FEDERAL INTERVENTION IN AMERICAN POLICE DEPARTMENTS

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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 park[13] when a Ferguson Police Department officer demanded to see his identification[14] 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 DEP'T 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/csllea08.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_clevelan.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).

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 commpt1.pdf.

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

the Buildup Era. There are two primary examples of how the federal government increased the cost of police misconduct during this Buildup Era.

First, federal courts increased the cost of misconduct by developing the exclusionary rule. The first major step in this direction happened in the US Supreme Court case of *Mapp* v. *Ohio*. Years before *Mapp*, the Court had attempted to remove the incentive for law enforcement officers to engage in misconduct by excluding from criminal court any evidence obtained by officers in violation of the Constitution.[41] But this earlier decision applied only to police officers employed by the federal government. It did not apply to the vast majority of police officers who worked at the local and state levels. These local police officers were still free to violate the Constitution during their investigations with relative impunity. In *Mapp*, the Court finally changed this.[42] The *Mapp* decision extended this so-called exclusionary rule to cover the behavior of local police officers.[43] Today, because of the *Mapp* decision and its progeny, police officers have a somewhat reduced incentive to engage in misconduct.

After *Mapp*, the exclusionary rule became the primary weapon for fighting local police misconduct. In the decades that followed, the Court turned to the exclusionary rule to discourage a range of police behaviors. Most famously, in the *Miranda* v. *Arizona* decision from 1966, the Supreme Court held that police must read criminal suspects a list of prophylactic warnings before initiating an interrogation.[44] The Supreme Court used the exclusionary rule established in *Mapp* as the enforcement mechanism for this new *Miranda* protocol. If a police officer failed to read a criminal suspect his or her *Miranda* rights, any incriminating statement obtained in that interrogation is generally deemed inadmissible in court. The Court has also used the exclusionary rule to enforce a number of other limitations on police behavior,

[41] *Weeks* v. *United States*, 232 US 383 (1914).

[42] *See generally Mapp* v. *Ohio*, 367 US 643 (1961) (mandating the exclusion of evidence obtained in violation of the Fourth Amendment by a state law enforcement officer).

[43] *Id.* at 655–661.

[44] The justices in the *Miranda* decision cited the Wickersham Commission Report multiple times in explaining the long, documented history of police brutality and misconduct during interrogations. *Miranda* v. *Arizona*, 384 US 436, 445 n.5, 447–448 (1966) (citing the Wickersham Commission Report as part of the evidence for abusive interrogation styles used at the time).

including limitations on searches of cars,[45] searches of homes,[46] and stops-and-frisks.[47]

Second, Congress and federal courts carved out avenues for civilians to file federal civil rights lawsuits against local police officers and police departments during the Buildup Era. During the same year as the *Mapp* decision, the Court also handed down another pivotal decision that would allow for additional federal oversight of local police departments. In *Monroe* v. *Pape*, the Court concluded that individuals who were victimized by police misconduct could file suits against police officers under the Civil Rights Act of 1871 (now codified as 42 USC § 1983).[48] Congress originally wrote the Civil Rights Act of 1871, otherwise known as the Ku Klux Klan Act, to give newly freed slaves a legal remedy against state government officials who deprived them of their constitutional rights. But the language of the act was broad. It established that "any citizen of the United States or other person within the jurisdiction thereof" has a right of action in federal court against any state actor that deprives them of "any rights, privileges, or immunities secured by the Constitution and the laws."[49]

Despite the sweeping language of this act, courts generally prevented its use as a legal basis to sue police officers for the first ninety years of its existence. That changed in *Monroe*. There, the Supreme Court finally concluded that this broad language allowed civilians to file federal lawsuits against police officers who violated their constitutional rights.[50] Nearly two decades later in *Monell* v. *Department of Social Services of the City of New York*, the Court further expanded federal oversight of local police departments. In that case, the Court held that civilians could use § 1983 to sue both individual police officers *and* their employers, in certain limited

[45] *See, e.g., Arizona* v. *Gant*, 556 US 332 (2009) (limiting the ability of a police officer to search a vehicle incident to an arrest and using the exclusionary rule as a mechanism to enforce this new judicial mandate).

[46] *See, e.g., Kyllo* v. *United States*, 533 US 27 (2001) (limiting the ability of police officers to use heat sensors to gain an extrasensory look into a person's house and enforcing this new judicial mandate through the exclusionary rule).

[47] *See, e.g., Terry* v. *Ohio*, 392 US 1 (1968) (providing police with a limited ability to execute stops-and-frisks, but providing that failure to abide by the limitations of the court's ruling in this case would lead to evidentiary exclusion).

[48] 365 US 367 (1961). [49] 42 USC § 1983 (2000).

[50] At first glance, this power to file federal lawsuits against local police officers seems as if it would significantly deter wrongdoing. But a legal doctrine known as "qualified immunity" prevents individuals from winning such a suit against a police officer unless they can show that the police officer's conduct violated "clearly established law." For more on this legal doctrine, see the detailed discussion of qualified immunity in Chapter 2.

situations.[51] In *Monroe* and *Monell* the federal government armed civilians with two new, valuable litigation options to hold police accountable for wrongdoing.

In addition to evidentiary exclusion and civil liability, the federal government has also taken on a greater role in overseeing local police misconduct by prosecuting the most egregious instances of police misconduct under 18 USC § 242. In sum, by the late 1990s the federal government was positioned to engage in some sort of meaningful oversight of local police behavior. No doubt, this type of federal intervention into local police behavior motivated some police departments to take steps towards professionalization. But despite the increased cost of police misconduct, many problematic police departments still seemed unwilling or unable to address these problems on their own.

So, in 1994, in response to the release of the George Holliday video showing Los Angeles Police Department (LAPD) officers beating Rodney King on a Southern California highway, Congress took the most significant step to date in expanding federal oversight of local police departments. This began the next era in the federal regulation of local police conduct: the Intervention Era.

B The Intervention Era

Most of us know the story of the Rodney King beating. In March 1991, two police squad cars pursued a suspected drunk driver speeding on a Los Angeles highway.[52] At first, the incident seemed routine – the kind of

[51] *See Monell* v. *Dep't of Soc. Servs.*, 436 US 658, 694–701 (1978) (holding that a claimant under § 1983 could recover from a police department based on the actions of an officer if the department was deliberately indifferent in failing to train or supervise the officer).

[52] The pursuit started around 12:30 AM when California Highway Patrol (CHP) officers first observed King's Hyundai speeding in the northeastern San Fernando Valley in Los Angeles. Seth Mydans, *Seven Minutes in Los Angeles – A Special Report: Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, NY TIMES, March 18, 1991, *available at* www.nytimes.com/1991/03/18/us/seven-minutes-los-angeles-special-report-videotaped-beating-officers-puts-full.html. When the CHP officers put on their emergency lights and sirens, King slowed but did not stop. INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 4 (1991) [hereinafter Christopher Commission Report]. An LAPD squad car – assigned to Officers Laurence Powell and Timothy Ward – then joined the pursuit. *Id.*

incident that police handle on a regular basis.[53] Only minutes later, a video taken by a nearby onlooker showed three LAPD officers brutally beating one of the car's occupants – a man named Rodney King – while another eleven officers stood by watching.[54] The images shocked and disgusted the nation.[55] This is the story that most of us know.

What many people don't know is how the Rodney King incident radically transformed the regulation of police misconduct in the United States. Within weeks of this event, the US House Subcommittee on Civil and Constitutional Rights convened a hearing to examine how the federal government could combat local police wrongdoing.[56] "[T]here is no excuse for the type of behavior recorded on video tape in Los Angeles," declared Representative Don Edwards, chairman of the subcommittee.[57] "We want to know how widespread is police misconduct in Los Angeles and nationwide. We want to know how effective the Federal Government's response has been ... [and] [w]e want to look at ... whether [federal laws] need to be strengthened."[58]

[53] At around 12:50 AM, Powell and Ward radioed in a "Code 6," which signifies that a chase had come to a close. Christopher Commission Report, *supra* note 52, at 4. The LAPD radio transmission operator then broadcast a "Code 4," a notification to all officers that no additional assistance is needed at the scene of the pursuit. *Id.* at 5. Despite these transmissions, 11 additional LAPD units with 21 officers and a helicopter appeared at the scene; at least 12 of the officers arrived after the radio transmission operator had sent out the Code 4 broadcast. *Id.* The Christopher Commission also found that "a number of these officers had no convincing explanation for why they went to the scene after the Code 4 broadcast." *Id.*

[54] Amateur camera work by George Holliday caught a glimpse of the LAPD ruthlessly kicking and striking King "with 56 baton strokes." *Id.* at 3. King required 20 stitches and suffered a broken cheekbone and right ankle. Within days, video of the beating made headlines across the country, sparking public protests and outcry. *An Aberration or Police Business as Usual?* NY TIMES, March 10, 1994, at 47. Chief Gates called the incident as "an aberration." David Parrish, *Police "Street Justice" Called Normal Conduct*, DAILY NEWS, March 10, 1991, at N1. In the aftermath of these events, the City of Los Angeles formed an independent commission to formally investigate the conditions that precipitated the Rodney King incident, headed by Warren Christopher. *See generally* Christopher Commission Report, *supra* note 52. The Christopher Commission Report found a wide range of systematic problems affecting the LAPD including problems with use of force, complaint procedures, training policies, and structural organization. *See generally id.*

[55] President George H. W. Bush called the events "shocking" and ordered an investigation by the Department of Justice. *See* Seth Mydans, *Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, NY TIMES, March 18, 1991, at A1.

[56] *Police Brutality: Hearing Before the H. Subcomm. on Civil and Const. Rights of the Comm. on the Judiciary*, 102d Cong. 172 (1991).

[57] *Id.* at 1. [58] *Id.*

The subcommittee attempted to do just that. The Rodney King incident was a wakeup call for federal policymakers. For one thing, the event illustrated the organizational causes of local police misconduct. Subsequent investigations by both Congress and local officials in Los Angeles concluded that the Rodney King beating was not the result of a few rogue officers. It was indicative of a diseased organizational culture within the LAPD that condoned violence, tolerated racism, and failed to respond to misconduct.[59] The Rodney King incident was no aberration. It was part of a pattern and practice of misconduct that had afflicted the LAPD for years.[60] This was no surprise to policing scholars. In the years leading up to the Rodney King incident, there was a growing recognition that police misconduct often stemmed from a lack of adequate organizational oversight. Calls for reform, though, had been largely ignored until that fateful evening in March 1991.

The Rodney King incident also painfully demonstrated how the existing federal law had failed to reign in local police misconduct. Admittedly,

[59] Christopher Commission Report, *supra* note 52, at ix–x (explaining that after the city of Los Angeles investigated the use of force post-Rodney King incident, investigators discovered that in the years leading up to the King beating "183 officers had four or more allegations [of excessive force], 44 had six or more, 16 had eight or more, and one had 16 such allegations").

[60] Subsequent investigations into these incidents uncovered an organizational culture that permitted gross misconduct, patterns of excessive use of force, a failure by the LAPD to properly discipline officers, an inability to properly process citizen complaints, and a failure to adopt an early warning system to identify problematic police officers. In the investigation after the Rodney King incident, the Christopher Commission found that, among the officers who were subject to the most allegations of excessive use of force, "the performance evaluation reports for [these problematic officers] were very positive" as they "document[ed] every complimentary comment received and express[ed] optimism about the officer's progress in the Department." *Id.* at x. After the Rodney King incident, the Christopher Commission found that the LAPD's internal procedures for handling citizen complaints frequently led to public frustration. Out of 2,152 citizen allegations of excessive force, the LAPD sustained only 42. Once more, the commission determined that internal policies and procedures used by the Internal Affairs Division make it hard for citizens to file complaints. *Id.* at xix. Years later, investigators found that many of the basic problems remained. MERRICK J. BOBB, MARK H. EPSTEIN, NICOLAS H. MILLER, AND MANUEL A. ABASCAL, FIVE YEARS LATER: A REPORT TO THE LOS ANGELES POLICE COMMISSION ON THE LOS POLICE DEPARTMENT'S IMPLEMENTATION OF INDEPENDENT COMMISSION RECOMMENDATIONS 34 (May 1996) (hereinafter FIVE YEARS LATER REPORT ON LAPD), *available at* www.parc.info/client_files/Special%20Reports/2%20-%20Five%20Years%20Later%20-%20Christopher%20Commission.pdf.

important Supreme Court decisions like *Mapp, Miranda, Monroe*, and *Monell* had gradually increased the available remedies in cases of police wrongdoing. And statutes like § 1983 and § 242 provided additional avenues for redress. Despite this progress, the federal government continued to play a limited role in regulating local police misconduct. As one high-ranking DOJ official testified during the Rodney King hearings, the federal government is "not the front line," but instead "more of a backstop" in combating police misconduct.[61]

After the Rodney King hearings, Congress passed the Violent Crime Control and Law Enforcement Act (VCCLEA) of 1994. Most people know the VCCLEA as the bill that attempted to reduce crime by ratcheting up sentences for criminal offenders. But hidden inside this largely punitive measure was a little-known statute – § 14141 – that has turned out to be a monumentally important shift in the federal regulation of local policing. In the event that a police department like the LAPD is engaged in "pattern or practice" of unconstitutional misconduct, § 14141 gives the US attorney general the authority to seek a federal court order forcing that police department to make policy changes aimed at deterring future misconduct.[62] Essentially, § 14141 gives the federal government the power to force reform in local police departments.

This was a transformative moment in policing and civil rights history. Three short years after the DOJ described itself as a mere "backstop" in combating police misconduct, Congress pushed the federal government onto the front lines. Because of § 14141, the DOJ found itself with a new and expansive authority to force reform in problematic local police departments. The impact of § 14141 has been significant. Over the last twenty years, the DOJ has used § 14141 to overhaul police departments in many of the nation's largest cities. In each of the documented cases, policing has measurably improved after the initiation of federal oversight.

This underscores the most valuable feature of § 14141: the federal government's ability to intervene into problematic police departments

[61] *Police Brutality: Hearing Before the H. Subcomm. on Civil and Const. Rights of the Comm. on the Judiciary*, 102d Cong. 3 (1991) (statement of John R. Dunne, Assistant Attorney General, Civil Rights Division).

[62] 42 USC § 14141 (1994). Congress passed this statute as part of the VCCLEA of 1994. Pub. L. No. 103–322, 108 Stat. 1796. The statute makes it unlawful for a police agency to engage in a pattern or practice of unconstitutional misconduct, § 14141(a), and gives the attorney general the authority to seek injunctive or equitable relief to force police agencies to implement reforms aimed at curbing misconduct, § 14141(b).

and take action. During the Buildup Era, the federal government gradually expanded its oversight of local police departments through the invention of the exclusionary rule, the expansion of avenues for litigation against police departments, and increasing numbers of criminal prosecutions. While these Buildup Era reforms were significant, they often failed to stimulate widespread reform in local police departments. All of the regulatory developments in the Buildup Era were minimally invasive. Although each mechanism raised the cost of police misconduct, none of these mechanisms forced local police departments to make any changes aimed at proactively deterring future wrongdoing. Section 14141 represented the first major step in a new era of police regulation. For the first time, Congress gave the federal government the power to intervene into problematic local police departments and *force* them to implement proactive reforms aimed to curbing future misconduct. This signified the beginning of the Intervention Era in local police regulation.

Nevertheless, the Intervention Era has not yet solved the nation's police misconduct epidemic. Reactive intervention alone has not proven to be sufficient to bring about the kind of reform that many advocates desire. The underwhelming results of the Intervention Era can be traced back to a few remaining problems. For one thing, the federal government has only responded to local police misconduct during the Intervention Era via piecemeal litigation after it successfully identifies a problematic police department. By itself, this is not problematic. If the federal government had both ample data to identify problematic police departments and the financial resources to enforce § 14141 aggressively, then this sort of enforcement mechanism could work. Under these ideal conditions, police departments across the country would be effectively put on notice – if you fail to control your police officers, the DOJ will intervene quickly and forcefully.

Unfortunately, none of these optimal enforcement conditions exist. The federal government lacks virtually any data on local police behavior. In fact, national recordkeeping on local police conduct is so abysmal that, as FBI director James Comey has bluntly put it, "I can't tell you how many people were shot by the police last week, last month, [or] last year."[63] The federal government also lacks the necessary resources to intervene into many problematic police departments. Between 1994 and 2013, the

[63] Michael S. Schmidt, *F.B.I. Director Speaks Out on Race and Police Bias*, NY TIMES, February 12, 2015, at A1.

DOJ only investigated around three police agencies and intervened into around one police agency each year.[64]

Two potential problems emerge from this lack of data and lack of resources. First, the average police chief has little motivation to make proactive reforms aimed at curbing future wrongdoing. Between 1994 and 2013, the federal government investigated only 0.017 percent of police departments annually.[65] And the federal government intervened in only 0.006 percent of police departments annually.[66] Given these lottery-like odds, a rational police chief has little motivation to change his behavior because of the unlikely threat of federal intervention. Second, because of the lack of national data on police behavior, federal intervention has often appeared haphazard or procedurally unjust. As one city leader in Steubenville, Ohio, commented after his selection for federal intervention via § 14141, "You see all these problems that have come up at the police departments in Los Angeles and New York and New Orleans, and you've got to wonder, why us?"[67] This sort of skepticism is understandable, as the federal government has yet to develop a clear and transparent methodology for identifying which police departments are in need of federal reform.

Compounding these problems, the federal government has not developed a mechanism to ensure the sustainability of reforms brought about via federal intervention. The period of federal intervention into local police departments can be lengthy, sometimes lasting as long as a decade or more.[68] Further, once that process concludes, the federal government

[64] *See infra* Chapter 3 (describing the number of investigations conducted by the DOJ each year during this time period, based on data collected directly from the DOJ).

[65] Assuming the DOJ investigates around three agencies per year during this period and there are 18,000 police departments, as described *supra* note 26, then that would mean that the DOJ typically investigated 3/18,000 police departments on an annual basis, or 0.017 percent.

[66] Assuming the DOJ brings a § 14141 action against an average of one agency per year during this time period, and there are 18,000 police departments as described *supra* note 26, then that would mean the DOJ typically brought actions against 1/18,000 police departments on an annual basis, or 0.006 percent.

[67] Eric Lichtblau, *U.S. Low Profile in Big-City Police Probes Is Under Fire; Law: Critics Say Justice Dep't Boldly Pursues Misconduct Cases in Smaller Towns but Goes Slower on Larger Inquiries*, LA TIMES, March 17, 2000, at A1 (quoting Gary Dufour, former city manager of Steubenville, Ohio).

[68] Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1392 (showing in figure 5 the length of selected cases involving federal intervention via § 14141, with each taking between five and twelve years to complete).

must ultimately leave. The available evidence suggests that some cities may revert back to problematic practices after federal regulators leave town. For example, some have accused departments like the Pittsburgh Bureau of Police of sliding back into patterns of unconstitutional misconduct after federal overseers left the city.[69] Without any formal mechanism in place, the sustainability of reforms after federal intervention remains uncertain.

C The Path Forward: Expanded Oversight of Local Police

So where do we go from here? The Intervention Era has given us a glimpse of how federal regulation can improve American policing. Nevertheless, the Intervention Era has failed to bring about widespread reform. This book argues that the limitations of the Intervention Era do not represent fundamental problems with federal oversight. They represent commitment problems. We as a country have not yet bought into the idea of the federal government as a legitimate regulator of local police conduct. In passing § 14141, Congress gave the federal government expansive legal authority to intervene into local police departments. However, it failed to give the federal government the tools needed to use this expansive legal authority. You might say that in passing § 14141, Congress gave the DOJ a powerful weapon without adequate ammunition. This book argues that the federal government must finish the job. Congress must provide the federal government with the necessary resources to regulate local police misconduct effectively.

This book proposes a threefold package of reforms to improve federal oversight of local police departments. First, the federal government should collect better data on local police behavior. We currently have federal statistics how many civilians die at the hands of law enforcement every year in the United States. We have no data on the number of officer-involved shootings each year. We do not keep track of the number of injuries caused by police annually. Nor do we keep any national

[69] Laura Maggi, *Pittsburgh Bureau of Police Was First in Nation With Official Federal Intervention*, TIMES-PICAYUNE, October 16, 2011, *available at* www.nola.com/crime/index.ssf/2011/10/pittsburgh_bureau_of_police_wa.html (describing the Pittsburgh experience with federal intervention); Jeffrey Benzing, *Pittsburgh Police Could Face Second Federal Consent Decree, Peduto Says*, PUBLICSOURCE, July 1, 2014, *available at* http://publicsource.org/from-the-source/pittsburgh-police-could-face-second-federal-consent-decree-peduto-says (describing how Pittsburgh may have fallen back into a pattern or practice of misconduct).

statistics on citizen complaints against local police officers. Congress did recently pass the Deaths in Custody Reporting Act, which will require local police departments to report the number of individuals killed in police custody each year.[70] Similar laws handed down by Congress, though, have previously gone unenforced.[71] Requiring police departments to report more data on officer behavior to the federal government is both feasible and cost-effective. The federal government already requires local police departments to report data on the number of crimes that occur in each jurisdiction.[72] Congress could easily require local police departments to report additional data on anything from the number of officer-involved shootings, to the number of civilian complaints, to the number of civil rights lawsuits. This list is by no means exhaustive. The federal government already has a useful enforcement mechanism to ensure that localities meet such reporting requirements. The bottom line is that these additional reporting requirements would not be financially burdensome for local police departments and would shed important light on the behavior of local police departments. This book considers several ways the DOJ could harness these additional databases to incentivize reform in local police departments.

Second, it is time for the federal government to move from reactive to proactive regulation of local police departments. One way to accomplish this would be for the federal government to tie federal funding to local police departments to the enactment of reforms aimed at curbing police misconduct. The federal government currently provides upwards of $500 million in grant money to local and state police departments every year. But the overwhelming majority of these grants go to the promotion of public safety, the encouragement of agency coordination, and the purchase of new policing equipment. The federal government

[70] Death in Custody Reporting Act, Pub. L. No. 113–242 (codified as 42 USC § 13727 (2015)).

[71] Technically, this law is simply a reauthorization of an earlier measure passed in 2000. It took several years for law enforcement agencies to report data via the original version of this law. And the original version expired shortly thereafter in 2006. As a result, the DOJ did not release any comprehensive statistics from the first attempt at this sort of database. Allie Gross, *Congress Is Finally Going to Make Local Law Enforcement Report How Many People They Kill*, Mother Jones, December 17, 2014, *available at* www.motherjones.com/politics/2014/12/death-custody-reporting-act-police-shootings-ferguson-garner.

[72] U.S. Dep't of Justice, Bureau of Justice Statistics, Uniform Crime Reports (UCR): Crime in the United States (2000–2012), Law Enforcement Officers Killed and Assaulted (hereinafter UCR Reports Police Deaths and Assaults Data), www.fbi.gov/about-us/cjis/ucr/ucr-publications.

almost never ties this funding to the promotion of "lawfulness, accountability, or fairness in policing."[73] By changing this, Congress could inspire proactive reform. In addition to this proposal, this book lays out several additional, ambitious models of proactive federal regulation of local police departments.

Third, the federal government should look for ways to increase the frequency of federal interventions via § 14141 or other similar top-down reform efforts. Congress could conceivably accomplish this by providing the DOJ with substantially more funding to investigate and intervene into more police departments via § 14141. This book also considers a number of other, less costly ways for the federal government to increase the frequency of these sorts of top-down reform efforts. This book concludes by arguing that this package of reforms would represent the next step in the evolution of police regulation. While some of these reforms may be contentious, they would likely contribute to substantial reductions in local police misconduct.

III Roadmap of the Book

The first chapter of this book describes the problem of police misconduct in the United States. This chapter complicates the typical narrative surrounding police misconduct. It argues that police misconduct is not evenly spread across the country. Instead, the United States has historically suffered from a small handful of corrupt police departments that systemically violate civil rights with virtual impunity. This realization raises a simple question – why have a handful of communities abdicated their responsibility for fighting police wrongdoing? The answer is at the heart of the regulatory challenge we face today. This chapter evaluates unique conditions that have led to the presence of systemic misconduct in a handful of police departments in the United States. It also chronicles the historical rise and fall of the Hands-Off and Buildup Eras in American police regulation. Ultimately, Chapter 1 concludes that while cost-raising mechanisms made police misconduct more expensive during the Buildup Era, they did not consistently inspire proactive change in police departments. Thus, the failure of the Buildup Era motivated Congress to eventually pass § 14141 in 1994, thereby beginning the Intervention Era.

[73] Rachel Harmon, *Federal Programs and the Real Cost of Policing*, 90 NYU L. Rev. 870, 890 (2015).