

REFLECTIONS ON THE FERGUSON REPORT

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ABSTRACT

This Essay reflects on the significance of the *Investigation of the Ferguson Police Department* by the Civil Rights Division of the Department of Justice (“Ferguson Report”). The Ferguson Report is a valuable teaching tool for criminal procedure because it documents detailed cases of police misconduct. But it also reveals how many deeply intrusive and over-reaching policing practices are not, in fact, unconstitutional. Reading the Report offers a window into how the law can enable misconduct, and it reveals how little opportunity the community affected had to create change.

INTRODUCTION

How does law shape police lawlessness? And what can lawyers do to promote change? For this Symposium, marking ten years since the time of the “Ferguson Uprisings,” I want to consider these questions by reading the *Investigation of the Ferguson Police Department* by the Civil Rights Division of the Department of Justice (“Ferguson Report”). The Ferguson Report is the most well-known legal document to emerge from the wake of the fatal shooting of Michael Brown on August 9, 2014. For several years, I have assigned the report to law students interested in criminal procedure.

I assign the Ferguson Report because the Department of Justice lawyers and investigators had a remarkable degree of access to the Ferguson Police Department—the investigators “participated in ride-alongs with on-duty officers, reviewed over 35,000 pages of police records as well as thousands of emails and other electronic materials provided by the police

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department.”¹ Few lawyers will ever have this level of access to the inner workings of a legal system. Most civil rights lawyers representing individuals in police misconduct claims will never get to see the bigger picture—how an individual case of police misconduct relates to other cases—much less how the policing operates as a whole. If systemic data is produced at all, it is likely heavily redacted for litigation. There is often no opportunity to question city officials. And any opportunity for a back-and-forth comes within the narrow context of a deposition, and it would be limited to those witnesses relevant to the individual police misconduct. The Ferguson Report represents a different type of engagement with the law, and a different type of lawyering, than what many lawyers do.

I also assign the Ferguson Report because it looks different from the typical documents (i.e., briefs, complaints, legal opinions) that law students typically see. Because of this, my students often tell me they see the goal of the Ferguson Report as akin to investigative journalism. They believe the lawyers were trying to pull back the curtain and reveal police abuses. And just by careful accretion of detail itself—by documenting police abuse through both narratives and data—lawyers can make the case for change.

I suspect one reason why my students see the Ferguson Report this way—rather than as a prelude to litigation—is because it is relatively light on the law. No careful parsing of the law is required to understand what is wrong with the egregious policing practices discussed in the Ferguson Report: false arrests, excessive force, racial profiling, using the criminal law to gin up revenue, and the pervasive lack of respect the police demonstrated for the citizenry they are sworn to protect. The aim of the Ferguson Report was to change the policing practices on the ground to bring them in line with the governing doctrine, and not change the governing doctrine itself.

In this Essay, I want to engage with some of the unelaborated Fourth Amendment doctrine for two ends. On a granular level, it is important to recognize how law contributes to unlawful conduct. Quite a bit of the policing behavior discussed in the Ferguson Report is lawful, even when it is also deeply intrusive, frightening, and unreasonable. Recognizing this provides an opportunity to consider where to draw the line, and how the existing doctrinal lines contribute to systemic lawlessness. Second, the narratives provide an opportunity to consider what avenues people have to

1. C.R. DIV., DEP’T. OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1 (2015) [hereinafter *Ferguson Report*].

address unreasonable behavior by the police. Much of the conduct that was reported took place openly and egregiously. Courts often implicitly assume that the political process can change or curb unjustified policing practices, but Ferguson provides an important example of how difficult it can be for members of the public—even in the age of ubiquitous cell phone videos and other types of accountability—to check open and pervasive lawlessness by the police.

I. THE FERGUSON REPORT

In 2014, the Department of Justice (DOJ) published the Ferguson Report. The DOJ reported that it spent one hundred person-days onsite and found that Ferguson officers engaged in a wide variety of unconstitutional policing practices with the stated aim of revenue generation.² The Ferguson Report states, “Ferguson police officers from all ranks told us that revenue generation is stressed heavily within the police department, and that the message comes from City leadership.”³ The police were encouraged to engage in over-enforcement of low-level municipal code violations. “Patrol assignments and schedules [were] geared toward aggressive enforcement of Ferguson’s municipal code” at the expense of the community’s well-being.⁴ The Ferguson Report concluded that “the City’s focus on revenue rather than [] public safety . . . compromised the institutional character of Ferguson’s police department, contributing to a pattern of unconstitutional policing . . . Further, Ferguson’s police and municipal court practices both reflect and exacerbate existing racial bias, including racial stereotypes.”⁵

The Ferguson Report documented racial bias using data on police stop, arrests, and use of force. From 2012–2014, the Ferguson Report stated:

African Americans account[ed] for 85% of vehicle stops, 90% of citations, and 93% of arrests made by FPD officers, despite comprising only 67% of Ferguson’s population. African Americans are more than twice as likely as white drivers to be searched during vehicle stops even after controlling for non-race based variables such as the reason

2. *Id.*

3. *Id.* at 2.

4. *Id.*

5. *Id.*

the vehicle stop was initiated, but are found in possession of contraband 26% less often than white drivers, suggesting officers are impermissibly considering race as a factor when determining whether to search.⁶

The Ferguson Report also documented that African Americans were much more likely to receive “multiple” citations during a single incident and that African Americans accounted for “95% of Manner of Walking in Roadway charges, and 94% of all Failure to Comply charges.”⁷ The Ferguson Report documented racial disparities in the use of force: “Nearly 90% of documented force used by FPD officers was used against African Americans. In every canine bite incident for which racial information is available, the person bitten was African American.”⁸

II. POLICE-CITIZEN ENCOUNTERS

In addition to providing data on policing, the Ferguson Report documents several instances of police misconduct. Narratives of police-civilian encounters are found throughout the Ferguson Report. Parsing the line between lawful and unlawful conduct illuminates how law can play a role in enabling deeply intrusive and unjustified policing practices. My aim is to highlight a few of the narratives here and consider how these encounters relate to Fourth Amendment doctrine.

One encounter detailed in the Ferguson Report involves an African-American man who was arrested and charged with eight different counts, including giving a false name by telling the officer his name was “Mike” instead of “Michael.” This is the full narrative:

[I]n the summer of 2012, an officer detained a 32-year-old African-American man who was sitting in his car cooling off after playing basketball. The officer arguably had grounds to stop and question the man, since his windows appeared more deeply tinted than permitted under Ferguson’s code. Without cause, the officer went on to accuse the man of being a pedophile, prohibit the man from

6. *Id.* at 4.

7. *Id.*

8. *Id.* at 5.

using his cell phone, order the man out of his car for a pat-down despite having no reason to believe he was armed, and ask to search his car. When the man refused, citing his constitutional rights, the officer reportedly pointed a gun at his head, and arrested him. The officer charged the man with eight different counts, including making a false declaration for initially providing the short form of his first name (e.g., “Mike” instead of “Michael”) and an address that, although legitimate, differed from the one on his license. The officer also charged the man both with having an expired operator’s license, and with having no operator’s license in possession. The man told us he lost his job as a contractor with the federal government as a result of the charges.⁹

Mike’s encounter with the police raises issues of pretext, coerced consent searches, profiling, unjustified violence, and mediating the consequences of arrest. Mike was doing something utterly ordinary—winding down after basketball at a park—when the police first engaged with him. The officer approached Mike for the stated purpose of addressing his purported tinted windows, a low-level violation that could easily be addressed by means other than the criminal law. This is a classic example of over-criminalization.

Minor encounters like this one can also easily escalate into arrests. In *Atwater v. City of Lago Vista*, the Supreme Court held that police may lawfully make full custodial arrests for fine-only offenses.¹⁰ Gail Atwater was subjected to a full custodial arrest for a seatbelt violation. The seatbelt violation itself carried a fifty dollar fine as the maximum punishment. The Court held that handcuffing her, taking her to the precinct, putting her through the booking process and jailing her was not unreasonable under the Fourth Amendment—even as it characterized Atwater’s arrest as a “pointless indignity” and commented that the officer’s behavior demonstrated “extremely poor judgment at best.”¹¹

In the *Atwater* case, the Court noted that “good sense” and “political

9. *Id.* at 3.

10. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 351–52 (2001).

11. *Id.* at 346–47.

accountability” would serve as a check to boorish police behavior.¹² But in Mike’s case, he had to wait two years until after his incident before the DOJ published the Ferguson Report. He was not able to address the consequences of police misconduct prior to losing his job. And his case was not isolated—the police department in Ferguson for years had been violating the rights of the people with apparent impunity.

Beyond overcriminalization, the doctrine of consent searches also opens the door to significant intrusions of liberty. What if, instead of refusing, Mike had consented to the search of his car? If the police officer discovered something unlawful during the car search, he would be entitled to lawfully arrest Mike. If Mike had tried to raise the issue of coercion after the fact, he would likely lose.

A police officer’s request to search someone like Mike’s car, apropos of nothing, is likely be perceived as jarring and intrusive. If Mike consented to the search, and then later sought to suppress any evidence obtained through that search, he would nonetheless face an uphill battle. Someone in Mike’s shoes may well fear retaliation if they refuse to consent to a search (and in this case, the fear was well-founded; the officer reportedly held a gun to his head and arrested him after he refused).¹³ But even if Mike had a reasonable fear of police retaliation, his consent may well have been treated as valid under the legal standard in *Schneckloth v. Bustamonte*. There, the Supreme Court held that police were not required to advise a driver that he had the right to say no to a warrantless car search that took place at 2:40 in the morning, after a police officer stopped an automobile (based on a burned-out headlight), asked to see identification, ordered the occupants out, and requested to search the vehicle.¹⁴ The officer’s “uncontradicted testimony” described the encounter as “all very congenial at [the] time.”¹⁵

The Court stated that in assessing whether the “defendant’s will was overborne in a particular case,” such that his consent was not valid, courts analyze “the totality of all the surrounding circumstances,” including factors such as youthfulness, lack of education, and/or the prolonged nature of questioning.¹⁶ In this formulation, a person not being advised of the right to

12. *Id.* at 353.

13. *See Ferguson Report, supra* note 1, at 3.

14. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 220 (1973).

15. *Id.*

16. *Id.* at 226.

say “no” is relevant, but it is not dispositive. The Court justified its decision by emphasizing the importance of “consent” searches for gathering up evidence of wrongdoing.¹⁷ This dynamic opens the door to what Justice Marshall characterized in his dissent as “the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights.”¹⁸

If Mike had been asked for consent to search his car, and he had agreed, the setting would likely count against him. He was not isolated in a car in the middle of the night; he was in a park that was presumably populated with others playing basketball and enjoying the grounds.¹⁹ And there were no weapons displayed by the officer at the time of the search.²⁰ Even if he felt coerced in the public setting—and even if reasonable people would feel as though they had to agree when asked to submit to a search by a uniformed officer—that may well be insufficient to establish coerced consent.

The officer violated the law by ordering Mike out of the car and performing a frisk without any reasonable suspicion. And yet, the line between the legal standards at issue—probable cause for an arrest, reasonable suspicion for a stop-and-frisk, and no showing at all for a consent-based search—often blur together so fluidly that it is difficult to point to where lawful conduct leaves off and lawlessness begins. In *Terry v. Ohio*, the Supreme Court for the first time made a distinction between two different types of seizures: “arrests” and “stops.” In *Terry*, the Court held that while an arrest requires a showing of probable cause, a “stop” requires a lower standard of proof, given its more limited intrusion on a person’s liberty.²¹ In Mike’s case, there was of course no justification for a frisk. But the standard for “reasonable suspicion” is low—even lower than probable cause for an arrest. And that, in turn, opens the door to a range of common behavior that could be targeted.

One reason why the encounter is so jarring for someone in Mike’s shoes is precisely because of pretext. A reasonable person in Mike’s shoes would wonder whether the officer was looking for an excuse to order him out of

17. *Id.* at 227–28.

18. *Id.* at 288 (Marshall, J., dissenting).

19. *See Ferguson Report, supra* note 1, at 3.

20. *See id.*

21. *See Terry v. Ohio*, 392 U.S. 1, 21–22 (1968).

his car. In *Whren v. United States*, however, the Supreme Court largely foreclosed the door to pretext-based arguments and held that the “actual motivations” or “subjective intentions” of a police officer “play no role in ordinary, probable-cause Fourth Amendment analysis.”²² In *Whren*, the officers’ “suspicions were aroused” when “when they passed a dark Pathfinder truck with temporary license plates and youthful occupants waiting at a stop sign, [with] the driver looking down into the lap of the passenger at his right.”²³ The driver “remained stopped at the intersection for what seemed an unusually long time—more than 20 seconds.”²⁴ After the police “executed a U-turn in order to head back toward the truck, the Pathfinder turned suddenly to its right, without signaling, and sped off at an ‘unreasonable’ speed.”²⁵

Whren raised the question of lawlessness in the guise of unfettered discretion by police. Since so many traffic code violations exist, police can pick and choose whom to target. As the petitioner argued, “a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists.”²⁶ In addition, the police will use pretext as a means to target people on prohibited grounds, such as race.²⁷ The Court ultimately held that an officer’s motive does not invalidate “objectively justifiable behavior under the Fourth Amendment” and the “constitutional reasonableness of traffic stops” does not depend “on the actual motivations of the individual officers involved.”²⁸ Thus, even where police admit that they had bad faith or unlawful motivations, a stop might be considered “objectively reasonable.”

The Ferguson Report contains several other cases of pretextual police encounters. The entire system, from line officers to supervisors to court officers, was tainted. And many of the instances of police misconduct

22. *Whren v. United States*, 517 U.S. 806, 813 (1996).

23. *Id.* at 808.

24. *Id.*

25. *Id.*

26. *Id.* at 810 (“Petitioners, who are both [B]lack, further contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car’s occupants.”).

27. *Id.* at 813.

28. *Id.* at 812–13.

happened openly. Consider this one:

In October 2012, police officers pulled over an African-American man who had lived in Ferguson for 16 years, claiming that his passenger-side brake light was broken. The driver happened to have replaced the light recently and knew it to be functioning properly. Nonetheless, according to the man's written complaint, one officer stated, "let's see how many tickets you're going to get," while a second officer tapped his Electronic Control Weapon ("ECW") on the roof of the man's car. The officers wrote the man a citation for "tail light/reflector/license plate light out." They refused to let the man show them that his car's equipment was in order, warning him, "don't you get out of that car until you get to your house." The man, who believed he had been racially profiled, was so upset that he went to the police station that night to show a sergeant that his brakes and license plate light worked.²⁹

As they did with Mike, the officers engaged in open retaliation in this case. The purported violation was demonstrably false—everyone could see that the light was in order—but the police prevented the citizen from getting out of the car. This indignity was a form of public humiliation: The individual was forced to stay seated rather than demonstrate the basis for the false citation, and it had the potential to easily escalate into unjustified violence. Under these circumstances, it is remarkable that the targeted individual still took the step of engaging in an act of citizenship—going to the police station and reporting that the police violated his rights.

In Ferguson, the act of going to the police station itself carried the potential for escalating violence. For instance, the Ferguson Report details an encounter where a man was falsely arrested simply because he happened to encounter officers while leaving a police station. The Ferguson Report details the following:

[In] March 2013, officers responded to the police station to take custody of a person wanted on a state warrant. When they arrived, they encountered a different man—not the

29. *Ferguson Report*, *supra* note 1, at 14.

subject of the warrant—who happened to be leaving the station. Having nothing to connect the man to the warrant subject, other than his presence at the station, the officers nonetheless stopped him and asked that he identify himself. The man asserted his rights, asking the officers “Why do you need to know?” and declining to be frisked. When the man then extended his identification toward the officers, at their request, the officers interpreted his hand motion as an attempted assault and took him to the ground. Without articulating reasonable suspicion or any other justification for the initial detention, the officers arrested the man on two counts of Failure to Comply and two counts of Resisting Arrest.³⁰

Like Mike’s arrest, this is yet another case of retaliation. The officers justified their false arrest by the claim that they interpreted his arm movements in a way that was threatening. Police have considerable discretion in interpreting seemingly innocuous conduct in ways that then justify police arrests, detentions, and prosecutions. Police routinely make discretionary determinations about whether a person may be reaching for a weapon or whether a particular symbol indicates a gang affiliation. When people who engage in innocent movements that police officers claim are dangerous, they face an uphill battle.

This approach is not limited to movements. For instance, in *Illinois v. Wardlow*, the Supreme Court held that “unprovoked” flight in a “high crime area” was sufficient to establish the legal justification for a stop.³¹ The Court further noted that the legal doctrine recognizes that “nervous, evasive behavior” is relevant to establishing reasonable suspicion.³² The definition of a “high crime area” was left undefined in *Wardlow*, and “nervous, evasive” behavior is likewise vague. Many people may be nervous in the presence of police. And, as the dissent pointed out, “A pedestrian may break into a run for a variety of reasons—to catch up with a friend a block or two away, to seek shelter from an impending storm, to arrive at a bus stop before the bus leaves, to get home in time for dinner, to resume jogging after a

30. *Id.* at 21.

31. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

32. *Id.* at 124.

pause for rest, to avoid contact with a bore or a bully, or simply to answer the call of nature—any of which might coincide with the arrival of an officer in the vicinity.”³³ The doctrine gives the police the benefit of the doubt when interpreting movements that are ambiguous as best. As a result, it makes it exceedingly difficult for people subject to unjustified arrest and use of force to demonstrate that the officer acted without basis.

The Ferguson Report also reveals a continued unwillingness by police officers to recognize the human toll of harassing police behavior. In another encounter, police also handcuffed and detained a man—even though they knew he was not the person they had legal cause to arrest—and then minimized the harm caused to him:

[I]n July 2013 police encountered an African-American man in a parking lot while on their way to arrest someone else at an apartment building. Police knew that the encountered man was not the person they had come to arrest. Nonetheless, without even reasonable suspicion, they handcuffed the man, placed him in the back of a patrol car, and ran his record. It turned out he was the intended arrestee’s landlord. The landlord went on to help the police enter the person’s unit to effect the arrest, but he later filed a complaint alleging racial discrimination and unlawful detention. Ignoring the central fact that they had handcuffed a man and put him in a police car despite having no reason to believe he had done anything wrong, a sergeant vigorously defended FPD’s actions, characterizing the detention as “minimal” and pointing out that the car was air conditioned. Even temporary detention, however, constitutes a deprivation of liberty and must be justified under the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809–10 (1996).³⁴

How does society measure the cost of being handcuffed, falsely arrested, and detained in a police car? Often, the cost of police misconduct is measured in terms of discrete metrics—physical injuries after excessive force, or the length of detention after a false arrest, for instance. This

33. *Id.* at 128–29 (Stevens, J., dissenting in judgment).

34. *Ferguson Report*, *supra* note 1, at 17.

approach is too narrow—it does not do justice to the uncertainty, indignity, and fear of being helpless at the hands of the police. And this approach may also contribute to the mindset of the police sergeant who insisted that the being handcuffed and placed in an air-conditioned police car was a “minimal” intrusion.

CONCLUSION

The Ferguson Report contains too many encounters to fully detail here. Taken as a whole, the Ferguson Report shows which law violations by the police were both open and egregious. But it is important to also recognize how the law gives police justification for initiating and escalating unjustified stops, arrests, and uses of force. Recognizing how law contributes to lawlessness should be an important lesson taken from the Ferguson Report.