



The Absence of Accountability for Police Violence towards People of African Descent in the United States of America

For the visit to the United States by the U.N. Expert Mechanism
to Advance Racial Justice and Equality in the Context of Law
Enforcement
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The Center for Law, Equity and Race (CLEAR)ⁱ and the Program on Human Rights and the Global Economy (PHRGE)ⁱⁱ welcome your upcoming visit to the United States in your capacity as the Expert Mechanism to Advance Racial Justice and Equality in the context of Law Enforcement. We appreciate the opportunity to address the lack of accountability for acts of police violence against people of African descent and the need for a meaningful reparative response. As we set out below, the lack of accountability for acts of police violence allows gross misconduct to go unredressed and has led to functional impunity for officers and further victimization of people of African descent at the hands of law enforcement.

1. Background on Role of Police, Interactions and Escalation

Law enforcement within the United States has a mixed history.ⁱⁱⁱ In southern portions of the US, but not exclusively, stemming from the vestiges of slavery and the effects of Jim Crow, the police have been used to maintain “law and order.” Documentation has established the role played by law enforcement in extrajudicial killings and violence against people of African descent within the United States.^{iv} There have been recent efforts to employ a community-policing model which emphasizes the presence of police within communities to address a wide range of situations including non-violent mental health incidents, traffic violations, substance use disorder prevalence, and many other issues. While the stated intention behind the community-policing model is to promote positive interactions between community members and law enforcement, the actual effect has been to increase contact between civilians and armed police officers, ultimately resulting in many cases of violent responses to non-violent situations.

Black men, regardless of socio-economic status, have been frequently victimized after police escalated non-violent and routine situations and employed lethal force. Examples of these situations can be found across the country. Eric Garner of New York City was killed by an officer's illegal use of a chokehold after being stopped for allegedly selling untaxed cigarettes. George Floyd of Minneapolis, Minnesota was murdered when Officer Derek Chauvin knelt on his neck for over nine minutes after being called about a phony \$20 bill. Most recently, Tyre Nichols of Memphis, Tennessee was severely beaten by multiple police officers who alleged he was driving recklessly. Mr. Nichols died from his injuries after three days. The officers involved in all three of these killings had prior complaints for excessive force filed against them; yet the current system allowed them to avoid any accountability and continue working as officers in the community with deadly consequences for citizens.

Data indicates that police officers only spend 10% of their time responding to crime, and only 5% responding to violent crime.^v Despite this, police training and occupational culture frequently encourage officers to always anticipate danger and presume the worst in their interactions with the community. This attitude is particularly prevalent towards communities of African descent. Additionally, there has been a concerning trend of militarization among law enforcement, with many departments becoming outfitted with surplus military hardware and adopting organizational norms based on a wartime mentality. The use of military apparatus was on full display in Ferguson, Missouri to respond to demonstrations by the community after the police shooting of Michael Brown in 2014. The prevalence of militarized policing has been tied to an increase in the incidence of extrajudicial killings and violence by law enforcement.^{vi}

While some jurisdictions within the United States have begun employing non-police responders for non-criminal incidents, such programs remain the exception rather than the norm

and generally still rely upon police support. For many Black Americans, especially those in urban communities, police officers are a constant presence and navigating tense interactions has become a matter of life and death. Promoting meaningful police accountability and reducing the disproportionate policing of Black communities will save lives, safeguard civil and human rights, and alleviate the inequities present in the United States today regarding law enforcement.

2. The History of Racialized Policing

To fully address the longstanding issue of police violence against people of African descent and other marginalized communities in the United States minimally requires recognition and redress of past injustices as well as implementation of prescriptive measures such as the ones discussed below. Throughout the history of the United States, law enforcement accommodated, encouraged, and sometimes participated in extrajudicial and terrorist violence against Black, Indigenous, and immigrant communities through lynchings, bombings, banishments, and other violence and acts of harassment. Law enforcement officials and entities allowed many of these acts of violence to go uninvestigated and unpunished.^{vii} Instead false accusations against people of African descent were often sustained with no attempt at corroboration by law enforcement, while complaints of violence or harassment made by people of African descent were ignored or rarely punished.

Throughout the twentieth century and twenty-first centuries, the federal government, often in collaboration with state and local law enforcement agencies, has targeted people of African descent who have organized and advocated against police violence and violations of basic human rights. The US Federal Bureau of Investigation (FBI) established a counterintelligence program known as COINTELPRO to “disrupt, misdirect, discredit, or

otherwise neutralize” Black leaders and their supporters during the period from 1956 to 1971. Their targets included civil rights icon Dr. Martin Luther King, Jr. and political activist Professor Angela Davis among countless others. More recently in 2017, the FBI Counterterrorism Division released a report identifying so-called “Black Identity Extremists” as a threat to law enforcement following the August 2014 shooting of Michael Brown in Ferguson, Missouri and lack of indictments of the police officers involved. This information raises serious concerns and issues about the continuing surveillance of people of African descent by law enforcement in violation of their basic human rights.

3. Barriers to Addressing Officer Misconduct and Potential Remedies

a. Restrictions on Qualified Immunity

The judicially created doctrine of qualified immunity presents significant hurdles to people of African descent who are victims of law enforcement misconduct and who seek accountability through civil litigation as a remedy for violations of civil and human rights. Officers sued for misconduct may assert an affirmative defense of qualified immunity, requiring a judge to then find that not only did officers violate the plaintiff’s legal right, but that the right was “clearly established” at the time of the misconduct. Whether a right is “clearly established” is a matter of law to be determined by the court after review of legal precedent. However, following the U.S. Supreme Court’s 2009 ruling in *Pearson v. Callahan*, a court can determine a right was not clearly established and summarily dismiss the claim without making any determination as to whether the officer’s conduct constituted a violation of a legal right. In this way, courts avoid the creation of precedents which would clearly establish rights as required and instead show an increasing tendency to grant immunity in excessive force cases.^{viii}

Unlike most interlocutory rulings in the US legal system, a denial of qualified immunity is immediately appealable to a higher court, causing long, costly delays in litigating claims against police officers. This makes the prospect of settling or dropping a case more enticing and further blocks the formation of precedent clearly establishing the bounds of law enforcement conduct. This current system results in a continuing violation of the rights of persons of African descent and others to have their claims fairly adjudicated and addressed.

While some jurisdictions, such as New Mexico and Colorado, have limited qualified immunity in the aftermath of the horrific murder of George Floyd in 2020 and ensuing protests, there is still a large effort by law enforcement agencies and unions to have the qualified immunity doctrine codified and expanded. Unfortunately, this effort is supported by many conservative lawmakers around the country. The restriction or elimination of qualified immunity is necessary to encourage restraint and deter unnecessary and excessive use of force by officers and allow civil liability to function as the method of accountability it was always intended to be.

b. Correcting the Power Imbalance of Police Unions

Police unions are among the most powerful labor organizations active in the United States, and through collective bargaining agreements they have effectively secured control over officer hiring and disciplinary decisions in many jurisdictions. Agreements which prohibit civilian review of complaints, mandate destruction of disciplinary records, and require municipalities to pay for officer legal expenses are not uncommon.^{ix} These unions also expend massive resources to lobby against legislation which would impose any form of oversight on officers or stricter penalties for misconduct.^x

The collective bargaining process used by police unions generally suffers from a lack of community involvement and transparency. Negotiations are conducted between unions and municipalities with no representatives of the population whose taxes fund the police and who are directly affected by their service. The public is further cut out of any process for officer accountability when unions or municipalities impose mandatory arbitration for disciplinary decisions. Arbitration allows a third party, often selected or pre-approved by police unions, to overturn disciplinary actions with no deference given to the determinations made after review by police department management or municipal officials. Empirical studies have shown that at least half of all police department disciplinary actions were overturned, and penalties reduced in the geographically diverse cities of Boston, Chicago, Houston, and Portland, Oregon.^{xi}

To ensure accountability among law enforcement officers and promote public safety and equity, jurisdictions within the United States need to restrict collective bargaining by police unions to only allow negotiation of terms related to officer benefits and working conditions. Issues of discipline, hiring, firing, and promotion must be left to police departments, local elected officials, and civilian review boards. Additionally, representatives of the communities patrolled by officers need to be allowed to participate in contract negotiations to promote greater transparency and remind law enforcement of the people they are meant to serve.

c. Mandatory Professional Liability Insurance

Because many service professionals in the United States are required by law or professional standards to carry insurance protecting against malpractice claims by clients, professional liability insurance presents a valuable instrument for identifying officers engaged in dangerous policing behaviors and deterring such behaviors through a neutral actuarial process. Using a system of premiums which increase upon occurrences of dangerous policing and a fixed

deductible, officers engaged in risky policing would be priced out of the profession before they could victimize people of African descent and others. Such a system of police accountability can create an infrastructure that will save lives by detecting, preventing, and deterring police misconduct, while at the same time reducing taxpayer costs and ensuring victims are fairly compensated.

While the insurance company would be responsible for most of an officer's financial liability following a determination of misconduct, such officers would be responsible for paying a deductible, placing a direct financial consequence on them to deter reckless policing. Their premiums would subsequently rise, allowing the officers responsible for repeated misconduct to be priced out of the profession.

d. Reparative and Restorative Justice Remedies

Repair, restoration, and reconciliation are essential elements to address historic and continuing harms against people of African descent and to create an equitable and just society. While victims of police killings have gained more media coverage and recognition since the rise of the #BlackLivesMatter movement, municipal and state responses to police violence remain resistant to acknowledging the role of historical and systemic oppression in such incidents against people of African descent. If an officer's action is questioned or formally condemned, questions are always raised to lay some fault on the victim of the police violence.

Recent efforts at promoting education about past racial violence and present systemic inequality in the United States have been met with both hostility and attempted censorship by government officials around the country. The states of Florida, Georgia, and Texas have been leading the charge in efforts to deny and discount the history of violence against people of African descent.

Efforts to begin a national process to identify and address the legacy of enslavement and the continuing violations of the basic human rights of people of African descent have been anemic at best. The US House Resolution (H.R.) 40 to establish a Commission to Study and Develop Proposals for African-American Act was initially introduced in 1989 by Congressman John Conyers. A mere hearing on the bill to establish a study commission did not take place until June 2019, a full 30 years after its introduction. The limited official support for acknowledging and redressing the history of state violence and neglect towards people of African descent and other communities of color has placed the burden of seeking repair, restoration, and remediation upon the victimized population. Some local jurisdictions have taken steps to begin to address the legacy of racial violence and denial of the human rights of people of African descent. For example, the City of Evanston, Illinois has established a reparations fund to address past housing discrimination; other cities in California, Massachusetts and New York are exploring ways to address the legacy of harms against people of African descent. Many groups within civil society and academia have demonstrated the value of a restorative justice approach by establishing truth and reconciliation commissions or similar entities to address the history of racial violence by law enforcement and other government actors. Examples of these efforts are underway in the states of Maryland, Alabama, and Louisiana. We ask the Expert Mechanism to lift up the work being done in these states as examples to be followed by the rest of the nation.

4. Conclusion

The inability to hold law enforcement officers accountable for their misconduct and the unavailability of reparative and restorative justice constitute significant deviation from the security and equality that all people deserve. We urge you to recognize and bring attention to the

significant obstacles to law enforcement accountability and the harmful impact such hurdles have on people of African descent who have been victimized and marginalized across the nation. We also urge you to recommend the adoption and expansion of restorative justice projects which can provide reparations for people of African descent for systemic racial persecution by law enforcement.

Respectfully Submitted,

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ⁱ The Center for Law, Equity, and Race uses an interdisciplinary, collaborative approach to enrich and inform the national discourse on reparative justice and criminal justice reform and build additional strength in racial justice research and practice.

ⁱⁱ The Program on Human Rights and the Global Economy (PHRGE) specializes in economic, social, and cultural rights and rights-based approaches to development with an emphasis on the promotion of human rights in the United States. CLEAR and PHRGE thank Jacob Hayward, NUSL '23, for his assistance in preparing this submission.

ⁱⁱⁱ Gary Potter, *The History of Policing in the United States*, Eastern Kentucky University School of Justice Studies; retrieved February 17, 2023.

^{iv} Margaret A. Burnham, *By Hands Now Known – Jim Crow's Legal Executioners*, (Norton & Co., 2022).

^v Barry Friedman, *Disaggregating the Police Function*, 169 *UNIV. OF PENN. L. REV.* (Mar. 2021).

^{vi} Edward Lawson Jr., *TRENDS: Police Militarization and the Use of Lethal Force*, 72 *POL. RES. Q.* 177 (2018). <https://journals.sagepub.com/doi/pdf/10.1177/1065912918784209>.

^{vii} *Ibid.*

^{viii} Andrea Junata et al., *Taking the Measure of Qualified Immunity: How Reuters Analyzed the Data*, *REUTERS*, <https://www.reuters.com/investigates/special-report/usa-police-immunity-methodology/> (Dec. 23, 2020).

^{ix} Joanna C. Schwartz, *Police Indemnification*, 89 *N. Y. UNIV. L. REV.* 885, <https://chapman.edu/law/files/events/SchwartzPaperIndemnification.pdf> (Jun. 2014).

^x Press Release, Fraternal Order of Police, FOP National President Warns of Fallout After Court Ruling, <https://fop.net/2022/08/fop-national-president-warns-of-fallout-after-court-ruling/> (Aug. 22, 2022).

^{xi} Deborah Ramirez & Tamar Pinto, *Policing the Police: A Roadmap to Police Accountability Using Professional Liability Insurance*, 73 *RUTGERS L. REV.* 101, 113-114 (2021).