



Written Submission prepared by the
International Human Rights Clinic at Santa Clara University
for the Thematic Hearing on

Structural racism and police violence in the United States

before the
Inter-American Commission on Human Rights

October 7, 2020
177th Period of Sessions

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I. State and local governments must limit the role of police unions in obstructing efforts to hold police officers accountable

In its 2018 report on Police Violence Against Afro-Descendants in the United States, the IACHR did not discuss, nor make direct recommendations, regarding the role and impact of police unions in how individual police officers are held accountable for excessive, deadly, and racist use of force.¹ The report made some reference to the impact police unions have on criminal investigations into police conduct.² Yet, as is explained below, police unions have a significant influence on police departmental policy, state law reform, and the culture of police departments.

In particular, a vast majority of states have collective bargaining statutes that give police unions the power to negotiate benefits, salaries, and other conditions of employment for police officers.³ These collective bargaining statutes have generally been interpreted by courts to permit police unions to negotiate the methods available to police department leaders to investigate and punish police officers suspected of misconduct.⁴ As such, police unions negotiate collective bargaining agreements with states and municipalities that have broader consequences to society than the average collective bargaining agreement.⁵

Moreover, a vast majority of states also have civil service statutes that apply to municipal police officers and regulate their appointment and discharge by empowering police officers “to challenge any internal managerial action that affects them on both substantive and procedural grounds in a formal adversarial process.”⁶ In some states, collective bargaining agreements can supersede civil service laws to establish protective procedures for officers, thus establishing a floor for police officer employment protection that police unions can then raise via collective bargaining.⁷

Outside of civil service statutes and collective bargaining agreements, some states also have a Law Enforcement Officers Bill of Rights (LEOBRs), which provides police officers with due process protections during disciplinary investigations that are not provided to other classes of

¹ IACHR, *Police Violence Against Afro Descendants in the United States*, OEA/Ser.L/V/II.Doc.156/18 (Nov. 26, 2018).

² *E.g., Id.* at 69.

³ Stephen Rushin, *Police Union Contracts*, 66 Duke Law Journal, 1191, 1202 (2017).

⁴ *Id.* at 1202-1203.

⁵ *Id.*

⁶ *Id.* at 1207-1208 (quoting Professor Rachel Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2010))

⁷ *Id.* at 1208.

public employees.⁸ These protections add obstacles to police reform and holding police officers accountable by, for example, banning civilian review boards; establishing strict time requirements for filing complaints against police officers; limiting officer interrogation procedures; and clearing police officers' personnel files of civilian complaints after a certain amount of time has passed.⁹

With regard to police accountability, this section will outline the effect and influence police unions have on police reform as well as the current state of police accountability laws and procedures. Accordingly, the culture and attitude of self-prioritization in police unions' pursuit of favorable employment rights and procedures inhibits victims of police violence, prosecutors' offices, and police departments themselves from holding police officers accountable for misconduct.

A. Police union contracts limit accountability and create investigatory and other hurdles

Police union contracts are developed through collective bargaining between the union and the city or state that employs departmental officers.¹⁰ Naturally, not all union contracts contain the same provisions; however, there are common provisions that appear in police union contracts which tend to make it more difficult to internally investigate police officers and hold them accountable if misconduct is found.¹¹ For example, a large number of police union contracts require investigators to provide officers with access to evidence before beginning interrogations while interrogations themselves are delayed for a set period of time after the alleged incident.¹²

Outside of procedural obstacles created by police union contracts, many provisions create obstacles to information-gathering when a police officer is being investigated.¹³ For example, many police union contracts prevent a police officer's past misconduct from being considered in a new case,¹⁴ and in some way inhibit review of police officer's conduct by civilian oversight boards.¹⁵ Moreover, numerous police union contracts limit the investigation of anonymous complaints against police officers; disqualify complaints after a set period of time;¹⁶ and require the use of arbitration in adjudicating police officers who appeal disciplinary measures.¹⁷

⁸ *Id.* at 1208-1209.

⁹ *Id.* at 1209-1210 (describing provisions in Maryland's LEOBR).

¹⁰ See generally, *Id.* at 1222-1223 (Figure 2).

¹¹ *Id.* at 1222.

¹² *Id.*

¹³ *Id.* at 1228-1238.

¹⁴ U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices*, 60 (2018).

¹⁵ Stephen Rushin, *Police Union Contracts*, 66 *Duke Law Journal*, 1232, 1235 (2017).

¹⁶ *Id.* at 1235-1236.

¹⁷ *Id.* 1238-1239.

The appeals process and arbitration proceedings have proven particularly significant to police accountability. For example, between 2006 and 2017, 451 out of 1,881 fired police officers from the U.S.'s 55 largest police departments were reinstated after appealing the firing decision.¹⁸ Meanwhile, a 2018 University of Oxford study found a correlation between increased police violence and the extent to which police unions, through the terms of collective bargaining agreements, insulate and protect police officers accused of abuse.¹⁹ This correlation ultimately means that the more police officers are protected from discipline by their police union, the more likely it is police officers will engage in abuse.²⁰

B. Police unions can impede change

Police unions sit at a political intersection because they are, in essence, an organized labor force - a cause that most liberal politicians tend to support - yet, police unions advocate for far more than the average public-sector labor union.²¹ Unlike most labor unions, police unions lobby for accountability mechanisms that shield police officers from being held accountable, albeit from the public, even though collective bargaining agreements are negotiated between police unions and, in essence, the public.²²

Despite the fact that police officers are public employees, the role of police unions as advocates for police officers can mean that police unions often work to block reforms that they perceive as a threat to the profession's status quo or the officers it represents. Of course, the purpose of police unions in the first place is to advocate on behalf of police officers, and insulate them from adverse actions.²³ But, beyond collective bargaining, or investigatory and arbitration hearings at

¹⁸ U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices*, 60 (2018); "Fired/Rehired: Police Chiefs are Often Forced to Put Officers Fired for Misconduct Back on the Streets," *Washington Post*, Aug. 3, 2017,

https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/?utm_term=.8eef74e1ea6b.

¹⁹ Abdul N. Rad, *Police Institutions and Police Abuse: Evidence from the US*, University of Oxford, 75 (2018).

²⁰ *Id.* at 76.

²¹ William Finnegan, *How Police Unions Fight Reform*, *The New Yorker*, Jul. 27, 2020

<https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform> (last visited Sep 27, 2020)

(describes similar slowdowns of the NYPD, called the "blue flu"). ; Steven Greenhouse, *How Police Unions Enable and Conceal Abuses of Power*, *The New Yorker*, Jun. 18, 2020

<https://www.newyorker.com/news/news-desk/how-police-union-power-helped-increase-abuses> (last visited Sep 27, 2020); Stacey Vanek Smith and Cardiff Garcia, *The Link Between Disproportionate Police Brutality And Police Unions* NPR,

<https://www.npr.org/2020/06/12/876293261/the-link-between-disproportionate-police-brutality-and-police-unions> (last visited Sep 27, 2020)

²² William Finnegan, *How Police Unions Fight Reform*, *The New Yorker*, Jul. 27, 2020

<https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform> (last visited Sep 27, 2020)

(describes similar slowdowns of the NYPD, called the "blue flu").

²³ *About the Fraternal Order of Police*, Fraternal Order of Police, <https://www.fop.net/CmsPage.aspx?id=223> (last visited Sep 27, 2020); *Id.* at 73; Christopher Ingraham, *Police unions and police misconduct: What the research says about the connection*, *The Washington Post*, June 10, 2020

which police unions will represent and defend police officers, police unions also represent police officers by taking hard political stances on reform initiatives that seek to improve public trust.²⁴ At the federal, state, and local level, police unions have spent millions of dollars on lobbying and litigation efforts, political candidacies, as well as ballot and legislative measures.²⁵ Some of this money is spent to influence certain candidates, but also to prevent meaningful reform.²⁶

Police unions also use their influence and their voice to target or retaliate against elected officials who push for or support police reform efforts.²⁷ After a top prosecutor in St. Louis, MO proposed to establish a unit within the prosecutor's office that would independently investigate police misconduct, the police union responded by pressuring lawmakers to set the proposal aside, by litigating to limit the prosecutor's ability to investigate police misconduct, and by advocating for the prosecutor's removal from office.²⁸ When a Minneapolis city council member proposed redirecting money away from hiring officers to instead be used for violence prevention, the police stopped responding as quickly to the council member's constituents when they dialed 911.²⁹ In the days after George Floyd was killed by four police officers in Minneapolis, MN in May 2020, the president of the police union, Lt. Bob Kroll, used his voice to condemn the firing of those four officers and referred to protesters as a "terrorist movement."³⁰

The political clout of police unions is unmistakable, given the thousands of union members that many police unions represent, along with the pressure and sometimes heated rhetoric police unions deploy upon elected officials who seek reforms.³¹ This pressure can ultimately amount to

<https://www.washingtonpost.com/business/2020/06/10/police-unions-violence-research-george-floyd/> (last visited Sep 27, 2020).

²⁴ Noam Scheiber et al., *How Police Unions Became Such Powerful Opponents to Reform Efforts*, The New York Times, Jun. 6, 2020 <https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html> (last visited Sep 27, 2020)

²⁵ *Id.*; Tom Perkins, *Revealed: police unions spend millions to influence policy in biggest US cities*, The Guardian, Jun. 23, 2020

<https://www.theguardian.com/us-news/2020/jun/23/police-unions-spending-policy-reform-chicago-new-york-la> (last visited Sep 27, 2020)

²⁶ *Id.*

²⁷ Noam Scheiber et al., *How Police Unions Became Such Powerful Opponents to Reform Efforts*, The New York Times, Jun. 6, 2020 <https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html> (last visited Sep 27, 2020)

²⁸ *Id.*

²⁹ *Id.*; William Finnegan, *How Police Unions Fight Reform*, The New Yorker, Jul. 27, 2020

<https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform> (last visited Sep 27, 2020) (describes similar slowdowns of the NYPD, called the "blue flu").

³⁰ *Id.*

³¹ *Id.*; Steven Greenhouse, *How Police Unions Enable and Conceal Abuses of Power*, The New Yorker, Jun. 18, 2020 <https://www.newyorker.com/news/news-desk/how-police-union-power-helped-increase-abuses> (last visited Sep 27, 2020).

an “us vs. them” dynamic where politicians who advocate for police reforms are labeled “anti-police”³² and thereby risk wearing that label or cease efforts to reshape the status quo.

C. Police unions often reinforce a culture of impunity

The institution of police unions raises concerns regarding the cultural and ideological posture of the police departments and police officers that unions stand to represent. As mentioned above, police unions differ from typical labor unions because of the protective and insulated mechanisms that shield police officers from accountability. Different studies have found that the insulation provided to police officers by police unions has contributed to a culture of impunity, where unionized police departments exhibit a greater propensity toward violent misconduct and receipt of use of force complaints.³³

At the same time, other reports have found that some collective bargaining agreements have incorporated the so-called “code of silence” into official policy.³⁴ The code of silence, also referred to as the “blue wall of silence,” requires that police officers who report misconduct of their colleagues face retaliation from within the police department, which then ultimately discourages intervention and encourages silence when wrongdoing is observed or discovered.³⁵

By their very resistance to police reforms, police unions can serve to perpetuate a culture of policing that is out of step with what community members, and even city leaders, demand from police departments. For example, in Minneapolis, MN, city council members have referred to the city’s police union as “a clear barrier to change.”³⁶ After the Minneapolis Mayor banned a training method known as “warrior-style” training, which focuses on confronting physical threats instead of de-escalation, the union began offering its own warrior-style training.³⁷

³² William Finnegan, *How Police Unions Fight Reform*, The New Yorker, Jul. 27, 2020 <https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform> (last visited Sep 27, 2020).

³³ See generally, Dhammika Dharmapala et al., *The Effect of Collective Bargaining Rights on Law Enforcement: Evidence from Florida*, Journal of Law, Economics, & Organization (2019); Citizen Complaints about Police Use of Force Bureau of Justice Statistics, <https://www.bjs.gov/content/pub/pdf/ccpuf.pdf> (last visited Sep 27, 2020); Abdul N. Rad, *Police Institutions and Police Abuse: Evidence from the US*, University of Oxford, 75 (2018); Stacey Vanek Smith and Cardiff Garcia, *The Link Between Disproportionate Police Brutality And Police Unions* NPR, <https://www.npr.org/2020/06/12/876293261/the-link-between-disproportionate-police-brutality-and-police-unions> (last visited Sep 27, 2020).

³⁴ Police Accountability Task Force, Chicago Office of Inspector General, *Recommendations for Reform: Restoring Trust between the Chicago Police and the Communities they Serve*, 14, 2016.

³⁵ U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices*, 57-58 (2018).

³⁶ Susan Du, Emily Cassel & Hannah Jones, *Defund & dismantle: Minneapolis looks toward a police-free future*, City Pages (2020), <http://www.citypages.com/news/defund-dismantle-minneapolis-looks-toward-a-police-free-future/571575191> (last visited Sep 27, 2020).

³⁷ *Id.*

The president of the Minneapolis police union, Lt. Bob Kroll, in fact, won election in 2015 after the city installed a new police chief who promised reforms.³⁸ Since then, Mr. Kroll has used his position to criticize politicians, both local and national, who are intent on reducing police violence, including former President Barack Obama.³⁹ In 2007, Minneapolis' current police chief alleged in a lawsuit that the department demoted Black male officers and tolerated known racists, including Mr. Kroll.⁴⁰ In the complaint, Mr. Kroll was accused of making discriminatory statements about homosexuals, Muslims, and of wearing a motorcycle jacket with a "white power" badge sewn into it.⁴¹

In this sense, it is important for the Commission to reiterate the following statement mentioned in its latest report on police violence in the U.S.:

*In addition to the obligation to refrain from violating rights, the Commission emphasizes the State's positive obligation to adopt measures to build an inclusive society free from all forms of racial discrimination, and calls for steps to modify the culture of policing and dynamics between the police and African Americans in order to build trust and confidence.*⁴²

D. Recommendations

Given the significant, yet often under-examined effect that police unions have in perpetuating police impunity in the United States, the IACHR should highlight the extent to which police unions serve to condone international human rights violations by police officers. In particular, the IACHR should identify when and how police unions obstruct efforts to hold police officers accountable for misconduct and thereby contribute to the failure of state actors (police officers) in respecting, protecting, and guaranteeing the human rights of U.S. civilians, but especially people of color.

U.S. federal, state, and local governments must recognize the criticality of police union collective bargaining agreements in ensuring human rights within the U.S. Accordingly, such collective bargaining agreements should be negotiated to no longer include terms that limit police accountability or the mechanisms of accountability.

³⁸ Noam Scheiber et al., *How Police Unions Became Such Powerful Opponents to Reform Efforts*, The New York Times, Jun. 6, 2020 <https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html> (last visited Sep 27, 2020)

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Arradondo v. City of Minneapolis*, United States District Court District of Minnesota, Dec 03, 2007 https://minnesota.publicradio.org/features/2007/12/03_williamsb_copslawsuit/complaint.pdf (last visited Sep 27, 2020).

⁴² IACHR, *Police Violence Against Afro Descendants in the United States*, OEA/Ser.L/V/II.Doc.156/18 (Nov. 26, 2018), p. 13.

The manner in which police unions have cultivated political influence has been utilized to foster impunity and shape norms for police officers that are out of step with international human rights law. The IACHR should take notice of the impact police unions have upon policing culture and the legislative process. Likewise, police unions and legislators should engage positively with reforms that will bring U.S. policing in line with international human rights law.

Considering the above, the IACHR should question the United States about how it intends to encourage a transformation in the terms of collective bargaining agreements that affect police accountability and use of force. The IACHR can specifically question the U.S. federal government about how it intends to adjust collective bargaining agreements with police unions of federally-employed law enforcement, where such adjustments can serve as a catalyst to wider change.

II. In the U.S. federalist system, states and local governments must exercise their authority to reform laws on police accountability and on restricting the use of force by police officers

In its 2018 report on Police Violence Against Afro-Descendants in the United States, the IACHR provided an overview of the United States' domestic legal framework governing police use of force and how this framework fails to comply with internationally-recognized human rights standards.⁴³ However, the report did so without first recognizing the unique role federalism plays in United States domestic law and, being that most policing in the United States operates at the state and local level, the statutory responsibility to reform police accountability and use of force under the law lies to a great extent with individual U.S. states.⁴⁴

⁴³ IACHR, *Police Violence Against Afro Descendants in the United States*, OEA/Ser.L/V/II.Doc.156/18 (Nov. 26, 2018), pp. 114-116.

⁴⁴ See, e.g. *National Federation of Independent Business v. Sebelius* (2012) 567 U.S. 519, 535–536 (“The Constitution may restrict state governments—as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the ‘police power.’”)

In its report, the Commission did recognize that the “protection against arbitrary deprivations of life applies to the entire State structure—including federal, state, and local government entities,”⁴⁵ and that “the government—federal, state, and local—is responsible for establishing adequate and effective legal remedies, and a justice system that is independent and impartial in its investigations of police abuses, and that achieves convictions when appropriate.”⁴⁶ Nevertheless, in addressing issues of police accountability and use of force, the Commission should take into account the following analysis of U.S. federalism, separation of powers, and use of force standards.

With regard to police accountability and use of force laws, this section aims to redirect the IACHR’s attention to individual U.S. states as the primary enactors of such laws. Accordingly, it is largely the U.S. states that bear the responsibility of conforming police accountability and use of force statutes to standards dictated by international human rights law. Thus, the United States, and most importantly its individual states, should take up the task of changing state and local laws to be in-line with international human rights standards of anti-discrimination, as well as the state's duty to respect, protect, and guarantee the rights to life, public safety, and access to justice.

A. Constitutional standards on the use of force by police officers

The Constitutional standards for police use of force under the Fourth Amendment, as recognized by the Supreme Court in *Graham v. Connor*, establish only a base-level requirement to which U.S. states must adhere.⁴⁷ Accordingly, it is primarily the obligation of individual U.S. states under the United States federalist system to reform use of force and accountability laws beyond Fourth Amendment standards and in conformity with the state's duty to respect, protect, and guarantee the rights to life, public safety, and access to justice under international human rights law.⁴⁸

To the extent the U.S. federal government can improve use of force and accountability standards, it is limited by the Constitutional principle of federalism; the corresponding police power of the states; Constitutional standards articulated by the Supreme Court; and Article V of the Constitution, which lays forth the process for amending the Constitution.⁴⁹ As such, the federal laws available to victims of police violence only go as far as the Constitution currently allows.⁵⁰

⁴⁵ IACHR, *Police Violence Against Afro Descendants in the United States*, OEA/Ser.L/V/II.Doc.156/18 (Nov. 26, 2018), p. 12.

⁴⁶ *Id.*, p. 13.

⁴⁷ *Graham v. Connor*, 490 U.S. 386 (1989).

⁴⁸ Flanders, Chad and Welling, Joseph (2015) "Police Use of Deadly Force: State Statutes 30 Years After Garner," *Saint Louis University Public Law Review*: Vol. 35 : No. 1 , Article 7, 124-128.

Available at: <https://scholarship.law.slu.edu/plr/vol35/iss1/7> (discusses federalism in the context of *Tennessee v. Garner* and Tennessee’s use of force statute).

⁴⁹ *See Id.*; U.S. Const. Article V.

⁵⁰ *See*, e.g. 42 U.S.C. § 1983.

Moreover, any amendment to the Constitution to strengthen Fourth Amendment standards of accountability and use of force would still require action by U.S. states via three-fourths ratification.⁵¹ The U.S. federal government is not without influence on state policy -- it can, for example, condition funding to states on their adoption of certain standards.⁵² But, the federal government cannot dictate what states' standards must or will be.⁵³

As mentioned previously, in 1989, the Supreme Court held in *Graham v. Connor* that instances of police use of force should be evaluated under the Fourth Amendment's prohibition of "unreasonable" searches and seizure.⁵⁴ As such, the Court decided that an "objective reasonableness" analysis should be used to determine whether a police officer's use of force was excessive.⁵⁵

While this analysis requires a balancing of the individual's Fourth Amendment interests against "the countervailing governmental interests at stake," reasonableness is nonetheless "judged from the perspective of a reasonable officer on the scene."⁵⁶ Accordingly, legal analyses of police use of force under the *Graham* standard are fact-dependent as to the specific circumstances of the individual case.⁵⁷ Yet, in any case that applies the *Graham* standard, the perceptions of the police officer at the time he or she used force can often be exculpatory.⁵⁸ For example, courts have deemed the use of deadly force to be permitted when a suspect is carrying a deadly weapon in what is *perceived by the officer* to be a threatening manner.⁵⁹ Even when a suspect had not been carrying a weapon, but the officer reasonably believed they were, the use of deadly force has been deemed justified.⁶⁰

Another important Supreme Court case, *Tennessee v. Garner*, has required as a matter of constitutional tort law (e.g., 42 U.S.C. § 1983, discussed below) that the Fourth Amendment standard for use of force requires the police officer to have "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."⁶¹ However, the

⁵¹ U.S. Const. Article V.

⁵² See, e.g. *Fact Sheet: Justice in Policing Act of 2020*, Congressional Black Caucus and House Committee on the Judiciary, https://judiciary.house.gov/uploadedfiles/fact_sheet_justice_in_policing_act_of_2020.pdf (last visited Sept. 19, 2020).

⁵³ See, e.g. *New York v. U.S.*, 505 U.S. 144 (1992); *Printz v. U.S.*, 521 U.S. 898 (1997)

⁵⁴ *Graham v. Connor*, 490 U.S. 386, 388 (1989).

⁵⁵ *Id.* at 396-97

⁵⁶ *Id.*

⁵⁷ Richard M. Thompson II, *Police Use of Force: Rules, Remedies, and Reforms*, Congressional Research Service, 7 (2015).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*; see also *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.")

⁶¹ *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

Garner standard does not require states to adopt it for its officers in a state's own criminal prosecutions.⁶² As such, state laws similar to Tennessee's in *Garner* ("if, after notice of the intention to arrest the defendant, he either flee[s] or forcibly resist[s], the officer may use all the necessary means to effect the arrest") were not required to be changed upon its decision.⁶³ Ultimately, this is due to the fact that the Constitution, which undoubtedly applies to the states, can require a state to strike down unconstitutional statutes but cannot require a state to make laws.⁶⁴

B. Federal law governing police accountability

In light of the limited impact the federal government can have upon state and local police departments and their use of force requirements, federal law generally provides citizens and victims of police violence with civil liability statutes, whereupon a plaintiff must prove he or she was deprived of some constitutional right. Thus, in order to find a police department or police officer liable for excessive use of force under federal law, courts apply the constitutional standards articulated in *Graham* and *Garner*.⁶⁵

There are essentially three statutes available to hold police officers accountable at the federal level for unconstitutional use of force by police officers: 18 U.S.C. § 242, which is a criminal offense statute for violations of constitutional rights; 42 U.S.C. § 1983, which is a civil cause of action for deprivation of constitutional rights; and 42 U.S.C. § 14141, which allows the Attorney General to bring civil suits for injunctive relief against police departments engaged in a "pattern or practice" of constitutional rights violations.⁶⁶

Under § 242, the government must prove: (1) the defendant deprived an individual of a right secured by the Constitution or U.S. Law; (2) the defendant acted under the color of law when he or she did so; and (3) the defendant acted willfully to deprive the right.⁶⁷ Accordingly, courts have differed in how they interpret the *mens rea* requirement under § 242, with some requiring a specific intent to commit the physical act and to deprive the constitutional right; others requiring only an intent to commit the physical act; and others still requiring merely a reckless disregard standard.⁶⁸

⁶² Flanders, Chad and Welling, Joseph (2015) "Police Use of Deadly Force: State Statutes 30 Years After *Garner*," Saint Louis University Public Law Review: Vol. 35 : No. 1 , Article 7. Available at:

<https://scholarship.law.slu.edu/plr/vol35/iss1/7>

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Richard M. Thompson II, *Police Use of Force: Rules, Remedies, and Reforms*, Congressional Research Service, 13-23 (2015).

⁶⁶ *Id.* at 13 (2015).

⁶⁷ *Id.*

⁶⁸ *Id.* at 16-18.

Under § 1983, a plaintiff's suit against an individual officer requires an analysis of whether a constitutional right was violated in order to determine damages.⁶⁹ As such, a § 1983 suit against an officer would be analyzed under the Fourth Amendment.⁷⁰ Yet, the doctrine of qualified immunity creates another hurdle for plaintiffs to breach in order to succeed.⁷¹ In essence, if an officer's actions did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known," then the officer is protected against civil liability.⁷² In this sense, qualified immunity may result in impunity for officer misconduct. According to this Honorable Commission "impunity fosters an environment in which police violence and abuses are tolerated, and serves to sustain disparate treatment towards groups subject to historic discrimination."⁷³

Section 1983 also provides aggrieved individuals the option to sue the municipality that employs the officer who allegedly violated the individual's rights.⁷⁴ However, such suits can only be brought when the municipality allegedly caused the constitutional violation, as opposed to merely employing the officer who committed the violation.⁷⁵ Nonetheless, suing a municipality under § 1983 may encourage cities to more carefully protect against unconstitutional policies and conduct amongst its workforce, including police officers.⁷⁶

Under § 14141, government authorities or agents acting on their behalf are prohibited from engaging in a "pattern or practice of conduct by law enforcement officers ... that deprives persons of rights . . . secured or protected by the Constitution or laws of the United States."⁷⁷ As such, the statute authorizes the U.S. Attorney General to sue for equitable or declaratory relief when he or she has "reasonable cause to believe" a pattern or practice of constitutional violations has occurred.⁷⁸ These suits often result in consent decrees upon which cities are expected to update use of force and other policing policies.⁷⁹

C. State police power

⁶⁹ *Id.* at 20.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*, quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

⁷³ IACHR, *Police Violence Against Afro Descendants in the United States*, OEA/Ser.L/V/II.Doc.156/18 (Nov. 26, 2018), p. 13.

⁷⁴ *Id.* at 22.

⁷⁵ *Id.*

⁷⁶ Reed Hundt, *Suing Municipalities Directly under the Fourteenth Amendment*, 70 Nw. U. L. Rev. 770, 782 (1975-1976).

⁷⁷ 42 U.S.C. § 14141

⁷⁸ Richard M. Thompson II, *Police Use of Force: Rules, Remedies, and Reforms*, Congressional Research Service, 23 (2015).

⁷⁹ *Id.*

Given the police power of the U.S. states, the most meaningful reform to police use of force and accountability statutes must derive from state legislatures.⁸⁰ Indeed, the Fourth Amendment standard articulated in *Graham* is a floor - not a ceiling - to what states can require from its police officers before they use force against civilians.⁸¹ In fact, many states have laws that go beyond what is required by *Graham*, including bans on chokeholds, rules on shooting at moving vehicles, or rules on pursuits.⁸² Nonetheless, especially when it comes to lethal use of force, all U.S. states do not meet standards of international law -- a reality that only the states themselves can change.⁸³

The use of force statutes among the U.S. states' statutes vary in multiple respects. In particular, some states combine lethal and non-lethal use of force statutes into one, while others more specifically outline terms for the use of lethal force in statutes categorized as "justifiable homicide".⁸⁴ On the other hand, no state statute requires lethal force to be used only as a last resort, nor does any state statute limit the use of lethal force only to when a police officer faces an imminent threat of death or serious injury.⁸⁵ And, only four states encourage the use of non-lethal force first prior to applying lethal force.⁸⁶

According to international human rights law, "police use of force in the United States, as in all other States of the Americas, should be guided by the principles of legality, absolute necessity, and proportionality, and used only when other methods have been exhausted and failed."⁸⁷ Indeed, according to a 2015 report conducted by Amnesty International, all U.S. state statutes on the use of force fail to meet these international law standards.⁸⁸

Among these failures: no state requires that police officers must attempt non-violent measures prior to applying the use of force; several states' statutes use permissive, as opposed to restrictive, language; many states use vague or broad language to identify when use of force is

⁸⁰ See, e.g. *Hillsborough Cty. v. Automated Med. Lab.*, 471 U.S. 707, 719 (1985) ("Police powers" to protect health and safety are "primarily, and historically... matter[s] of local concern"); *New York v. U.S.*, 505 U.S. 144 (1992); *Printz v. U.S.*, 521 U.S. 898 (1997)

⁸¹ *Graham v. Connor*, 490 U.S. 386 (1989); See, U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices*, 9–12 (2018).

⁸² See U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices*, 10 (2018); Michael A. Foster, *Police Use of Force: Overview and Considerations for Congress*, Congressional Research Service, 3 (2020).

⁸³ *Deadly Force Police Use of Lethal Force in the United States* (p. 21, Rep.). (2015). New York, NY: Amnesty International USA.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 21, 23.

⁸⁷ IACHR, *Police Violence Against Afro Descendants in the United States*, OEA/Ser.L/V/II.Doc.156/18 (Nov. 26, 2018), p. 12.

⁸⁸ *Deadly Force Police Use of Lethal Force in the United States* (p. 21, Rep.). (2015). New York, NY: Amnesty International USA, 21.

justified; a majority of states do not require officers to first provide a warning prior to the use of lethal force; and nine states allow police officers to use lethal force to suppress a riot.⁸⁹

Similarly, a 2020 report prepared by University of Chicago Law School's Global Human Rights Clinic evaluated the twenty largest U.S. cities' use of force policies against the international legal principles of legality, necessity, proportionality, and accountability.⁹⁰ The report found that not a single police department from the twenty cities had a use of force policy that "complied with basic international human rights law and standards."⁹¹

D. Recommendations

Given that the constitutional principle of federalism, specifically under the Tenth Amendment, provides U.S. states' with the power to regulate the use of force - and accountability for excessive use of force - among police departments, the IACHR should direct its recommendations with this constitutional reality in mind. By directing its criticisms and recommendations toward U.S. states, the IACHR will more effectively activate the respective governments of U.S. states, and their citizen-voters, to adhere their laws to international human rights law.

To the extent the U.S. federal government can influence the legislative goals of the U.S. states, the federal government should engage with state leaders through conferences, initiatives, and even legislation in order to persuade and encourage state governments to update their accountability and use of force legal standards to be in-line with international human rights law.

Considering the above, the IACHR should question the United States about how it intends to engage with state governments to update state accountability and use of force standards to be in-line with international human rights law. The IACHR should specifically question the U.S. federal government on what legislative changes it intends to make so that victims of police violence can have recourse outside of state law.

Additionally, the Commission should once again reiterate to the U.S. that the protection against arbitrary deprivations of life applies to the entire State structure—including federal, state, and local government entities; that police use of force must be guided by the principles of absolute necessity, proportionality, and legality; that lethal force may be permissible only when strictly

⁸⁹ *Id.* at 21-25.

⁹⁰ University of Chicago Law School - Global Human Rights Clinic, *Deadly Discretion: The Failure of Police Use of Force Policies to Meet Fundamental International Human Rights Law and Standards* (2020). Global Human Rights Clinic. 14. <https://chicagounbound.uchicago.edu/ihrc/14>

⁹¹ *Id.* at 19.

necessary to protect life; and that the U.S. must bring its domestic law in line with international standards in this area.

III. International human rights obligations regarding non-discrimination and the protection of the rights to life, health, and security require divestment of police department funding and reinvestment in communities and services.

While problems of racism in policing and criminal justice are addressed as pressing civil rights issues nationally, the Commission highlights that they also raise concerns regarding the United States' international human rights obligations.

Inter-American Commission on Human Rights, *Police Violence Against Afro Descendants in the United States*, OEA/Ser.L/V/II.Doc.156/18 (Nov. 26, 2018), p. 11.

International human rights law, in general, and the inter-American human rights legal system, in particular, require States to adopt all measures necessary to respect, protect, and ensure the full enjoyment of all human rights. These human rights include the right to not be arbitrarily deprived of one's life by police officers, to not be discriminated against in policing efforts due to racial bias, to receive adequate mental health services when undergoing a psychiatric emergency, to receive medical and other treatment for substance abuse, and to not be subjected to cruel, inhuman, or degrading treatment or punishment. To meet these human rights obligations, States must ensure the allocation of resources to the appropriate government services, agencies, and departments. With these goals in mind, there is a growing movement for governments to divest police department funding and reinvest funds into other community services and programs that are better suited to address the enjoyment of these human rights and that allow police officers to focus on securing peace and enforcing the law.

A. Defunding the Police - a Movement Calling for the Divestment of Police Department Funding in the United States and Reinvestment in Communities

In its prior press releases and reports⁹² on structural racism and police violence in the United States (“U.S.”), the Commission and numerous international human rights bodies⁹³ have continuously called on the U.S. to address police violence against Black communities and thus implement reforms in their justice systems.⁹⁴ Following this year’s multiple killings and shootings of African-Americans, such as George Floyd, Breonna Taylor, and Jacob Blake, as well as the fervent #BlackLivesMatter protests, protestors across the nation have increased their demand for accountability and reform of the police and its systems. Most notably, an area of reform that has gained momentum within the last few months is the defunding of police departments throughout the U.S.

The defund movement is not monolithic and can be defined in multiple ways, each of which depends on communities’ goals towards fighting police violence and the institutionalized racism within those systems. However, the essential idea is to *divest* the excessive amounts of money invested in local police departments and *invest* this funding into community programs that promote healthy, safer, and productive environments in every neighborhood.⁹⁵

The defund movement highlights the importance of social service programs and argues that such programs may have a more significant impact in the reduction of crime and incarceration than any reactionary method adopted by the police departments. *The Freedom to Thrive* report⁹⁶ from 2017, for example, documents how the funding for incarceration, correction, and policing programs come at the expense of programs that would benefit the welfare of communities in

⁹² Press Release, IACHR, [IACHR calls on the United States to implement structural reforms in the institutional systems of security and justice to counter historical racial discrimination and institutional racism](#) (August 8, 2020) [hereinafter “IACHR 2020 Press Release”];

IACHR, *Police Violence Against Afro Descendants in the United States*, OEA/Ser.L/V/II.Doc.156/18 (Nov. 26, 2018) [hereinafter “Report on Police Use of Force”]. This Report was released to the public in March 2019.

⁹³ The Committee on the Elimination of Racial Discrimination (“CERD”) discussed systemic racism in the U.S. in its concluding observations in May 2008 (CERD/C/USA/CO/6) and August 2014 (CERD/C/USA/CO/7-9) and most recently issued a Decision pursuant to its early warning/urgent action mandate on June 12, 2020 following the death of George Floyd calling for accountability for excessive use of force by law enforcement personnel. On June 5, 2020, many UN Special Procedures and the Chair of CERD issued two statements, one on *the Protests against Systemic Racism in the United States* and one condemning “modern-day racial terror lynchings in US and call[ing] for systemic reform and justice.” In 2016, the Working Group of Experts on People of African Descent conducted a mission to the United States, and it noted that “[k]illings of unarmed African Americans by the police is only the tip of the iceberg in what is a pervasive racial bias in the justice system.” HRC, *Report of the Working Group of Experts on People of African Descent on its Mission to the United States of America*, A/HRC/33/61/Add.2, ¶ 24 (Aug. 18, 2016).

⁹⁴ IACHR 2020 Press Release.

⁹⁵ “*What Would Defund Look Like*”, Santa Clara University, School of Law’s ACLU and BLSA organizations (Zoom expert panel discussing the defunding of police departments, their take on police reform in the wake of nationwide protests demanding an end to discriminatory policing practices resulting in the disproportionate killing of Black people, accountability for violent police officers, and the shifting of funding from law enforcement to social services) (September 1, 2020).

⁹⁶ See e.g., Cte. for Popular Democracy, et al., [Freedom to Thrive: Reimagining Safety & Security in Our Communities](#) (2017).

areas such as education, healthcare, infrastructure, food programs, and other programs that are needed in black communities. Reinvestment into programs involving education, housing, and unemployment is crucial in building stable communities.⁹⁷

Divestment implies releasing police officers from duties for which they are not trained, such as addressing mental health emergencies.⁹⁸ A police response to a mental health crisis can lead to further aggression and violence due to the lack of knowledge on part of police officers who may not be properly trained to handle a mental health crisis without resorting to forceful compliance tactics.⁹⁹ Funding programs that specialize in providing mental health and drug-related services will allow trained individuals to handle such crises and allow the people involved to receive the proper help they need, as well as alleviate the police from this burden.¹⁰⁰

The approach to defunding the police has already begun. In the Movement for Black Lives' ("M4BL") "Defund the Police" campaign, the coalition emphasizes that safe communities do exist in the United States: they are communities that do not center on the police¹⁰¹. Wealthy neighborhoods, with accessible paths to quality public education, healthcare, and better living wages do not experience racially biased police violence to the same extent as poor communities of color.¹⁰²

Community organizers are urging federal, state, and local policymakers to take action and prioritize police budget divestment and community reinvestment. Local organizers, such as Rosie Chavez of the Silicon Valley De-Bug organization¹⁰³, work diligently to create awareness about police violence and the call for reparations, especially as they have witnessed first-hand the deaths of their family members by police officers. Rosie believes that the money allocated and funded towards police is excessive and unnecessary, particularly where that funding is used for purchasing military-style weapons¹⁰⁴.

Defunding, divesting, and reinvesting police funding requires more than simply restructuring police departments or providing additional training to police offices. In the city of Camden, New Jersey, for example, the police force was disbanded in 2012 as a result of corruption and abuse claims against the department.¹⁰⁵ The city converted its police force to the Camden Metro

⁹⁷ Paige Fernandez, [Defunding the Police Will Actually Make Us Safer](#), ACLU (June 11, 2020)

⁹⁸ [To add value to Black communities, we must defund the police and prison systems](#), Brookings (June 11, 2020).

⁹⁹ William G. Brooks III, [Police Need More Mental Health Training](#), The Hill (February, 22, 2018).

¹⁰⁰ [To add value to Black communities, we must defund the police and prison systems](#), Brookings (June 11, 2020).

¹⁰¹ [DEFUND THE POLICE – M4BL](#), Movement for Black Lives. (Values and Vision).

¹⁰² *Id.*

¹⁰³ "What Would Defund Look Like", Santa Clara University, School of Law's ACLU and BLSA organizations (September 1, 2020).

¹⁰⁴ *Id.*

¹⁰⁵ Sidney Fussell, [What Disbanding the Police Really Meant in Camden, New Jersey](#), Wired (July 1, 2020).

Division of the Camden County Police Department.¹⁰⁶ While there was restructuring, new police training, and a 42% decrease in violent crimes since 2012, community activists explain that this change had nothing to do with policing itself.¹⁰⁷ Residents living in the margins were pushed out due to gentrification; thus, this transformed the demographic of those neighborhoods struggling with violence.¹⁰⁸ This restructuring also led to an increased reliance on surveillance equipment, such as license-plate-reading cameras, city-wide web of CCTV cameras, and an increase in minor arrests.¹⁰⁹ The Camden example of “defund and disband” was a less than productive approach to reform, and instead became a cost-saving measure of hiring less police rather than divesting and reinvesting funds into social and community-based programs that would help reduce racially-biased violence committed by police.¹¹⁰

As M4BL stated, “ending police violence will require a thoughtful, deliberate, and participatory approach that has already begun.”¹¹¹ Defunding, divesting and reinvesting police funds can be part of that strategy. The RIGHT care project, for example, does not reject completely the crucial police play in law enforcement, but rather allows social service workers to take the lead in non-dangerous situations while decreasing the role of law enforcement.¹¹² This is especially successful in situations of mental health calls where a social service worker and a paramedic accompany the officer.¹¹³ This has led to a decrease in arrests and aggressive confrontations in areas that it has been implemented, especially in calls regarding non-dangerous, non-violent scenarios such as homelessness, drug addiction, and mental health.¹¹⁴

Another successful approach to decreasing police involvement is seen in Milwaukee, where the city has created an Office of Violence Prevention that focuses on crime and violence reduction through public health strategies¹¹⁵. This office has also included a way for the involvement of the community to come up with solutions to the violence. The “Blueprint for Peace”, allows the people of Milwaukee to better invest into programs that benefit their community, such as youth programs, healthcare, employment, and family resources.¹¹⁶ Programs such as these are being used to put an end to violent cycles and for the safety of communities.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ [DEFUND THE POLICE – M4BL](#), Movement for Black Lives. (Values and Vision).

¹¹² Jon Schuppe, [What would it mean to 'defund the police'? These cities offer ideas](#), NBC News (June 11, 2020).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

In sum, federal, state and local authorities have the obligation to provide programs aimed at guaranteeing the human rights to life, health (including mental health and substance abuse issues), and security without discrimination. These human rights goals can be achieved by defunding, divesting, and reinvesting police funds into social and community programs that are better suited to address community needs without resorting to police force. The defund and divest movement is an important solution to make sure that human rights obligations are met.

B. Recommendations

We respectfully request that the Commission recommend to the U.S. this type of transformative justice to ensure that the protection of the human rights to life, health, and security does not rest solely in the hands of the police.¹¹⁷ Divestment of the police departments funding would not only allow for the improvement in infrastructure, education, and service programs but would also allow for the opportunity for much-needed reparations for anti-black policies. In its previous press release on the systemic racism and violence against the Afro-American communities in the United States¹¹⁸, the Commission states the need for satisfactory and comprehensive reparations for the racial police violence against Afro-American communities. These reparations should begin with the reinvestment of funds into service programs, instead of focusing tax dollars into crime prevention and incarceration methods.¹¹⁹

¹¹⁷ [DEFUND THE POLICE – M4BL](#), Movement for Black Lives.

¹¹⁸ Press Release, IACHR, [The IACHR expresses strong condemnation for George Floyd's murder, repudiates structural racism, systemic violence against Afro-Americans, impunity and the disproportionate use of police force, and urges measures to guarantee equality and non-discrimination in the United States](#) (June 8, 2020).

¹¹⁹ [To add value to Black communities, we must defund the police and prison systems](#), Brookings (June 11, 2020).