

An Evaluation of the Necessity and Potential Effectiveness of the Consent Decree

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This paper will examine elements of the U.S. Department of Justice (DOJ) Report, “Investigation of the Ferguson Police Department” alongside qualitative data collected during field visits to Ferguson, Missouri in 2014 and 2015. The data will show that the information presented in the report is consistent with the experiences of African Americans in Ferguson that are documented in my research, both from personal observation and from extended conversations with residents. Additionally, these findings will be applied to specific sections of the Consent Decree in order to demonstrate the potential effectiveness of the Consent Decree as a solution to ongoing tensions between the Ferguson Police Department (FPD) and the community, particularly African American residents. Finally, I will show that the data supports the necessity of the Consent Decree in light of the well-documented problems of accountability within the FPD.

Ultimately, this paper suggests that the well-documented patterns of racial bias as well as unconstitutional and unlawful practices that are commonplace within the FPD compel the Court to take action in support of the residents of Ferguson. As this intervention has taken the form of the Consent Decree, I urge the Court to maintain and even strengthen certain provisions of the Decree, specifically as they relate to routine violations of residents’ Fourth Amendment protections through searches, stops, citations, and arrests as well as through FPD officers’ use of force.

Introduction

I travelled to Ferguson, Missouri in December of 2014 and again in July of 2014. In total I have spent over 5 weeks in the St. Louis area in order to study the intersection of race and policing in the local context in pursuit of my doctorate in Anthropology. My data collection took the form of interviews, both formal and informal, as well as participant observation, a qualitative data collection method that emphasizes direct involvement in the interactions and activities one seeks to study. This project has enabled me to spend a considerable amount of time talking to residents of Ferguson and Protesters as well as shorter but insightful conversations and interactions with FPD officers, former Interim Chief Andre Anderson, and other city officials. I also attended several protests, city meetings, and informal community gatherings in order to familiarize myself with the dynamics of the tension between African American residents of Ferguson and the FPD.¹ This research has provided me with a nuanced understanding of the conflict at hand, and I seek to lend this perspective to those evaluating the necessity and potential effectiveness of the Consent Decree.

Violations of the Fourth Amendment in Stops, Searches, Citations, and Arrests

Section A-1 of “Investigation of the Ferguson Police Department” concerns the constitutionality, or more accurately the lack thereof, of stops and arrests routinely carried out by FPD. The authors of the report note that, “FPD misconduct in the area of stops and arrests

¹ My research was not limited to Ferguson, as I have an academic interest in the Greater St. Louis area as a whole, but my project has taken Ferguson as a particular point of focus. This has led to me spending more time in Ferguson and with residents of Ferguson than any other area of Greater St. Louis.

disproportionately impacts African Americans” (p 16). Many violations of this nature took the form of a “failure to comply” charge. Subsection b-i of Section A-1 of the report reads:

Officers frequently arrest individuals under Section 29-16(1) on facts that do not meet the provision’s elements. Section 29-16(1) makes it unlawful to “[f]ail to comply with the lawful order or request of a police officer in the discharge of the officer’s official duties where such failure interfered with, obstructed or hindered the officer in the performance of such duties.” Many cases initiated under this provision begin with an officer ordering an individual to stop despite lacking objective indicia that the individual is engaged in wrongdoing. The order to stop is not a “lawful order” under those circumstances because the officer lacks reasonable suspicion that criminal activity is afoot. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 882-83 (1975); *United States v. Jones*, 606 F.3d 964, 967-68 (8th Cir. 2010). Nonetheless, when individuals do not stop in those situations, FPD officers treat that conduct as a failure to comply with a lawful order, and make arrests. Such arrests violate the Fourth Amendment because they are not based on probable cause that the crime of Failure to Comply has been committed. *Dunaway v. New York*, 442 U.S. 200, 208 (1979). (p 19)

Frequent instances of Fourth Amendment violations also appear in my collected data. I was told of instances in which drivers were stopped and had their belongings searched because they were white in a largely African American neighborhood and vice versa. I have witnessed protesters arrested for failing to comply with unlawful orders during protests, and heard dozens of similar stories. I have been informed of traffic stops in which the officer ultimately let the (African American) driver go without writing a citation because the officer could not identify any violations – the real purpose of this traffic stop was to check for warrants without probable cause. The same man relayed another instance in which he received eight citations during one traffic stop in a similar situation, many that were ultimately dismissed because they were unfounded.

The DOJ gathered some of the evidence for these claims much like I did - by talking with residents about their previous experiences. The report states, however, that many of claims stem from information that the FPD itself provided. This is stated in Subsection a of Section A-1:

In reviewing FPD records, we found numerous incidents in which—based on the officer’s own description of the detention—an officer detained an individual without articulable reasonable suspicion of criminal activity or arrested a person without probable cause. In none of these cases did the officer explain or justify his conduct. (p 17)

The Consent Decree seeks to address Fourth Amendment violations in Section VII, titled “VOLUNTARY CONTACTS, STOPS, SEARCHES, CITATIONS, AND ARRESTS” (p 19). Subsections a through d of Section VII outline a set of principles that the FPD is to follow. These principles are so reasonable that they may well be considered basic to lawful and ethical policing. The Decree recommends, for example, that the FPD and other city employees refrain from instituting law enforcement policies with an intention to reap profits and discriminating based on race, gender, or other such markers. In addition to the low baseline level of ethical standards laid out in these suggestions, these sections offer no insight on how these principles will be enforced other than, “the City agrees to ensure that FPD officers adhere” to these principles.

While data collected by both the DOJ and myself show a clear necessity for the intervention of the Court to protect the Fourth Amendment rights of the residents of Ferguson, I suggest that the Consent Decree section relevant to this issue does not go far enough to institute reform in this area. I urge the Court to strengthen protections of the Fourth Amendment in order to ensure that FPD officers are familiar with how the Fourth Amendment should inform their practices regarding stops, searches, citations, and arrests.

Violations of the Fourth Amendment in FPD Officers' Use of Force

Section A-3 of the DOJ report addresses officers' use of force in relation to Fourth Amendment protections. The report reads:

FPD engages in a pattern of excessive force in violation of the Fourth Amendment. Many officers are quick to escalate encounters with subjects they perceive to be disobeying their orders or resisting arrest. They have come to rely on ECWs, specifically Tasers®, where less force—or no force at all—would do. They also release canines on unarmed subjects unreasonably and before attempting to use force less likely to cause injury. Some incidents of excessive force result from stops or arrests that have no basis in law. Others are punitive and retaliatory. In addition, FPD records suggest a tendency to use unnecessary force against vulnerable groups such as people with mental health conditions or cognitive disabilities, and juvenile students. Furthermore, as discussed in greater detail in Part III.C. of this report, Ferguson's pattern of using excessive force disproportionately harms African-American members of the community. The overwhelming majority of force—almost 90%—is used against African Americans. (p 28)

These claims were also substantiated by the data I collected in Ferguson. I have witnessed FPD officers body-slam a teenage girl to the ground in a parking lot while she posed no immediate physical threat to an officer or anyone else, without attempting to deescalate the argument by other means. I have heard of people being beaten and taunted by correctional officers inside of the Ferguson Jail. I have seen scars on small, teenage bodies from Tasers and have photographed several pairs of wrists cut and bruised from flexcuffs, a widely-known method of retaliation by police during arrests.

Investigators for the DOJ heard many stories similar to these as they sought out data for their report. In addition to residents' recollections, the DOJ also drew on documentation generated by FPD officers after they administer force. Section A-3 concludes with the following statement:

FPD's stated practice is to maintain use-of-force investigation files for all situations in which officers use force. We reviewed the entire set of force files provided by the department for period of January 1, 2010 to September 8, 2014. Setting aside the killing of animals (e.g., dogs, injured deer) and three instances in which the subject of the use of force was not identified, FPD provided 151 files. We also reviewed related documentation regarding canine deployments. Our finding that FPD force is routinely unreasonable and sometimes clearly punitive is drawn largely from FPD's documentation; that is, from officers' own words.
(p 29)

Section IX of the Consent Decree, titled, "FORCE" (p 31), seeks to address this issue.

Much like the aforementioned section VII, Section IX lists a set of guidelines (a through h) for officers' use of force. Again, these suggestions are so commonsense and that they seem obvious; do not subject officers or civilians to unnecessary injury, use a level of force out of proportion to the threat or resistance, intervene when a fellow police officer or corrections officer is using unnecessary force, and provide immediate medical assistance as necessary after using force.

These suggestions outline basic practices that all police officers should adhere to so as not to violate residents' Fourth Amendment rights and, more importantly, not to inflict undue physical (and often psychological) harm on the very population they are charged to serve. While item h on this list specifies that officers should be disciplined for unnecessary, unreasonable, or unlawful use of force, it does not specify what form this disciplinary action might take and to what extent it will be enforced. Further, Residents of Ferguson are traumatized by repeated instances of excessive force deployed against themselves, their families, their friends, and even their pastors – especially since August of 2014. The circumstances in Ferguson warrant a higher level of scrutiny surrounding officers' use of force in order to ensure the safety of the residents as well as to bolster public confidence in the FPD and to promote an environment in which the population can heal, both physically and psychologically. Again, I urge the Court to consider

strengthening this section of the Consent Decree by outlining higher standards for conduct and specifying significant disciplinary actions for officers who violate them.

FPD Accountability and the Necessity of the Decree

As I mentioned above, the suggestions and guidelines outlined in the Consent Decree do not go far enough in ensuring the protection of the rights and bodies of Ferguson residents, particularly African Americans. That being said, the Consent Decree itself has proven necessary based on data collected by the DOJ and myself. One of the factors that makes this form of intervention so necessary is the ongoing lack of accountability within the FPD. One of the most striking forms of unaccountability is related to formal complaints against officers, a topic that was elaborated on in the DOJ report evaluating the police response to initial protests, titled, “After-Action Assessment of the Police Response in Ferguson, Missouri.” A key finding of this report states:

The St. Louis County PD and the St. Louis Metropolitan PD each reported one officer complaint during the assessment period. Neither the Ferguson PD nor the Missouri State Highway Patrol reported receiving a complaint against any officer or trooper during the assessment period. However, given the size and scope of the protest and the findings outlined within this report, the limited number of filed complaints is misleading. Other factors that made it difficult or impossible to lodge complaints— or a lack of confidence in the complaint process— likely deterred citizens from filing complaints about police behavior. (XVIII-XIX)

During my field visits I witnessed several people attempt to file complaints at FPD. Officers were reluctant and slow to take complaints and often challenged and dismissed the account given by the resident. I was told about officers reading people their Miranda Rights before they were allowed to give their complaint – a clear tactic of intimidation. Most

significantly, I heard from residents again and again that the FPD did not take complaints seriously or even keep them on file. The DOJ report on the FPD explains why this system of unaccountability is harmful for the community:

Public trust has been further eroded by FPD's lack of any meaningful system for holding officers accountable when they violate law or policy. Through its system for taking, investigating, and responding to misconduct complaints, a police department has the opportunity to demonstrate that officer misconduct is unacceptable and unrepresentative of how the law enforcement agency values and treats its constituents. In this way, a police department's internal affairs process provides an opportunity for the department to restore trust and affirm its legitimacy. Similarly, misconduct investigations allow law enforcement the opportunity to provide community members who have been mistreated a constructive, effective way to voice their complaints. And, of course, effective internal affairs processes can be a critical part of correcting officer behavior, and improving police training and policies. (82)

The issue of public trust in the FPD is even more salient when considering the well-documented rates of racial bias in the violation of residents' rights. African Americans living in Ferguson have been subject to a policing environment that has left them vulnerable, often-victimized, and without recourse. If the City is to work towards repairing its relationship with the community, residents must have confidence in their ability to file meaningful complaints of misconduct and abuse.

Section XIX-B of the Consent Decree, titled, "Misconduct Complaint Intake, Investigation and Adjudication" (p 90) seeks to address this issue. It details several specific ways in which the FPD should improve its processes for receiving and evaluating complaints lodged against officers. This is perhaps one of the most comprehensive and important sections of the Consent Decree, and I urge the court to maintain this portion of the document. Without a

transparent and ethical system of accountability, none of the other reforms or suggestions outlined in the Decree can be adequately enforced.

Conclusion

In conclusion, the claims made by the DOJ in its report on the FPD are supported by my own data, collected during field visits for my doctoral research. These claims paint a grim picture of structural racism within the City of Ferguson; this tension necessitates intervention by the Court in the form of a Consent Decree. While the proposed Decree addresses these claims, it does not go far enough in its reform suggestions, particularly relating to Fourth Amendment violations during stops, searches, citations, and arrests as well as incidents in which officers deploy force against residents. Further, the section of the Consent Decree relating to accountability, particularly complaints of misconduct, is imperative to the success of the document as a whole. Reform must be enforced through the ability for residents to hold the FPD accountable for their actions. Without this enforcement mechanisms, there is no basis for real reform.