



Impunity for Killings by Police in the United States

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I. Obstacles to Accountability for Killings by Police Forces in the United States

The police are regularly shielded from accountability for excessive use of force within the United States. Although exact statistics are difficult to find, more often than not, officers are not investigated or prosecuted for the killings of civilians. A central, contributing factor to this impunity is the legal standard by which police officers' use of deadly force is evaluated: the United States Supreme Court has established the Constitutional boundary to be one of "reasonableness", which in practice creates a wide breadth of discretion for police action and "justified" use of force, while making it difficult to hold officers accountable through the criminal legal system.¹ Beyond the failings of the legal framework, each of the primary avenues for accountability available to victims of police misconduct are plagued by institutional deficiencies, procedural obstacles, and high rates of acquittal.

The first accountability mechanism available to victims is a criminal investigation and trial by state and federal prosecutors. The initiation of a criminal investigation is contingent entirely upon prosecutorial discretion, which is often marred by resource constraints, pressure from police unions,² and bias in favor of the police due to the working relationship between prosecutors and officers to convict civilians. Consequently, prosecutors are less likely to file charges against police officers than civilian suspects.³ In fact, between 2005 and 2015, only 54 officers were *charged* after police-involved killings, despite the thousands of such incidences that occurred over the same time period.⁴ Even in the rare instances when an investigation leads to possible charges being filed, presiding juries and grand juries frequently evidence bias in favor of the police.⁵ As one example, grand juries in Dallas, Texas declined to indict 174

¹ See, e.g., U.S. Const. amend. IV.; *Tennessee v. Garner*, 471 U.S. 1 (1985); *Graham v. Connor*, 490 U.S. 386 (1989); Tim Longo, *Defining Instrumentalities of Deadly Force*, 27 *Touro L. Rev.* 261 (2011); Chase Madar, *Why It's Impossible to Indict a Cop*, *Nation* (Dec. 25, 2014), <https://www.thenation.com/article/why-its-impossible-indict-cop/>.

² Letitia James, *Prosecutors and Police: The Inherent Conflict in our Courts*, MSNBC (Dec. 5, 2014), <http://www.msnbc.com/msnbc/prosecutors-police-inherent-conflict-our-courts>.

³ Rueben Fischer-Baum, *Allegations of Police Misconduct Rarely Result in Charges*, *FiveThirtyEight* (Nov. 25, 2014), <https://fivethirtyeight.com/features/allegations-of-police-misconduct-rarely-result-in-charges/>

⁴ Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, *Wash. Post* (Apr. 11, 2015), http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.90c3d610122a.

⁵ See James Pinkerton, *Hard to Charge*, *Houston Chron.*

<http://www.houstonchronicle.com/local/investigations/item/Bulletproof-Part-3-Hard-to-charge-24421.php> (last viewed Oct. 5, 2015); Mark Motivans, *Federal Justice Statistics 2010 – Statistical Tables*, Bureau of Justice Statistics 12 (Dec.2013), <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf>.

of 175 police officers under investigation between 2008 and 2012.⁶ When trials do take place, police are held to a less stringent legal standard for their use of deadly force than their civilian counterparts, making it more difficult for prosecutors to prove a violation of the law.⁷ Ultimately even in the rarest of instances -- when a police officer is convicted of a crime, sentences are often more lenient than those applied to civilians convicted of similar crimes.⁸

A second accountability option allegedly available to victims of police violence is to file suit against police officers and municipalities in civil court to seek monetary damages. However, civil suits are resource- and time-intensive, restricting the availability of such remedies to select plaintiffs. Procedural constraints -- including state statutes limiting who and when may bring suits and high pleading standards -- also present obstacles. If damages are awarded or there is a settlement, the officer is most often indemnified, causing any monetary damages to be paid out of taxpayer money and insulating the police department from meaningful institutional reform or personal accountability.⁹

Last, civilians or police departments may request an internal investigation. These investigations are handled differently depending on the jurisdiction, adding to the inconsistency and lack of transparency characteristic of these processes.¹⁰ As would be expected in cases of self-policing, internal review boards and other internal affairs units rarely find fault.¹¹ The Bureau of Justice Statistics has previously found that ninety-two percent of use of force complaints filed with large state and local law enforcement agencies were dismissed.¹² Additionally, state statutes limit the time, place, and manner in which individuals may file complaints, and police agencies regularly discourage such reporting.¹³ When internal investigations are initiated, they are often hindered by departmental cultures of secrecy, as well as the intimidation of or unreliable witnesses.¹⁴ Even if a review board does find fault, many states allow those decisions to be overturned by independent arbitration. In Boston, for example, 17 of 23 administrative sanctions by the Boston Police Department were overturned between 2006 and 2013 by independent arbiters.¹⁵ Police union contracts also frequently allow findings of fault to be sealed permitting an officer

⁶ James Pinkerton, *Hard to Charge: Bulletproof (Part 3)*, Houston Chron.

<http://www.houstonchronicle.com/local/investigations/item/Bulletproof-Part-3-Hard-to-charge-24421.php> (last visited Dec. 1, 2017).

⁷ See, e.g., Nicholas K. Geranios, *No Charges in Wash. Police Killing of Rock-Throwing Suspect*, PoliceOne.com (Sept. 9, 2015), <https://www.policeone.com/officer-misconduct-internal-affairs/articles/9495982-No-charges-in-Wash-police-killing-of-rock-throwing-suspect/>.

⁸ Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, Wash. Post (Apr. 11, 2015), http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.414583c19f35.

⁹ *Civil Suits Against Police Cost Taxpayers Millions But Rarely Result in Reforms*, Free Speech Radio News (June 23, 2015), <https://fsrn.org/2015/06/civil-suits-against-police-cost-taxpayers-millions-but-rarely-result-in-reforms/>.

¹⁰ For a comparison of disciplinary policies at twelve large municipal police departments, see Standards and Guidelines for Internal Affairs: Recommendations for a Community of Practice, U.S. Department of Justice Office of Community Oriented Policing Services 61-76 (2008) <https://ric-zai-inc.com/Publications/cops-p164-pub.pdf>.

¹¹ Matthew J. Hickman, Bureau of Justice Statistics, *Citizen Complaints About Police Use of Force* 4 (June 2006), <https://www.bjs.gov/content/pub/pdf/ccpuf.pdf>.

¹² *Id.*

¹³ Alexander Shalom, *The Crisis Continues Inside Police and Internal Affairs*, Am. Civil Liberties Union of N.J. 6 (Feb. 2013), https://www.aclu-nj.org/files/3413/6059/3876/ACLU_NJ_Internal_Affairs.pdf.

¹⁴ See, e.g., Kate Mather, *LAPD found no bias in all 1,356 complaints filed against officers*, L.A. Times (Dec. 15, 2015), <http://www.latimes.com/local/lanow/la-me-ln-lapd-biased-policing-report-20151215-story.html>; Margaret Talbot, *Bad Cops, Good Cops*, New Yorker (Dec. 21, 2015), <http://www.newyorker.com/magazine/2015/12/21/bad-cops-good-cops>; Press Release, U.S. Dept. of Justice, *Three Atlanta Police Officers Charged in Connection with the Fatal Shooting of an Elderly Atlanta Woman*, at 4 (Apr. 26, 2007), <http://www.justice.gov/archive/usao/gan/press/2007/04-26-07.pdf>.

¹⁵ Lawrence Harmon, *Do Arbitrators Give Violent Cops a Pass?*, Bos. Globe (June 29, 2013), <https://www.bostonglobe.com/opinion/2013/06/28/out-control-officers-find-comfort-arbitration/02N6zKhHmM2GM63PDIYIHO/story.html>.

to hide such a disciplinary record when subsequently applying for work with other police departments and jurisdictions, and rendering the accountability process practically useless.

Still other forms of oversight exist, including external or community oversight mechanisms – which often face implementation challenges and intense resistance from police unions¹⁶ – and federal investigation by the United States Department of Justice (DOJ), including criminal civil rights charges and consent decrees. Consent decrees allow municipalities to avoid litigation and liability by proposing concrete measures for the police departments to undertake to conform to Constitutional or federal law.¹⁷ Administered by the Department of Justice, such criminal investigations and agreements are wholly discretionary and constrained by limited resources and motivation of the administration in power.¹⁸

II. Impunity for Police Killings Violates United States' Obligations under International Human Rights Law

This Commission has established that international human rights instruments create positive obligations, requiring States to not only respect the rights enshrined in governing treaties, but also to ensure that those rights are protected.¹⁹ In effect, States must take affirmative measures to prevent and to address violations by State agents and private persons.

Under international human rights law, individuals are guaranteed the right to be free from the arbitrary deprivation of life.²⁰ Mechanisms must be established, therefore, to determine whether an officer's use of force amounts to a violation of that right, and to effectively prosecute and punish identifiable violations.²¹ In carrying out this duty, the State must exercise due diligence, including by conducting an immediate, exhaustive, and impartial investigation.²² Moreover, this Commission has recognized that States hold a "special duty" to investigate and prosecute police misconduct.²³

The wide discretion afforded criminal prosecutors and internal review boards to decline to initiate investigations into claims of police misconduct may violate the United States' obligations of due diligence under international human rights law. Similarly, the lack of an external check, such as a community oversight mechanism or an impartial judge or jury, facilitates self-policing, in violation of individuals' rights to justice by independent arbiters.

¹⁶ Nat'l Inst. Of Justice, *Citizen Review of Police: Approaches and Implementation*, Nat'l Criminal Justice Reference Service (mar. 2001), <https://www.ncjrs.gov/txtfiles1/nij/184430.txt>.

¹⁷ *Civil Suits Against Police Cost Taxpayers Millions But Rarely Result in Reforms*, Free Speech Radio News (June 23, 2015), <https://fsrn.org/2015/06/civil-suits-against-police-cost-taxpayers-millions-but-rarely-result-in-reforms/>.

¹⁸ See Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. Crim. L. & Criminology 489, 518-519 (2008).

¹⁹ *Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶¶ 117, 118 (2011); *see also* *Maya Indigenous Community v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at 727 ¶ 162 (2004); *Oscar Elías Bicet v. Cuba*, Case 12.476, Inter-Am. Comm'n H.R., Report No. 67/06, ¶¶ 227–231 (2006).

²⁰ *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am Ct. H.R. (ser. C) No. 154 ¶ 118 (2006); American Convention on Human Rights, art. 4, Nov. 22, 1969, OAS Treaty Series No. 36, 1144 UNTS 123, 9 ILM 99.

²¹ *Id.*

²² *Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 122 (2011); *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 412 (1998).

²³ Inter-Am. Comm'n H.R., *Report on Citizens Security and Human Rights*, ¶ 46, OEA/Ser.L/V/II.Doc. 57 (Dec. 31, 2009).

In complement, individuals are guaranteed the right to an effective remedy for a violation of their rights.²⁴ The failure of established protocols and institutions to hold officers accountable for excessive use of force and unlawful killings breeds impunity. The Inter-American Court has defined impunity as “the absence of any investigation, pursuit, capture, prosecution and conviction” of those responsible for human rights abuses.²⁵ To counter impunity, States must ensure that there exist channels by which individuals may petition independent tribunals for the enforcement of their rights and receive reparations for adjudicated violations.²⁶ Procedural barriers and other dynamics, including bias of judicial bodies and partiality of prosecutors, which limit individuals’ ability to file grievances or to obtain punishment for police misconduct, can amount to a denial of an effective remedy.²⁷

Importantly, excessive use of force, especially resulting in death, is most likely to be used by police against Black Americans and other people of color. This Commission has mandated States to adopt measures to guarantee access to justice for Afro-descendants and other minorities.²⁸ Impunity for extrajudicial killings disproportionately impacts Black and Latino Americans, depriving them of access to justice for rights abuses and perpetuating discrimination prohibited by international human rights law.

Moreover, the next-of-kin of victims of excessive force may experience violations of their own human rights. The Inter-American Court has recognized the rights of next of kin to mental and moral integrity,²⁹ as well as the right to know the truth of what occurred to their loved ones.³⁰ A State’s failure to act with requisite due diligence may result in prohibited suffering by victims’ families, and an inadequate investigation would effectively deny victims’ families’ right to truth.

III. Conclusion

The United States is obligated to respect, protect, and fulfill international human rights. The United States must not only prevent extrajudicial killings by police, but it must also create and reinforce the procedures and institutions through which individuals may report, file grievances, and seek justice for police misconduct. Current procedural obstacles to effective investigations and prosecutions, discrimination and bias pervasive throughout the judicial system, and discretionary legal standards prevent individuals from enforcing their rights and result in the systematic denial of accountability for police killings. The United State’s failure to hold officers accountable for excessive use of force resulting in death constitutes a violation of victims’ and their next-of-kin’s human rights.

²⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, ratified by the U.S. Sept. 8, 1992, 999 U.N.T.S. 171, arts. 2, 14.

²⁵ Case of the Ituango Massacres v. Colombia, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R.(ser. C) No. 148, ¶ 299 (July 1, 2006); see also Case of the Mapiripan Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 237 (Sept. 15, 2005); Case of the Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 203 (June 15, 2005); Case of Serrano-Cruz Sisters v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 120, ¶ 170(Mar. 1, 2005).

²⁶ Inter-Am. Comm’n H.R., *Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II.124, Doc. 5 rev. 1, ¶ 349, (Mar. 7, 2006).

²⁷ Velasquez Rodriguez Case (Merits), Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (1988).

²⁸ Inter-Am. Comm’n H.R., *The Situation of People of African Descent in the Americas*, OEA/Ser.L/V/II.Doc.62 ¶ 141 (Dec. 5, 2011), http://www.oas.org/en/iachr/afro-descendants/docs/pdf/AFROS_2011_ENG.pdf.

²⁹ Inter-American Court, *Caso de la Masacre de Pueblo Bello vs. Colombia*, Sentencia de 31 de enero de 2006, ¶ 154; InterAmerican Court, *Caso Gómez Palomino Vs. Perú*, Sentencia de 22 de noviembre de 2005, ¶ 60; Inter-American Court, *Caso de la “Masacre de Mapiripán” Vs. Colombia*, Sentencia de 15 de septiembre de 2005, ¶ 144 y 146; y Inter-American Court, *Caso de las Hermanas Serrano Cruz Vs. El Salvador, Fondo y Reparaciones*, Sentencia de 1 de marzo de 2005, ¶ 113-114.

³⁰ Inter-Am. Comm’n H.R., *Right to Truth in the Americas*, ¶ 110, OEA/Ser.L/V/II.152 Doc. 2 (Aug. 13, 2014).