, 17 (2d Cir. 1990)).

⁴⁹ *Id.*

forceful throughout the misconduct, or otherwise puts the victim in fear of being brutally beaten or killed if they do not comply. This further underscores the necessity of a detailed, thorough, trauma-informed interview to ensure that the violation is properly charged—be it a misdemeanor or, when the aggravated sexual abuse enhancement can be proven, a felony with a statutory maximum of life in prison.

V. Statutory sentencing disparities and the significance of the victim’s account on the Sentencing Guidelines

As noted above, before the enactment of 18 U.S.C. § 250, absent one or more of the enumerated felony enhancements under section 242, many sexual assaults were misdemeanors. This is in large part because section 242 is not a per se sex offense statute.⁵⁰ As a result, its sentencing structure fails to account for the gravity and nature of sexual assaults, underscoring the significance of section 250. For sexual assaults occurring before the enactment of section 25, 18 U.S.C. § 242 neither penalizes such conduct commensurate with physical assaults committed under color of law⁵¹ nor penalize sexual assaults commensurate with other sexual assaults within federal jurisdiction.⁵² Therefore, many incidents of sexual assault carry a low maximum penalty.

⁵⁰ See [United States v. Icker](#), 13 F.4th 321, 327–38 (3d Cir. 2021) (finding that defendant police officer convicted for sexually assaulting multiple women (without the aggravated sexual abuse enhancement) could not be subjected to registration requirements under SORNA because section 242 is not a “criminal offense that has an element involving a sexual act or sexual contact with another”).

⁵¹ See [Fara Gold](#), *Investigating and Prosecuting Sexual Misconduct Committed by Law Enforcement: Federal Criminal Jurisdiction*, ABA CRIM. JUST. MAG., Jan. 2021 (While some sexual assaults do result in pain and injury, the vast majority do not, especially when considering the full panoply of sexual misconduct covered by 18 U.S.C. § 242. This results in disparate sentencing schemes between serious sexual assault cases and relatively minor physical assault cases.)

⁵² See [18 U.S.C. § 2242](#) (Sexual Abuse); [18 U.S.C. § 2244](#) (Abusive Sexual Contact).

For example, consider an officer who, before March 16, 2022, pulled over a woman for speeding, and the woman submitted to sexual acts because of the officer's size or authority or just out of fear of general physical harm. As described in the previous section, because the woman's fear does not rise to the level of death, serious bodily injury, or kidnapping, and because that officer wielded his authority as a weapon as opposed to physically forcing the woman, the aggravated sexual abuse enhancement does not apply, and that officer, therefore, committed a misdemeanor. If, however, that officer committed the same sexual assault on federal land—whether he was an officer or a civilian—and the victim submitted out of fear of physical harm, he would be subject to a maximum of life in prison under 18 U.S.C. § 2242.

Similarly, the following examples constitute misdemeanor violations of section 242 for offenses that occurred before section 250 was enacted: a probation officer coerces a probationer to submit to vaginal intercourse under a false threat of a probation violation; a state prison corrections officer coerces an inmate into submission due to his size or authority; a prisoner transport officer rapes an inmate during transport, and although too terrified to try to resist, the victim only articulates a generalized fear of physical harm; a doctor or athletic coach at a state university fondles students under the pretext of treating them; or a detective threatens a domestic violence victim with removal of her children if she does not submit and have sex with him. To put a finer point on it, all of the foregoing examples of egregious abuses of authority were misdemeanors with a maximum penalty of one year in custody, significantly less than the ten-year maximum penalty facing an officer if he engages in excessive force, resulting in bodily injury.⁵³

Although the sentencing structure of section 242 does not account for the scope or gravity of sexual assault, the United States Sentencing Guidelines (U.S.S.G.) do, even without the enactment of section 250.⁵⁴ Guideline § 2H1.1 governs violations of section 242, and

⁵³ Conduct resulting in bodily injury is punishable up to 10 years in prison. See 18 U.S.C. § 242; see also *United States v. Myers*, 972 F.2d 1566, 1572–73 (11th Cir. 1992) (defining bodily injury to include “any injury to the body, no matter how temporary,” and any burn or abrasion, bruise, or just physical pain).

⁵⁴ See generally U.S. SENTENCING GUIDELINES MANUAL (U.S. SENT'G COMM'N 2021) [hereinafter U.S.S.G.].

that guideline cross-references to the guideline that governs the underlying offense.⁵⁵ Therefore, for most section 242 violations involving sexual assault, there is a cross-reference to the underlying offense of either sexual abuse or abusive sexual contact, governed by U.S.S.G. §§ 2A3.1 (Criminal Sexual Abuse) or 2A3.4 (Abusive Sexual Contact), respectively.

That means that, even if the conduct is a misdemeanor, if it involves either penetration or oral sex and otherwise meets the definition of sexual abuse under section 2242, then, at minimum, the advisory Guidelines range is 188–235 months in prison.⁵⁶ That is because the Guideline for Criminal Sexual Abuse begins with a base offense level of 30,⁵⁷ and six levels are added because the defendant acted under color of law.⁵⁸ Similarly, if the conduct involves groping or unwanted touching and meets the definition of abusive sexual contact under 18 U.S.C. § 2244, then, at minimum, the advisory Guidelines range is 27–33 months in prison. That is because the Guideline for Abusive Sexual Contact begins with a base offense level of 12⁵⁹ and then adds six levels because the defendant acted under color of law.⁶⁰

For incidents involving groping or unwanted touching, if the victim articulates generalized fear of physical harm or the kind of fear or physical force required for the aggravated sexual abuse enhancement, the base offense level increases to either 16 or 20, respectively.⁶¹ Therefore, for offenses before March 16, 2022, even though those additional details from the victim may not be enough to establish a statutory enhancement and convert a misdemeanor into a felony under section 242, they may substantially increase the defendant’s advisory Guidelines range.⁶² If that increase raises the advisory range

⁵⁵ U.S.S.G. § 2H1.1(a)(1).

⁵⁶ *See, e.g., United States v. Lucas*, 157 F.3d 998, 1003 (5th Cir. 1998) (applying U.S.S.G. § 2A3.1 where the underlying violation of 18 U.S.C. § 242 is a misdemeanor).

⁵⁷ U.S.S.G. § 2A3.1(a)(2).

⁵⁸ U.S.S.G. § 2H1.1(b)(1)(B).

⁵⁹ U.S.S.G. § 2A3.4(a)(3).

⁶⁰ U.S.S.G. § 2H1.1(b)(1)(B).

⁶¹ U.S.S.G. § 2A3.4(a).

⁶² *Davis*, 855 F. App’x at 364 (finding no error in applying additional four levels to defendant’s offense level pursuant to U.S.S.G. § 2A3.4(a)(2) for “confining the victim in the back of his police car, commenting to the victim

above the statutory maximum, the court should stack the counts when imposing a sentence in accordance with U.S.S.G. § 5G1.1, which essentially makes the statutory maximum the recommended sentence.⁶³ This somewhat makes up for the fact that the crime itself is only a misdemeanor.⁶⁴

Moreover, if the defendant sexually assaulted a victim multiple times, or if the defendant sexually assaulted more than one victim, those crimes can be charged separately and do not “group” under the Sentencing Guidelines.⁶⁵ The advisory sentencing range increases with additional criminal acts.⁶⁶

This again highlights both the significance of locating additional victims and the significance of the victim’s account itself, not only on making informed charging decisions, but also in ensuring that the Sentencing Guidelines calculations reflect the gravity of the defendant’s conduct.

VI. Working with state partners and civil enforcement counterparts

A. Strong federal and state partnerships

Coordinating with state or local investigators and prosecutors can help inform how best to investigate these allegations, and if the evidence permits, help determine in which jurisdiction to bring

about the size of her breasts, and photographing the victim's exposed breasts, [because that conduct] caused the victim to experience fear”).

⁶³ U.S.S.G. § 5G1.1(a) (“Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.”).

⁶⁴ See, e.g., [United States v. Peterson](#), 887 F.3d 343, 349 (8th Cir. 2018) (probation officer’s sentence of nine years in prison was substantively reasonable where all counts ran consecutive after defendant was convicted of four misdemeanor violations of 18 U.S.C. § 242 involving sexual assault and one count of 18 U.S.C. § 1001).

⁶⁵ See U.S.S.G. § 3D1.2 (offenses calculated under § 2H1.1 are excluded from grouping closely related counts).

⁶⁶ U.S.S.G. § 3D1.4 cmt. background (although the increase in offense level is generally capped at five levels, a “departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 Units”).

charges.⁶⁷ There are statutory advantages and evidentiary rules that may favor one jurisdiction over another. For example, Federal Rule of Evidence 413, which permits evidence of other sexual assaults to establish propensity, favors federal prosecution if there is no analogous state rule. Section 242 statutory enhancements, their available penalties, and statute of limitations may also favor federal jurisdiction. On the other hand, if a state has a strict liability statute where consent is not a defense, that state's jurisdiction may be more favorable.⁶⁸ Such statutory violations are easier to prove and often spare the victim from being retraumatized by testifying in a sexual assault trial.

With that in mind, one of the biggest advantages of the federal system, contrary to many state systems—and one that should not be overlooked—is that victims are neither required to testify before the grand jury to secure an indictment nor required to testify at a preliminary hearing to establish probable cause. Any prosecutor who has tried a sexual assault case where the victim has testified previously knows well how challenging it can be to work with the transcript of that prior testimony. Even the most honest person providing their best, then-existing memory of an event will rarely say the same thing twice in exactly same way. Such transcripts are fodder for unfair impeachment. It is inadvisable to make a victim testify unnecessarily before the grand jury—and in the federal system, it is never necessary and, therefore, can be avoided.

The most effective results from state and federal partnerships are global resolutions. While state and federal prosecutors generally should not proceed on parallel tracks toward trial, a global plea agreement with concurrent sentences can provide preferable outcomes to all parties involved. This is particularly true when a state may have jurisdiction over other sex crimes committed by the defendant that are beyond the reach of the federal government. For example, in *United States v. Garcia*, a sex crimes detective with the Las Cruces Police Department entered a guilty plea in federal court for violating section

⁶⁷ For more information, see AEquitas, *State, Meet Federal: Prosecuting Law Enforcement Involved Sexual Violence*, YOUTUBE (June 14, 2021), <https://perma.cc/24GV-R7D6>.

⁶⁸ See, e.g., O.C.G.A. § 16-6-5.1 (Improper sexual contact); N.Y. Penal Law § 130.05 (Sex offenses; lack of consent).

242 by sexually assaulting a student intern during a ride along.⁶⁹ As part of plea negotiations, he also agreed to enter a guilty plea to state charges related to sexual abuse of his own children and receive a concurrent sentence.⁷⁰

Federal prosecution can also provide redress where state or local prosecution might not be an effective alternative. For instance, tribal officials are not subject to state law, but they are subject to federal law. The penalties for violating federal law may offer a better outcome for victims on reservations who may otherwise hesitate to report a tribal officer to the tribal authorities. Additionally, federal prosecution may be the only viable option when the evidence may not precisely establish the county or local jurisdiction in which a crime occurred. Federal districts are geographically larger, encompassing many local jurisdictions and, therefore, may result in venue being more readily provable. These sorts of local jurisdictional or venue issues specifically arise when a prison transport officer sexually assaults an inmate at some point during a transport across county or state lines. For example, in the case of the private prisoner transport officer mentioned above, one of his victims was not able to identify the county she was in when the transport officer sexually assaulted her. She was, however, able to give a more general description about the area of the country she was in. Cell-site or other location data and other evidence established the larger federal district where the sexual assault occurred.

B. Other federal civil rights enforcement options

In addition to section 242, incidents of sexual misconduct may implicate the jurisdiction of other federal criminal civil rights statutes discussed in this issue of the *Journal of Federal Law and Practice*, be it an offender who sexually assaults a victim as part of a bias-motivated crime in violation of 18 U.S.C. § 249 or a landlord who targets tenants because of a protected characteristic and forces them to submit to sex acts under threat of eviction in violation of 42 U.S.C. § 3631, the criminal portion of the Fair Housing Act. Potential violations of these statutes warrant the same investigative steps as any other sexual misconduct violation and require the same

⁶⁹ See [Plea Agreement, United States v. Garcia, No. 14-cr-1251 \(D.N.M. Apr. 17, 2014\)](#), ECF No. 6.

⁷⁰ *Id.*

considerations for proving lack of consent and the aggravated sexual abuse enhancement.

Just as there are federal civil rights criminal statutes available to prosecute sexual misconduct, there are also federal civil rights civil statutes available to provide redress through civil enforcement. Several of the civil enforcement sections within the Civil Rights Division have enforcement authority over those statutes, as do local U.S. Attorney's Offices. That jurisdiction can overlap with federal criminal jurisdiction, providing additional relief for victims and resulting in positive institutional shifts. To that end, when an employee of a public school or university engages in sexual misconduct against students, potentially in violation of section 242, the Civil Rights Division's Educational Opportunities Section and the Federal Coordination and Compliance Section can also enforce Title IX of the Education Amendments of 1972, if the school in question receives federal financial assistance. The Educational Opportunities Section can also enforce Title IV of the Civil Rights Act of 1964 when sexual misconduct occurs at a public school.⁷¹ Similarly, when a state or local government employer engages in sexual misconduct against its employees, potentially in violation of section 242, the Civil Rights Division's Employment Litigation Section may also have jurisdiction under Title VII of the Civil Rights Act of 1964, which prohibits workplace discrimination based on sex, among other protected bases.⁷²

Additionally, if a sexual misconduct investigation against a corrections officer, other local government facility employee, or a police officer reveals a potential pattern at their respective agencies of engaging in widespread sexual misconduct or deliberately mishandling of sexual misconduct allegations, the Civil Rights Division's Special Litigation Section has authority to investigate under the Civil Rights of Institutionalized Persons Act and 34 U.S.C. § 12601. Finally, where a landlord, property manager, maintenance worker, or someone else with control over a house is sexually assaulting tenants in violation of 42 U.S.C. § 3631, the Division's Housing and Civil Enforcement Section may have civil enforcement

⁷¹ See Tiffany Cummins Nick, *Protecting Students with Disabilities from Sexual Harassment in Education: Title IX and More*, 70 DOJ J. FED. L. & PRAC., no. 1, 2022, at 217.

⁷² See Shayna Bloom, Jennifer Swedish, & Julia Quinn, *The Employment Litigation Section's Sexual Harassment in the Workplace Initiative and How to Get Involved*, 70 DOJ J. FED. L. & PRAC., no. 1, 2022, at 199.

authority pursuant to the pattern-or-practice provision of the Fair Housing Act, 42 U.S.C. 3614(a).⁷³

Even if the sexual misconduct alleged does not rise to the level of a federal crime, it may still fall within the jurisdiction of the aforementioned statutes. Victims would be well-served if federal prosecutors worked with their civil enforcement counterparts to determine if civil enforcement is warranted. Such cooperation can lead to more widespread accountability for those who commit sexual misconduct and more robust vindication of constitutional and federally protected rights.

About the Author

Fara Gold serves as a Special Litigation Counsel and Senior Sex Crimes Counsel for the Criminal Section of the Civil Rights Division, where she has developed national expertise in prosecuting sexual misconduct committed by government actors. Before joining the Department in 2009, Fara served as an Assistant State Attorney for nearly six years in Broward County, Florida, where she specialized in prosecuting sex crimes and child abuse cases.

Fara received the Attorney General's Award for Exceptional Service in 2014 and the Attorney General's Award for Outstanding Contributions by a New Employee in 2012. She also received the FBI Director's Award for Distinguished Service in Assisting Victims of Crime in 2021, the Assistant Attorney General's Award for Distinguished Service in 2020, and the Assistant Attorney General's Special Commendation Award for Outstanding Service in 2014 and 2011.

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⁷³ See Erin Meehan Richmond & Michael Campion, *Sexual Harassment in Housing: Working with Local Prosecutors in Sexual Harassment Matters*, 70 DOJ J. FED. L. & PRAC., no. 1, 2022, at 237.