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University of Chicago Law School - Global Human Rights Clinic UniversityofChicagoLawSchoolGlobalHumanRightsClinic@chicagounbound.edu

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DEADLY DISCRETION:

The Failure of Police Use of Force Policies to Meet Fundamental International Human Rights Law and Standards



HE INTERNATIONAL HUMAN RIGHTS CLINIC



DEADLY DISCRETION: The Failure of Police Use of Force Policies to Meet Fundamental International Human Rights Law and Standards

INTERNATIONAL HUMAN RIGHTS CLINIC, UNIVERSITY OF CHICAGO LAW SCHOOL²

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The student research and drafting team includes: Cornelius Cornelssen ('16); Anna Duke ('20); Josia Klein ('20); Brittany McKinley ('19); Ryan Maher ('18); and Shelbi Smith ('18).

The faculty research and drafting team includes: Claudia Flores, Associate Clinical Professor of Law; Brian Citro, Lecturer in Law (now Assistant Clinical Professor of Law, Northwestern Pritzker School of Law); and Nino Guruli, Lecturer in Law.

The Report was also edited by Elizabeth Lindberg and Molly Blondell, Legal Assistants.

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This Report is being published in the midst of a long series of horrifying incidents of police abuse of power in the United States. The deaths of George Floyd, Lacquan McDonald, Eric Garner, Michael Brown, Ahmaud Arbery, Tony McDade, Regis Korchinski-Paquet, Breonna Taylor and many others, have echoed throughout the communities of this nation and prompted protests across the country. The video and testimonies from these incidents provide grim illustrations of the power law enforcement officers have over the people they are sworn to serve and protect, and the deadly consequences when they abuse that power.

Society vests law enforcement with the responsibility to protect public safety and enforce the law when necessary. For these reasons, and these reasons only, law enforcement officers are granted the immense power to use force, including lethal force. This authority—state sanctioned violence—necessarily comes with limits and obligations to ensure those who enforce the law do not abuse it. These limits and obligations require that police use their power in a manner that protects and serves the entire community that has vested them with this privilege. The exercise of this authority also requires accountability when abuses occur. Without accountability, state sanctioned violence is nothing but the exercise of arbitrary brute force, a common tool of tyrannical and despotic governments.

Yet, as endless reports and studies have indicated, the police in the United States do not always use their power in a manner that reflects the restraint, care and humility promised to its people. The many and terrible deaths of unarmed African Americans, the targeting of poor communities and communities of color, and the absence of a mandate to protect individuals from domestic violence, all sanctioned by the Supreme Court of the United States in the name of police discretion, have scarred many and raised questions of whether the police sufficiently serve their mandate.²

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² See e.g. Castle Rock v. Gonzales, 545 U.S. 748 (2005); Jessica Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).

Even as the evidence of criminality and misconduct permeates the news, drives thousands to the streets, and garners national outrage, the exact scope and scale of lethal use of force remains unknown. The United States does not count the number of lives lost nationally due to police use of force. And police departments vary as to how and whether data on officer use of force, including the discharge of police firearms and deaths, is collected and published. This absence of comprehensive reporting and publishing of data on police use of force severely limits our ability to see the full picture and to accurately evaluate police misconduct. It also constrains our ability to identify practices and institutional mechanisms in need of reform. The failure by states and the federal government to address this lack of transparency and accountability tells its own story and is, on its own, a cause for great concern.³

The human rights of people living in the United States are profoundly affected by how law enforcement officials carry out their duties. Police use of force implicates the basic rights of every individual subject to this power—the rights to life, security of person, freedom from discrimination and equal protection of the laws. These rights, established following the atrocities of World War II in the Charter of the United Nations and the Universal Declaration of Human Rights, form the cornerstone of the human rights system. The challenge of managing police power is a global one. People in every country face the difficult and complex balance between granting police the discretion and resources needed to achieve their purpose, while holding them accountable when they abuse their power in violation of the human rights of the communities they serve.

To address this global challenge, the 193 member states of the United Nations, which include the United States, have developed principles and standards to constrain, direct and ensure the proper use of lethal force. These principles—legality, necessity, proportionality and accountability—have been developed and concretized in various forms in the international system, and have been articulated in resolutions by the U.N. General Assembly, rules by committees of experts, and findings by U.N. Special Procedure Mechanisms. These principles and the rules they establish represent the best global effort to consider how police discretion and accountability can contribute to a just and humane society that respects and protects the rights of all its individuals.

In the United States, some of these principles have been adopted and articulated by our courts and law makers.⁴ However, this country lacks a comprehensive and effective national legal framework that places specific conditions on the use of force and establishes mechanisms of accountability.⁵ While the Constitution sets some limits on the use of force, the standards set by the Supreme Court in its case law fall woefully short of meeting the international standards, and Congress has failed to take action to fill this critical gap in federal law.⁶ Due to the decentralized nature of law enforcement in the United States,

³ The F.B.I began a national use of force database in January of 2019 based on voluntary reporting from law enforcement bodies across the country. According to reports, fewer than half of the law enforcement bodies nationwide have submitted data. See Federal Bureau of Investigation, National Use-of-Force Data Collection, https://www.fbi.gov/services/cjis/ucr/use-of-force; Kimberly Adams, *FBI says new data on police use of force is coming this summer*, Marketplace, June 6, 2020, available at https://www.marketplace.org/2020/06/01/fbi-police-use-of-force-database/.

⁴ See e.g. Scott v. Harris, 550 U.S. 371 (2007); Graham v. Connor, 490 U.S. 386 (1989); Tennessee v. Graner, 471 U.S. 1 (1985); 42 U.S.C § 14141;41 U.S.C. § 1983; 18 U.S.C. § 242.

⁵ U.S. Commission on Civil Rights, Briefing Report, *Police Use of Force: An Examination of Modern Policing Practices* (Nov. 2018); Richard M. Thompson II, Congressional Research Service, *Police Use of Force: Rules, Remedies, and Reforms* (Oct. 30, 2015);

⁶ Scott v. Harris, 550 U.S. 371 (2007). See also Richard M. Thompson II, Congressional Research Service, Police Use of Force: Rules, Remedies, and Reforms (Oct. 30, 2015).

and the failure of national leadership to set uniform, federal standards, the main restrictions on police use of force exist at the state and local level. State law and police departmental policies provide the principles and standards on use of force and the consequences for when that authority is abused.

While, in many states, legislation provides some direction on the use of force to police departments, research and data indicates that state laws have overwhelmingly failed to do so in an effective manner. In 2015, Amnesty International, USA released "Deadly Force: Police Use of Lethal Force in the United States," evaluating state laws' compliance with international human rights standards. Alarmingly, the report found that not a single state's law fully complied.

This Report builds on Amnesty's findings by examining the other main source of accountability for the use of force: police department policies. To capture a large portion of the population and a diverse set of contexts, this Report evaluates the police policies from the 20 largest cities in the United States during 2017 to 2018.⁷ These internal departmental policies provide the primary guidance to police officers on when and how they may use lethal force.⁸ They are intended as manuals for officers on how to execute their duties, written by police leadership and, for the most part, adopted by the governing police boards.⁹ These policies provide the substantive standards that officers are trained on and the principles that departments must operationalize. Policy violations trigger internal and sometimes external reviews and possible disciplinary measures.

While police policies vary, a use of force policy generally establishes the magnitude and nature of the threat that must exist, and the level of certainty police officers must have, to justify the use of lethal force.¹⁰ Some policies call for a gradual escalation of the use of force; some list a series of measures an officer must or should take before resorting to lethal force.¹¹ They also prescribe what must happen after force has been used, who must be notified, and how an investigation unfolds.

This Report reviews and analyzes these policies to better understand how and whether police departments provide meaningful and effective direction to officers on the use of lethal force in a manner that respects the rights of the people they are charged to protect and serve. To evaluate use of force policies, authors developed and applied a grading system based on international law and standards on police lethal use of force. Through this evaluation, authors found that the policies in all 20 cities reviewed fail to meet international human rights law and standards. These use of force policies grant police undue discretion and insufficient guidance on when lethal force can be used, and they fail to establish strong enough accountability mechanisms.

⁷ The authors requested and examined use of force policies in effect from January 1, 2017 to June 20, 2018. As of June 1, 2020, some of the 20 police departments have amended their policies. Indianapolis, Los Angeles, San Francisco, New York, Philadelphia, Dallas, Columbus and San Antonio police departments made no changes to their use of force policies. Austin, San Jose, Denver, Seattle, Phoenix, Chicago, Fort Worth, San Diego made some changes to their policies, though many appear to be minor. Analysis and grading of these changes is beyond the scope of this report. Authors were unable to confirm whether Jacksonville, Charlotte, Houston and El Paso departments made changes to their use of force policies after June 20, 2018.

⁸ See Appendix B.

⁹ The authority of police boards and processes for adopting police policies are typically provided for in the relevant municipal codes. See e.g. Municipal Code of Chicago, Chapter 2-84, \$010-030; Los Angeles City Charter, \$\$ 570-576.

¹⁰ See analysis in Use of Lethal Force Policy Grading System and Grade Results *infra*.

¹¹ Id.

Part I of this Report provides summary of findings and recommendations for the development of a robust mechanism to constrain police lethal use of force. Police departments across the country allow for the use of force in circumstances where there is no immediate threat to life, such as allowing exceptions for the capture of a fleeing suspect. And almost none of the city policies provide adequate oversight and accountability mechanisms.

Part II presents the international law and standards governing police use of lethal force in the United States. It highlights the four main principles derived from these standards—legality, necessity, proportionality, and accountability—and explains their application to police use of force policies.

Part III uses these four principles to analyze and grade the use of lethal force policies of the 20 largest U.S. cities. Like the laws of the 50 states, not a single policy fully complied with international human rights law and standards. In fact, some policies fell well below full compliance, for example, failing to require that lethal force only be used in response to the immediate threat of deadly force.

Ultimately, deep, structural reform of the United States' law enforcement system is needed. The police in the United States kill more people than any of our peer nations.¹² In a 24-day period in 2015, police in the United States shot more people than the police did in England and Wales in 24 years.¹³ By all measures, the current system is broken. As this Report demonstrates, the very laws and departmental policies that are meant to guide police officers on how to make the difficult, life and death decisions that are required of them, do not comply with human rights. Structural reform to end police killings of unarmed black and brown men and women must start in the police departments themselves with human rights-compliant use of force policies.

¹² See Jamiles Lartey, By the numbers: US Police kill more in days than other countries do in years, The Guardian, (Jun. 9, 2015) https://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries.

¹³ Id.



This report was researched and drafted by the International Human Rights Clinic at the University of Chicago Law School ("authors") during October 2015 to August 2018. The authors collected "use of lethal force" policies of police departments in the 20 largest U.S. cities by population in 2018. A summary of these policies is available in Appendix B. To determine the 20 largest cities in the United States by population in 2018, the authors used *The World Almanac and Book of Facts 2018*. This almanac relies on data from the United States Census Bureau. The 2018 almanac's most updated population data is from 2016, and the U.S. Census Bureau had not yet released updated data on the largest cities by population as of July 2018. These cities are (in order of population size): New York, Los Angeles, Chicago, Houston, Phoenix, Philadelphia, San Antonio, San Diego, Dallas, San Jose, Austin, Jacksonville, San Francisco, Columbus, Indianapolis, Fort Worth, Charlotte, Seattle, Denver and El Paso.

Use of lethal force policies were then analyzed and graded using a system the authors developed based on international law and standards, including: the U.N. Code of Conduct for Law Enforcement Officials; U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; and the 2014 report of the former U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, on protection of the right to life during law enforcement.

The authors collected police department 2017-2018 use of lethal force policies online—on police department websites and at useofforceproject.org—by informal email communications with police departments, and through official public records requests via the relevant state freedom of information act statutes.¹⁴ In the event that a police department modified its use of lethal force policy during 2017-2018, and had multiple policies during the year, all relevant policies were obtained and assessed to determine if the changes impacted the policy.

¹⁴ Texas Government Code 55 (Public Information Act); Calif. Public Record Act: Gov't Code §6250-6268; Ohio Rev. Code sec. 149.43 et seq.; Ch. 132-North Carolina General Assembly; 5 Illinois Compile Statutes 140-Freedom of Information Act; Indiana Access to Public Records Act §\$5-14-3-1- et seq.; Fla. Stat. sec. 119.01 et. seq.; 65 Pennsylvania Statute § 67.101 et.seq. (Right-to-Know Law); Arizona Public Records Law §39-121 et. seq.; New York Freedom of Information Law, Article 6 Sec. 84-90; Washington Public Record Act- Chapter 42.56 RCW; Colorado Public (Open) Records Act, C.R.S. 24-72-201 et seq.

Summary of Findings and Recommendations

The human rights at stake in policing — the right to life and personal security as well as the freedom from discrimination— are bedrock guarantees, essential for the enjoyment of other fundamental human rights. Out of the 20 city police departments surveyed in this study, not one met the minimum standards established by human rights law. Even the two cities that had the best scoring policies, **Chicago** and **Los Angeles**, did not guarantee basic safeguards (i.e. necessity, proportionality and accountability) in the law.

Legality: No city satisfied the requirement of legality because no state has a human rights compliant state law. The failure to enact legislative standards on police use of force undermines the rule of law, frustrates accountability for misuse of state power, and weakens police department policies.

Necessity: Twelve city policies satisfied the necessity requirement, mandating immediacy of a particularized threat and the use of force as a last resort. Of the states that failed to satisfy this standard, eight policies contained various exceptions to the necessity requirement, such as permitting force when used to prevent a suspect's escape. **Indianapolis**, which failed on each of the three necessity subcategories, allows for the use of force to prevent the commission of a felony. But the policy does not specify the kind felony or the nature of the threat posed by the felony, thereby allowing the use of lethal force when it may not be necessary.

Proportionality: Use of force must be proportional to the threat or resistance the officer confronts. Seventeen city policies met the proportionality standard. Others permitted the use of deadly force in cases of self-defense or to prevent the commission of a felony without specifying that the threat to the officer must be proportionate to the force used.

Accountability: Finally, compliance with the requirements of necessity, proportionality, and effective legality require accountability mechanisms that guarantee effective and independent investigation for all instances of the use of lethal force. While all 20 cities have internal reporting requirements, only two cities—**Los Angeles** and **Chicago**—require mandatory external reporting for all instances of the use o