RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to examine existing policies on the use of lethal force against individuals during law enforcement encounters -- including investigative stops, arrests, and searches -- to determine whether those policies should be modified to ensure that the lethal force is only employed against individuals when necessary to protect officers or public safety; and

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments:

1. to establish an investigative entity to examine whether each use of lethal force was justified;
2. to publish at regular intervals, at least annually, the number of times lethal force has been employed during the previous time period, whether or not the lethal force resulted in the death of an individual;
3. to publish the conclusions of the investigative entity as to whether each use of lethal force was justified; and
4. to provide continuing review of lethal force policies and training of law enforcement officers on the proper implementation of those policies.
The Need For This Resolution

In the American Bar Association Criminal Justice Standards on The Urban Police Function, the ABA set forth the policy that law enforcement should only use the amount of force that is reasonably necessary to carry out their duties. Standard 1-2.4(d) set forth the following principle:

In order to maximize the use of the special authority and ability of the police, it is appropriate for government, in developing objectives and priorities for police services, to give emphasis to those social and behavioral problems which may require the use of force or the use of special investigative abilities which the police possess. Given the awesome authority of the police to use force and the priority that must be given to preserving life, however, government should firmly establish the principle that the police should be restricted to using the amount of force reasonably necessary in responding to any situation.

Standard 1-10.1 reiterated this principle:

The effectiveness of the police should be measured generally in accordance with their ability to achieve the objectives and priorities selected for police service in individual communities. In addition, the effectiveness of police should be measured by their adherence to the principles set forth in standard 1-2.4. This means that, among other things, police effectiveness should be measured in accordance with the extent to which the police:

* * *
(c) use only the amount of force reasonably necessary in responding to any given situation * * * .

Those Standards were adopted by the House of Delegates in February, 1979.\(^1\) In the past 40 years, the ABA has not spoken about the use of lethal force against individuals since, despite the intense controversy concerning reports of unjustified use of force by police against young men of color in recent years.\(^2\)

\(^1\) The text of these Standards as adopted by the House of Delegates in February, 1979, is archived at: https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjus_t_standards_urbanpolice/

There is widespread agreement with these old ABA Standards and the fundamental principle that police use of force should be reasonable. The National Institute of Justice recently restated the principle that “law enforcement officers should use only the amount of force necessary to mitigate an incident, make an arrest, or protect themselves or others from harm.”

The Need For Data Collection

Concern about law enforcement’s use of deadly force is not new. It has roots going back at least 60 years:

Police use of deadly force first became a major public issue in the 1960s, when many urban riots were precipitated immediately by police killings of citizens. Since that time scholars have studied deadly force extensively, police practitioners have made significant reforms in their policies and practices regarding deadly force, and the United States Supreme Court has voided a centuries-old legal principle that authorized police in about one-half the states to use deadly force to apprehend unarmed, nonviolent, fleeing felony suspects.


One of the difficulties in assessing the use of lethal force is that the data is not as available or robust as one would wish. As one leading researcher and scholar, Dr. Richard Johnson, observes:

https://www.americanbar.org/content/dam/aba/administrative/office_president/2_8_task_force_on_buildin_g_trust_in_american_justice_system.pdf.


4 Available at: https://www.tandfonline.com/doi/abs/10.1080/07418828800089691?journalCode=rjqy20.


Many civil rights leaders, politicians, and media figures have suggested that deaths from police use of force in the U.S. are widespread and have reached epidemic levels. To check the evidence for this argument, one must first determine how many police use of force deaths actually occur annually. There is some difficulty involved in determining exactly how many deaths occur annually from police use of force as data sources differ widely.

Official government statistics on deaths from police activity come from two distinct sources—the FBI Uniform Crime Reports and the CDC Mortality Reports. The FBI data is gathered from law enforcement agencies that voluntarily report specific types of crime data, including all homicides, each year. These data have been criticized because between 20% and 30% of law enforcement agencies do not report data in a given year, although the majority of these non-reporting agencies are quite small (fewer than 5 officers) and rarely experience violent crime. The CDC data, on the other hand, comes from a federal supplemental form that is completed by coroners and physicians when they complete a death certificate. Because it takes time to gather all of the facts needed to determine the correct cause of death, and it takes time to compile, tabulate, and analyze the data received, the FBI and CDC release their reports lagged by about two years. In other words, information on deaths in 2016 will not be available to the public until 2018. Despite the fact that these data come from different sources (police departments versus hospitals), the numbers generally coincide.


Concern about the statistics has led a number of media outlets to attempt to publish their own data on lethal force. Some of the databases are impressive. For example, the Washington Post has published yearly data on “fatal force” since 2015.9

But many media attempts to gather data are often flawed because they are based on information circulated by other media, published before a full investigation into the use of force has been conducted, use varying definitions of lethal force. Neither the FBI Uniform Crime Reports nor the CDC Mortality Reports examine the use of lethal force

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9 The 2019 data indicates that, as of December 15, 2019, 864 individuals had been shot and killed by police so far that year. https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/.
that does not result in death. This is unfortunate given that by definition any use of lethal force against an individual could result in death and should be investigated.

Despite the many voices lamenting the use of lethal force, especially against minorities, some studies of such force conclude that “from a historical perspective there is no doubt that police use of lethal force occurs only a fraction as often as it did 40 years ago, and official government statistics suggest that it has been declining further since 2012.” Even if this is accurate, many news accounts question the use of lethal force in particular cases, some of which are highly publicized.

**The Need For Policy And Training On Use of Lethal Force**

Although the issues surrounding the use of lethal force are not new, there has been increasing concern in recent years about the frequency of such use. As one scholar expressed in 2016:

> Over the last three years there has been growing concern in the public discourse about the use of force, especially lethal force, by the police in the United States. This concern spawned the creation of the Black Lives Matter organization and motivated President Obama to organize a commission on policing in the 21st century. Concerns over several highly publicized and politicized deaths of African-American men by police use of force have produced numerous public protests in almost every city, town, and university in the nation. Most of these protests have been peaceful, but many have not, especially the protest in Dallas on July 7 that resulted in eleven officers being shot, five of them fatally. This was followed on July 17 by the ambush of officers in Baton Rouge, with 6 officers shot, 3 of them fatally.

Johnson, *Dispelling the Myths, supra*, at p.1.

There is evidence that law enforcement policies that regulate and control the use of lethal force can have a real effect on the frequency of its use. As two leading scholars in this field have observed:

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Scholars have long theorized that constraining police officer discretion via organizational policy improves decision-making. Empirically, prior research shows that more restrictive lethal force policies result in a reduction in the number of police shootings and in racial disparity. Yet, researchers have never examined the impact of less lethal force policies in relation to the full spectrum of less lethal force tactics. In addressing this research void, we examine 3,340 use of force incidents from three US agencies, each varying in terms of policy direction and restrictiveness. The results consistently show that officers working within the most restrictive policy framework used force less readily than officers who operated within more permissive policy environments. Hence, police administrators wishing to reduce coercion should consider the potential effect that a more restrictive policy may have on such behavior.


This resolution does not make assumptions regarding the extent to which lethal force is appropriate or inappropriate. The ABA recognizes that law enforcement officers face threats to their safety or public safety that at times will require lethal force. Arguably, the challenges facing law enforcement have increased since the U.S. Supreme Court’s decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which recognize that individuals have a Second Amendment right to bear arms.14 The constitutional decisions make it more difficult for some jurisdictions to regulate possession of firearms. Although it is not clear that the number of firearms possessed by the public has any causal connection to the use of deadly force, see Gary Kleck, *Gun Control After Heller and McDonald: What Cannot Be Done and What Ought to Be Done*, 39 Fordham Urban L. J. 1383, 1388 (2012), it is possible that law enforcement officers will feel more at risk as firearm possession is ever more common and as reports of gun violence against officers get media attention.15

The statistics bear out this reasonable fear that police officers should have for their personal safety. In 2014, the FBI collected data on officer assaults from about 66% of the nation’s 17,000 law enforcement agencies and even though data from a third of law enforcement agencies was absent, the data that was collected revealed that 48,315 assaults occurred against law enforcement officers in 2014, resulting in 13,654 officers

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15 CNN reported that in 50 weeks, 38 officers were shot and killed in the line of duty in 2019, and 47 officers were shot and killed in 2018. https://www.cnn.com/2019/02/07/us/2019-officers-killed-trnd/index.html.
receiving an injury requiring medical treatment. Of these assaults on officers, 1,950 involved a firearm and 951 involved a “cutting instrument” such as a knife, sword, axe, etc., while another 6,803 assaults on officers involved “other dangerous weapons” such as motor vehicles, clubs, metal pipes, shovels. This means that in 2014, police officers were assaulted 9,704 times with deadly weapons, an average of 27 per day.

The benefits of providing ongoing police training on the use of lethal force are well understood. There is a need to make sure our modern police training incorporates what recent scholarship has taught us, particularly in areas as implicit bias training, conflict de-escalation training and the use of force in dealing with issues of mental health and disabilities. Trainings like this can be effective, despite the fact that studies concerning the effectiveness of certain kinds of cognitive-adjustment trainings, such as implicit bias training, are in their infancy and they certainly should be supported, given the potential benefit in terms of promoting public trust in the criminal justice system.

The public concerns about the use of lethal force that arose in the 1960’s and 1970’s were a driving force behind the position taken in the Urban Police Function Standards. The public concerns that today exist parallel earlier concerns to some extent, but unquestionably the current focus, quite properly, is on the impact of the use of lethal force on minority groups.

This Resolution asserts that both law enforcement and the public will benefit if governments at every level can improve data gathering on the use of lethal force, make that data publicly available, and examine and improve policies on the use of lethal force and police training on lethal force policies.

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17 Id.
18 Id.
20 See id., at 101-103.
CONCLUSION

Accordingly, this Resolution urges federal, state, local, territorial and tribal governments to take these steps:

1. Examine existing policies on the use of lethal force against individuals during law enforcement encounters -- including investigative stops, arrests, and searches; and determine whether those policies should be modified to ensure that the lethal force is only employed against individuals when necessary to protect officers or public safety.

   This recommendation recognizes that law enforcement approaches change over time, and that officers are called upon to deal with a wide array of challenges during their investigations.

2. Establish an investigative entity to examine whether each use of lethal force was justified; to publish at regular intervals, at least annually, the number of times lethal force has been employed during the previous time period, whether or not the lethal force resulted in the death of an individual; and publish the conclusions of the investigative entity as to whether each use of lethal force was justified.

   This recommendation seeks to ensure that every jurisdiction collects and reports data on all uses of legal forces whether or not the use of lethal force results in death and reports the data on a regular basis. The resolution requires that an entity be assigned the specific task of investigating each use of lethal force and publishing its conclusions once its investigation is complete.

3. Provide continuing review of lethal force policies and training of law enforcement officers on the proper implementation of those policies.

   Because law enforcement agencies cannot know whether their lethal force policies are as effective in practice as they might appear to be on paper, it is important to have continual review of those policies to improve them in light of what they learn from their data collection. Because the use of lethal force is the greatest use of force permitted under the law, it is important that law enforcement officers receive continuing training on the policies as they are tweaked over time and the best ways of implementing them.

Respectfully submitted,

John J. Morrissey, President
Massachusetts Bar Association
February 2020
1. **Summary of Resolution(s).**

This resolution urges federal, state, local, territorial, and tribal governments to examine policies on the use of lethal force against individuals during law enforcement encounters -- including investigative stops, arrests, and searches – in order to determine whether those policies should be modified to assure that the lethal force is only employed against individuals when necessary to protect officers or public safety.

The resolution also urges governments to:

- establish an investigative entity to examine whether each use of lethal force was justified;
- publish at regular intervals, at least annually, the number of times lethal force has been employed during the previous time period, whether or not the lethal force resulted in the death of an individual;
- publish the conclusions of the investigative entity as to whether each use of lethal force was justified; and
- provide continuing review of lethal force policies and training of law enforcement officers on the proper implementation of those policies.

2. **Approval by Submitting Entity.**

The Massachusetts State Bar Association approved co-sponsorship of the resolution on January 15, 2020.

The Criminal Justice Section approved co-sponsorship on January 30, 2020.

3. **Has this or a similar resolution been submitted to the House or Board previously?**

No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

This resolution is consistent with the (now over 40 years old) American Bar Association Criminal Justice Standards on The Urban Police Function (1979), Standards 1-2.4(d) and 1-10.1, which provide that law enforcement should only use the amount of force that is reasonably necessary to carry out their duties.
5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A


None known.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The sponsors will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.


Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.


N/A.

10. Referrals.

Prior to or concurrent with the filing of this resolution and Report with the House of Delegates, the Massachusetts Bar Association sent the resolution and report to the following entities and/or interested groups:

Criminal Justice Section
Tort, Trial and Insurance Practice Section
Center on Human Rights
Section of Civil Rights and Social Justice
Commission on Racial & Ethnic Justice
Young Lawyers Division
Section of Litigation

11. Contact Name and Address Information (prior to the meeting).

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Boston, Massachusetts
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(508) 423-0140
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

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- provide continuing review of lethal force policies and training of law enforcement officers on the proper implementation of those policies.

2. Summary of the Issue that the Resolution Addresses

Tracking accurately and evaluating fairly the use by police of lethal force in their encounters with members of the public is a critical element in helping to build public trust in the legitimacy and effectiveness of our criminal justice system.

3. Please Explain How the Proposed Policy Position Will Address the Issue

This resolution urges governments to examine existing policies on the use of lethal force by law enforcement in its interactions with the public, establish an entity whose responsibility it is to conduct an inquiry into instances of use of lethal force by law enforcement, and publish statistics in the use of lethal force periodically. It is also necessary to provide continuing review of lethal force policies and training of law enforcement officers on the proper implementation of those policies.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None identified.