



Introduction

On the afternoon of August 9, 2014, a white police officer named Darren Wilson shot an unarmed eighteen-year-old black man named Michael Brown in Ferguson, Missouri.¹ Almost immediately after the shooting, civil unrest erupted in the St. Louis suburb.² As darkness fell that evening, residents erected a makeshift memorial “in the middle of the street where [Michael Brown had] been sprawled in plain view for more than four hours.”³ Mr. Brown’s mother was among the mourners to lay flowers in this memorial, spelling out Mr. Brown’s initials in rose petals over the bloodstains on the street.⁴ The community was simmering with anger and distrust. But things got worse when police officers appeared on the scene with dogs.⁵ What happened next was emblematic of the strained relationship between police and the city’s residents.⁶ City residents watched as one of the officers on the scene allegedly allowed his dog to urinate on the memorial.⁷ To the dismay of protesters, a police vehicle later drove over the memorial, smashing the flowers and candles.⁸

While these alleged acts of callous indifference angered Ferguson residents, they merely escalated tensions that had been growing in the community for several years. Most of us know the rest of this story. For several days thereafter, Ferguson resembled a war zone. Looters and rioters joined peaceful protesters. Buildings and cars burned. Ten members of the public

¹ Andrew Hart, *Ferguson, Missouri Community Furious After Male Shot Dead by Police*, HUFFINGTON POST, August 10, 2014 (describing the aftermath on August 9 and 10 after Michael Brown’s shooting).

² Mark Follman, *Michael Brown’s Mom Laid Flowers Where He Was Shot – and Police Crushed Them*, MOTHER JONES, August 27, 2014, available at www.motherjones.com/politics/2014/08/ferguson-st-louis-police-tactics-dogs-michael-brown.

³ *Id.* ⁴ *Id.* ⁵ *Id.*

⁶ *Id.* (explaining that what happened next “was emblematic of what has inflamed the city of Ferguson”).

⁷ *Id.*

⁸ *Id.* (“soon the candles and flowers had been smashed, after police drove over them”).

and six police officers suffered injuries.⁹ Police made numerous arrests.¹⁰ Within a few weeks of the Michael Brown shooting, the US Department of Justice (hereinafter “DOJ”) announced that it had begun an investigation into the conduct of the Ferguson Police Department.¹¹ Thereafter, the DOJ spent around one hundred days in Ferguson, interviewing city leaders, participating in ride-alongs with on-duty police officers, analyzing 35,000 pages of internal records, meeting with community groups, and reviewing thousands of internal emails.¹²

The findings of this investigation were troubling, to say the least. The DOJ documented numerous examples of egregious misconduct – behavior that demonstrated a disregard for basic constitutional protections. Take the example of a thirty-two-year-old black man who was sitting in his parked car one afternoon after playing basketball in a public park¹³ when a Ferguson Police Department officer demanded to see his identification¹⁴ and subjected him to an unlawful pat down.¹⁵ When the man objected to the officer searching his car without a warrant, the officer pulled out his gun and arrested him.¹⁶ Prosecutors eventually charged this man with making a false declaration, for identifying himself as “Mike” rather than “Michael,” and failing to wear a seatbelt in a parked car.¹⁷ Because of these charges, the man eventually lost his job as a contractor for the federal government.¹⁸ In another unsettling case, Ferguson police issued a routine parking ticket to a black woman in 2007 for \$151.¹⁹ When the woman failed to pay the ticket, she was charged with seven additional offenses – each new offense imposing new fines and fees.²⁰ From 2007 until 2014, the woman paid \$550, was

⁹ Los Angeles Times Staff, *Ferguson Grand Jury Decision Recap: Mayhem as Police Cars, Businesses Burn*, LA TIMES, November 24, 2014, available at www.latimes.com/nation/nationnow/la-na-nn-ferguson-grand-jury-day-1-htmlstory.html.

¹⁰ More Than Fifty Arrested at Ferguson Police Station on “Moral Monday,” Other Events Elsewhere, ST. LOUIS POST-DISPATCH, October 13, 2014, available at http://m.stltoday.com/news/local/crime-and-courts/more-than-arrested-at-ferguson-police-station-on-moral-monday/article_c1752132-9731-542e-8525-1885fae7fd10.html (describing how forty-three protesters were arrested outside the police station and more were arrested elsewhere in the city).

¹¹ Devlin Barrett, *Justice Department to Investigate Police Force*, WALL STREET JOURNAL, September 5, 2014, available at www.wsj.com/articles/ferguson-police-chief-welcomes-justice-department-probe-1409849928 (stating that the DOJ opened its investigation of Ferguson on September 5, 2014 – less than a month after the Brown shooting).

¹² UNITED STATES DEPT’ OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, March 4, 2015, available at: www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

¹³ *Id.* at 3. ¹⁴ *Id.* ¹⁵ *Id.* ¹⁶ *Id.* ¹⁷ *Id.* ¹⁸ *Id.* ¹⁹ *Id.* at 4. ²⁰ *Id.*

arrested twice, and spent six days in jail because of this single parking offense.²¹ As of the date that the DOJ released its investigative findings, the woman still owed the municipality \$541.²²

At this point, you may wonder what would motivate Ferguson officials to treat their constituents this way. Part of the problem in Ferguson was a city culture that pressured the police department to do everything in its power to generate revenue. Because of this, the DOJ found that the Ferguson Police Department viewed black residents “less as constituents to be protected than as potential offenders and sources of revenue.”²³ Supervisors and leadership perpetuated this culture. These departmental leaders did little “to ensure that officers act[ed] in accordance with law and policy and rarely respond[ed] meaningfully to civilian complaints of officer misconduct.”²⁴

In many ways, Ferguson is a microcosm of the police misconduct problem that the United States faces today. Ferguson should have focused on protecting its constituents. Instead, it routinely violated their civil rights. And the Ferguson municipal government that should have responded to citizen complaints instead did nothing. But Ferguson is not all doom and gloom. The events in Ferguson should also give us hope. When the Ferguson Police Department abdicated its responsibility to its citizens, the federal government stepped in to protect the Constitution. Only a couple decades earlier, such a federal investigation of a local police department would have been unimaginable. For most of American history, the federal government had played a minimal role in overseeing local police departments. However, over the last twenty years American policing law has undergone a transformation. This transformation started in 1994 when Congress passed a little-known statute – 42 USC § 14141 (hereinafter “§ 14141”) – that gave the US attorney general the authority to investigate and overhaul local police departments engaged in a “pattern or practice” of unconstitutional misconduct.

Ultimately, the federal investigation in Ferguson concluded that the police officers routinely “violate the Fourth Amendment in stopping people without reasonable suspicion, arresting them without probable cause, and using unreasonable force” against them.²⁵ Ferguson recently agreed to a negotiated settlement with the DOJ, meaning that in the coming years, the Ferguson Police Department agreed to implement significant policy and procedural changes aimed at curbing future misconduct. It won’t be easy. If history is any guide, the process will take many

²¹ *Id.* ²² *Id.* ²³ *Id.* at 2. ²⁴ *Id.* ²⁵ *Id.* at 27.

years to complete and cost local taxpayers millions of dollars. But in the end, this process should provide Ferguson residents with an improved police force that no longer systemically violates civil rights.

Ferguson isn't the only city to be subject to this sort of federal intervention via § 14141. In the twenty years since Congress authorized federal interventions into local police departments, the DOJ has investigated or overhauled dozens of police departments across the country, including those in New York, Los Angeles, Chicago, Washington, DC, Seattle, Albuquerque, Baltimore, New Orleans, Pittsburgh, Cincinnati, Newark, Cleveland, Miami, Portland, and, of course, Ferguson.²⁶ These federal interventions represent the new frontier in American police regulation. In recent decades, the federal government has slowly reshaped the field of American policing law using this regulatory tool. Thus far, though, little research has examined how this sort of federal intervention works. This book fills that gap in the available literature. It provides a comprehensive analysis of federal interventions in American police departments. It delves into the history of American police regulation and the emergence of § 14141 as a tool for unprecedented federal intervention into local police departments. It explores the benefits and limitations of federal intervention as a regulatory tool.

Ultimately, though, this book takes a normative position. It argues that § 14141 represents a first step in addressing the problem of police misconduct in the United States. In order to address the structural, organizational, and political causes of police misconduct, this book argues that the Congress should further expand federal oversight of local police departments.

I Defining the Problem of Police Misconduct

Before delving into the book, it may be useful to present some basic facts about policing in the United States. First, policing in the United States is highly decentralized, both in literal terms and in terms of regulation. Literally, the term “police” describes a field of roughly 18,000 separate law enforcement agencies employing around 700,000 sworn officers who

²⁶ See Stephen Rushin, *Federal Enforcement of Police Reform*, 82 *FORDHAM L. REV.* 3189, 3244–3247 (showing all investigations and settlements under § 14141 between 1994 and 2013); see also Kimbriell Kelly, Sarah Childress, & Steven Rich, *Forced Reform, Mixed Results*, *WASH. POST*, November 13, 2015, available at www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results (listing additional settlements that have happened from 2013 until present).

serve predominantly at the local level.²⁷ We are not a nation of one police force. We are a nation of thousands of decentralized police departments. From a regulatory perspective, there is no single governmental body that truly oversees or regulates American police. Traditionally, local departments have been generally free to develop their own policing strategies and priorities, without significant state or federal government regulation. This is not to say that local police departments are without oversight. In most cases, local police departments are directly accountable to local political leaders, like a mayor, city council, or city manager. So when critics allege that the United States suffers from a police misconduct problem, this is a significant claim. It suggests that misconduct is present in a substantial number of the local police departments in the United States. It also suggests that local political leaders have been unwilling or unable to prevent this misconduct.

This realization is even more powerful when you understand a second basic fact about police misconduct. Law enforcement leaders and academics generally understand what kinds of policies and procedures can effectively combat misconduct. Over the last several decades, police departments have teamed up with social scientists to verify the effectiveness of numerous misconduct prevention tools. These studies have produced reputable findings about the prevention of police misconduct. For example, experts know that mechanisms like body cameras, dash cameras, and early intervention systems can reduce the occurrence of police misconduct. This is not to say that we have identified the “secret recipe” for ending police misconduct as we know it. Police departments, like any organization, will always have some misconduct. In the future, policing experts will discover new tactics that may further reduce misconduct. However, law enforcement experts today have identified a package of widely accepted policies and procedures that can demonstrably reduce the likelihood of misconduct in police departments. Professional organizations like the International Association of Chiefs of Police (IACP), the Commission on Law Enforcement Accreditation (CALEA), and the Police Assessment Resource Center (PARC) have attempted to expand the knowledge of these ideal policies and procedures. The failure by some police departments to combat police misconduct is not necessarily due to a lack of available information, but rather a lack of commitment. This leads to an

²⁷ BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES 2 (2011), *available at* www.bjs.gov/content/pub/pdf/cslea08.pdf (putting the number of state and local law enforcement agencies at 17,985).

obvious question. If many in the law enforcement community know how to reduce misconduct in local police departments, why haven't all police departments simply adopted these measures?

The answer leads us to the third basic fact about police misconduct. It is often expensive and unpopular for local political leaders to invest in oversight designed to reduce police misconduct. Many fail to consider the real cost of addressing police misconduct. This book discusses many major police departments that have undergone sustained, federally mandated reform efforts aimed at curbing wrongdoing. In each case, the cost of these efforts was substantial – often totaling in the tens or hundreds of millions of dollars over several years.²⁸ In most departments, correcting a pattern of police misconduct is not as simple as changing an internal policy. It requires oversight. It requires additional manpower. It requires technological tools. This leads to an uncomfortable realization. Fighting police misconduct is expensive. Municipal budgets, on the other hand, are finite. Communities undergoing significant police reforms have to make tough choices. In some cases, communities have been forced to raise taxes to pay for the cost of police reform.²⁹ In other cases, communities have had to reallocate scarce municipal resources that could have otherwise gone to fund schools, roads, or parks.

The strength of police unions and civil service protections also complicate the implementation of police reform efforts. The majority of American law enforcement officers are part of unions. Many of those who are not part of a union are organized into associations that wield considerable political influence. Time and time again, police unions and associations have pushed back against efforts to improve the oversight of local police departments. These groups commonly contend that efforts to

²⁸ Rich Exner, *How Much Cleveland Will Pay to Reform Its Police Department Under Consent Decree*, CLEVELAND PLAIN DEALER, June 2, 2015, available at www.cleveland.com/datacentral/index.ssf/2015/06/how_much_it_will_cost_cleveland.html (estimating that the consent decree should cost at least \$30 million and that the New Orleans decree should cost around \$55 million); see also Kelly, Childress, & Rich *supra* note 26 (describing how the Los Angeles consent decree cost anywhere between \$100 and \$300 million depending on whom you ask).

²⁹ New Orleans is an example of this phenomenon. Richard Rainey, *Mitch Landrieu Requests a Doubling of Tax Rates for New Orleans Police and Fire*, TIMES-PICAYUNE, May 1, 2014, available at www.nola.com/politics/index.ssf/2014/05/mitch_landrieus_tax_hike_plan.html; Tyler Bridges, *Legislature Approves Property Tax Hike for New Orleans Police and Fire; Now Heads to Voters*, LENS, May 29, 2014, available at <http://thelensnola.org/2014/05/29/legislature-approves-property-tax-hike-for-new-orleans-police-now-heads-to-voters>.

limit discretion or improve oversight will reduce officer aggressiveness, thereby increasing crime.

Once more, a fourth basic fact about police misconduct makes the situation even more challenging for reform advocates. Police misconduct disproportionately affects politically marginalized minorities. The fact that minority groups sometimes lack the same political power as the majority makes it difficult for minorities to combat police misconduct through the democratic system. The minority groups most disadvantaged by police wrongdoing are often unable to achieve reform through the democratic process. It has become common knowledge today that blacks and Latinos make up a disproportionate number of individuals killed by law enforcement every year.³⁰ Evidence from some major cities suggests that blacks and Latinos are also overrepresented in unjustified stops, searches, and seizures.³¹ Additionally, police misconduct disproportionately affects another, very different kind of minority group – criminals and criminal suspects. Police predictably use their discretionary power against people they suspect of criminal activity. Criminals and criminal suspects are among the most politically marginalized minority groups in the United States. In some states, felons are ineligible to vote while serving their sentences.³² Others permanently

³⁰ Oliver Laughland, Jon Swaine, & Jamiles Lartey, *US Police Killings Headed for 1,100 This Year, With Black Americans Twice as Likely to Die*, THE GUARDIAN, July 1, 2015, available at www.theguardian.com/us-news/2015/jul/01/us-police-killings-this-year-black-americans (describing the overrepresentation of black individuals in police killings in the United States); Nicole Santa Cruz, Ruben Vives, & Marisa Gerber, *Why the Deaths of Latinos at the Hands of Police Haven't Drawn as Much Attention*, LA TIMES, July 18, 2015, available at www.latimes.com/local/crime/la-me-0718-latino-police-20150718-story.html (describing how in Los Angeles County in 2015, Latinos made up over half of all deaths caused by law enforcement at the time of the story and also explaining how black victims made up a disproportionate number of those killed by law enforcement in Los Angeles County).

³¹ See, e.g., Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, NY TIMES, August 12, 2013, at A1 (describing how black and Latino young men made up a disproportionate number of the individuals stopped and frisked by the NYPD in recent years).

³² According to the National Conference of State Legislatures, states vary tremendously on the voting rights of felons. Only two states allow felons to vote while incarcerated – Maine and Vermont. All others at least temporarily limit voting rights while behind bars. Another thirty-eight states and the District of Columbia allow felons to automatically gain most voting rights after they complete their sentences. In some states, ex-felons must wait a period of time before having their voting rights restored. And in other states, ex-felons must apply to have their voting rights restored. See *Felon Voting Rights*, NATIONAL CONFERENCE OF STATES LEGISLATURES, available at www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.

disenfranchise convicted felons.³³ Given all of these conditions, locally elected political leaders have often been unwilling or unable to address police misconduct.

This is not to say that locally supported, bottom-up police reform is impossible. Several recent, high profile incidents of alleged law enforcement misconduct have sparked a national conversation about policing. In the wake of riots in Ferguson in 2014, the Black Lives Matter movement has galvanized renewed support for greater oversight of local police departments. Politicians, academics, and community advocates have also chimed in on how we can better address police misconduct. But much of this ongoing national conversation tends to miss the mark. At its core, the fight against police misconduct boils down to a single difficult question. How do we get thousands of local police departments to adopt costly and sometimes politically unpopular reforms aimed at preventing misconduct that primarily affects a politically marginalized minority of the population?

II The Need for Improved Federal Oversight of Local Police Departments

This book argues that in order to fight police misconduct effectively, we as a country must improve federal oversight of local police departments. To do this, we must increase the power of the federal government to document and respond to misconduct in local police departments. This sort of expanded federal oversight of local police departments would require an act of Congress. Such an act of Congress is sure to be contentious. Given the current dysfunction in Washington, such an act of Congress may even seem impossible. Feasibility aside, the goal of this book is to imagine the most effective and constitutionally permissible response to local police wrongdoing.

Some may claim that federal oversight of local police departments constitutes an unprecedented expansion of federal power. In reality, though, this book's proposal would represent a continuation of a nearly century-long trend of the federal government gradually expanding local police oversight. Through the first 150 years of our nation's history – an era this book describes as the Hands-Off Era – the federal government left police regulation entirely to the states and municipalities. That changed

³³ *Id.* (stating that in Virginia, Florida, and Iowa, felons permanently lose their voting rights).

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in the mid-twentieth century when the federal government came to recognize that local police misconduct was prevalent throughout the nation. In the decades thereafter, the federal government gradually pushed back against this perceived national epidemic of police misconduct by installing mechanisms that increased the cost of local police wrongdoing. During this Buildup Era the federal government did not force localities to fight police misconduct. Instead, the federal government carved out mechanisms for victims of police misconduct to punish misbehaving police departments through lawsuits or evidentiary exclusion.

During the late twentieth century, though, Congress came to realize that its Buildup Era responses were inadequate. When Congress passed § 14141, it gave the federal government the authority to intervene into problematic local police departments. This marked the beginning of the Intervention Era in local police regulation. This book focuses primarily on the history of the Intervention Era in American policing. While this interventionary power has brought about meaningful reform in a handful of targeted agencies, it too has proven ineffective at stimulating widespread reform across the thousands of American police departments, in part because of resource and informational constraints. Thus, today we are a nation at a crossroads. We must decide whether we are going to fully embrace the federal government as a legitimate and necessary overseer of local police conduct. This book argues that the best way to reduce local police misconduct is for Congress to expand federal oversight of local police departments.

A *The Hands-Off and Buildup Eras*

For most of American history, we have conceptualized policing as an entirely local institution. The responsibility of regulating police misconduct during this Hands-Off Era fell almost entirely on the states and localities. Federal regulators did not come to view police misconduct as a pervasive national epidemic until the early twentieth century. Many point to the release of the *Report on Lawlessness in Law Enforcement* by the National Commission on Law Observance and Enforcement (NCLOE) in 1931 as the first major recognition of police misconduct as a pervasive national epidemic.³⁴ President Herbert Hoover had appointed the NCLOE

³⁴ Samuel Walker, *Records of the Committee on Official Lawlessness*, in RECORDS OF THE WICKERSHAM COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, at v–vi (1997),

to investigate the administration of justice in the United States.³⁵ George W. Wickersham, who had previously served as the US attorney general under President Howard Taft, chaired the commission.³⁶ Other members of the commission included Harvard Law School dean Roscoe Pound and several other prominent reform advocates.³⁷ Ultimately, the reports that followed by the NCLOE came to be known as the Wickersham Commission Reports.

The Wickersham Commission produced fourteen separate reports on a range of topics including prohibition, prisons, probation, juvenile justice, prosecution, and the causes of crime. Most of these reports had little immediate impact on national policy, with one notable exception: the *Report on Lawlessness in Law Enforcement*.³⁸ This report vividly described the use of abusive interrogation tactics known as the “third degree – that is, the use of physical brutality, or other forms of cruelty to obtain involuntary confessions or admissions” by law enforcement agencies across the country.³⁹ The report described how police across the country commonly resorted to physical violence, intimidation, and isolation to get suspects to confess to criminal acts.⁴⁰ In total, the report showed the presence of this interrogation tactic in fifteen different cities spread out geographically across the country. Although police leaders across the country denounced the *Report on Lawlessness in Law Enforcement*, the issue of local police misconduct was now part of the national conversation. It would be years, though, before the federal government intervened in any significant way into local police affairs.

In the years since the Wickersham Commission, the federal government has gradually expanded oversight of local police departments. It has done so by purposefully trying to raise the cost of police misconduct. In some cases, the federal government increased the financial cost of police misconduct by allowing individuals to file civil suits to collect monetary damages in the event of wrongdoing. Not every cost-raising mechanism was financial. Federal courts also made police misconduct expensive by refusing to consider at trial evidence obtained by police in violation of the Constitution. According to this logic, if police misconduct is sufficiently expensive – either in monetary terms or otherwise – then rational municipalities should take steps to limit this cost by implementing police reform measures. Thus began

available at www.lexisnexis.com/documents/academic/upa_cis/1965_wickersham_compt1.pdf.

³⁵ *Id.* at v. ³⁶ *Id.* ³⁷ *Id.* ³⁸ *Id.* at vii. ³⁹ *Id.* at ix. ⁴⁰ *Id.*