RESOLVED, That the American Bar Association urges federal, state, local, tribal, and territorial governments to enact legislation that requires law enforcement agencies to keep records of all instances in which lethal force is used or a claim is made that non-lethal force is excessive, by maintaining the known or reasonably available demographic data of all persons against whom lethal force is used, including but not limited to race, color, national origin, age, gender, sexual orientation or gender identity, religion, the presence of mental or physical disability, whether the person was fleeing at the time, whether the individual possessed a weapon (including the type of weapon), and whether a body camera was used;

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, tribal and territorial governments to enact legislation to provide, when a person's death occurs in the custody of or during an encounter with a law enforcement officer acting in the officer's official capacity, a mechanism to ensure fair and independent evaluation, referral to an independent entity for an investigation, and, as appropriate, prosecution by an independent entity;

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, tribal, and territorial governments to enact or amend, as necessary, laws to provide that the reasonableness of police use of force should be judged on the basis of objective necessity;

FURTHER RESOLVED, that the American Bar Association urges Congress to fund a nationally respected entity independent of law enforcement to develop and keep current a national data base that records disciplinary actions against and complaints of excessive force by law enforcement officers, including action by any government or tribal entity revoking a law enforcement officer's certificate or license, and to require all law enforcement agencies receiving federal funds to record and report to that entity all said disciplinary actions and complaints;

FURTHER RESOLVED, that the American Bar Association urges all federal, state, local, tribal, and territorial governments to enact legislation that (a) prohibits the use of chokeholds, any other carotid restraint or any induced method of asphyxiation by law
enforcement officers, (b) eliminates no-knock warrants in drug cases, (c) eliminates rules and procedures which prevent disclosure of citizen complaints or disciplinary actions against law enforcement officers, and (d) expresses the duty of every law enforcement officer to act to prevent and stop the use of excessive force or improper use of lethal force by another law enforcement officer; and

FURTHER RESOLVED, that the American Bar Association supports the “Justice in Policing Act”, H.R.7120, and similar federal, state, local, tribal, and territorial legislation whose purpose is “to hold police accountable, change the culture of law enforcement and build trust between law enforcement and our communities.”
The American Bar Association ("ABA") adopts this Resolution in furtherance of existing ABA policy that urges the implementation of policies and practices dealing with law enforcement’s use of lethal force and racial profiling.

At the 2020 Midyear meeting, the House of Delegates passed resolution 10B, which urges an examination of existing policies on the use of lethal force against individuals during law enforcement encounters.\(^1\) More specifically, 10B calls for (1) the establishment of an investigative entity to examine whether use of lethal force was justified, (2) the publishing at regular intervals, at least annually, the number of times lethal force has been employed during the previous time period and whether or not the lethal force resulted in the death of an individual, (3) the publishing of conclusions of the investigative entity as to whether each use of lethal force was justified, and (4) continuing review of lethal force policies and training of law enforcement officers on the proper implementation of those policies.\(^2\)

Over the last two decades, the ABA has supported policies that address the use of racial profiling by law enforcement through Resolutions 121B (2004) (Elimination of actual and perceived racial and ethnic bias in the criminal justice system) and 104C (2008) (Use of racial profiling by law enforcement). Resolution 121B highlights how African Americans constitute an overwhelmingly disproportionate number of arrests and convictions for drug possession and distribution despite not using or selling more drugs than white individuals. Racial profiling is one of the major factors in this issue and contributes directly to the racial disparity in the criminal justice system. In 121B, the ABA urges states, territories and the federal government to strive to eliminate actual and perceived racial and ethnic bias in the criminal justice system by establishing criminal justice racial and ethnic task forces, requiring law enforcement agencies to develop and implement policies and procedures to combat racial and ethnic profiling, and require legislatures to conduct racial and ethnic disparity impact analyses to evaluate the potential disparate effects on racial and ethnic groups.\(^3\)

At the 2008 meeting of the House of Delegates, Resolution 104C was passed which urges federal, state, local and territorial governments to enact effective legislation, policies, and procedures to ban law enforcement’s use of racial or ethnic characteristics not justified by specific and articulable facts suggesting that an individual may be engaged in criminal behavior.\(^4\) Additionally, 104C urges legislation, policies and procedures, except when impractical due to the small size or other characteristics of a law enforcement agency, to (1) that law enforcement agencies have written policies, training, and supervision necessary to effectively implement the ban and funding necessary for these purposes; (2) data collection, on all police stops and searches, whether of drivers and their vehicles or pedestrians; (3) where feasible, independent analysis of data collected,

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1 20M10B  
2 Id.  
3 04A121B  
4 08A104C
and publication of both the data and the analysis; and (4) funding for police agencies to be made contingent on compliance with these.

Furthermore, in 1979, the ABA adopted the Criminal Justice Standards on The Urban Police Function. Specifically, Standard 1-2.4(d) states:

*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.*

Additionally, Criminal Justice Standard 1-5.3 Sanctions provides an overarching framework for this resolution when it states in pertinent part:

*Legislatures should clarify the authority of police agencies to develop substantive and procedural rules controlling police authority – particularly regarding investigatory methods, the use of force, and enforcement policies – and creating methods for discovering and dealing with abuses of that authority. Where adequate administrative sanctions are in effect, evidence obtained in violation of administrative rules should not be excluded in criminal proceedings.*

This resolution operates to further Resolution 10B, by calling for the investigative entity employed to investigate the use of lethal force be independent of the law enforcement agency involved and any other law enforcement agency. Additionally, this resolution urges that a special prosecutor be utilized. A special prosecutor is necessary to avoid any potential or real conflict of interest. In cases involving police violence, prosecutors cannot and should not rely on law enforcement to investigate themselves.

This resolution also furthers Resolutions 10B, 104C, and 121B by urging that law enforcement agencies to not only report the use of lethal force, but also report specific demographics of those such force is used against. These demographics include; race, gender, age, existence of an apparent disability, presence of mental illness, whether the person was fleeing, whether a body camera was worn by the officer, and whether said camera was in operation at the time of the incident.

This resolution furthers Criminal Justice Standard 1-2.4(d) and 1-5.3, by urging the enactment of legislation that requires a showing of reasonable necessity to establish a defense of immunity asserted by a law enforcement officer.

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BACKGROUND AND DISCUSSION

Over 1,000 people were shot and killed by police in 2019.\(^7\) That year, there were only 27 days where someone was not killed by law enforcement. Police shootings have been a concern for many years. Although this resolution calls for a change in legal standard for prosecutions involving police involved shooting, it does not make assumptions regarding the extent to which lethal force is appropriate or inappropriate. The ABA recognizes that law enforcement officers face extraordinary threats to their safety or public safety that at times will require lethal force. The goal of this resolution is to urge jurisdictions and law enforcement agencies to recognize the existence of implicit biases in everyday life (that affect policing) and to act with a greater level of care for the preservation of human life and dignity.

I. Data Collection and Adequate Recordkeeping Should be Required

Governments should enact legislation that requires law enforcement agencies to collect and/or preserve information on the use of lethal force by police or other law enforcement officers. The data should be maintained by adequate recordkeeping and, at minimum, should consist of the following: the total number of instances in which lethal force was used; an accurate demographic description of the individuals against whom legal force is used, including race, color, national origin, age, gender, apparent religion, physical or mental disability (regardless of whether the disability was known at the time of the incident); and factors relevant to an investigation including whether the individual was fleeing at the time, whether the individual possessed a weapon and whether cameras were present during the incident (including officer body cameras, officer dash cameras and/or known witness cameras).

In general, there is a lack of accurate records of people killed by law enforcement. The opening paragraph of the introduction to this report could only accurately state that “over 1,000 people were shot and killed” because the number continues to grow even though this report was written well into the year 2020. Media outlets, like the Washington Post, that have committed to keeping these records must rely on news reports, the partial records from law enforcement, independent databases, and social media.\(^8\)

The federal government does not require police departments to keep records of these killings. In 1994, Congress mandated that the Attorney General collect data on the use of excessive force by police and publish an annual report from the data.\(^9\) Despite this fact, in 2015, former Attorney General Loretta Lynch was quoted saying, “one of the things we are focusing on at the Department of Justice is not trying to reach down from Washington and dictate to every local department how they should handle the minutia of record keeping, but we are stressing to them that they must be kept.” When accurate record

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\(^8\) Id.

keeping is lacking, it is more difficult to determine the root of the problem. These records would not only tell us who was killed, but it would give a clearer picture as to what led to the incident.

The ABA already urges data collection of the race of individuals stopped by law enforcement in order to ascertain whether racial bias and profiling played a role. This demographical data needs to be maintained by police departments when there is an officer involved shooting. Of the over 1,000 people shot and killed by police in 2019, the race of 187 of the victims is unknown. At least 40% of those killed by American law enforcement were minorities. According to the Washington Post, since 2015, there have been over 5,000 recorded deaths at the hands of law enforcement. From their findings, Black Americans consist of thirteen percent of the population yet are killed by police at more than twice the rate of white Americans. Hispanic Americans are also killed by police in a similarly disproportionate rate.

A wealth of research on implicit social cognition has repeatedly demonstrated that even the most egalitarian-minded individuals are implicitly racially biased. Implicit racial bias can encourage police officers and others to perceive danger when dealing with a Black individual, even when that individual does not, in fact, pose a threat of violence. Latinos are also commonly stereotyped as criminal and dangerous. Muslim and Middle Eastern Americans are commonly stereotypes as terrorists.

Additionally, available data confirms that 180 of the victims had a mental illness. One of the most important statistics is whether the officer involved was recording the incident with a body camera. In 836 (87%) of the aforementioned incidents, either there was no body camera or it could not be determined whether a body camera was worn.

II. An Independent Special Prosecutor Should Be Appointed When Lethal Force Is Used By Law Enforcement

Governments should enact legislation which will require the appointment of an independent special prosecutor to investigate and prosecute criminal cases involving the use of lethal force by a police or other law enforcement officer. Employing independent investigators in law-enforcement-involved shootings comports with prior ABA policy relating to racial disparity within the criminal justice system. Prosecutors often consider police officers to be their teammates and may fear that prosecuting an officer will result

10 Id.
13 Kate Levine, Who Shouldn’t Prosecute the Police, 101 Iowa L. Rev. 1447, 1450 (2014); see also Laurie L. Levenson, Police Corruption and New Models for Reform, 35 Suffolk U. L. Rev. 1, 22 (2001) ("[P]rosecutors often enjoy too close of a relationship with local police and are therefore reluctant to turn against those with whom they have worked.")
in other officers refusing to testify in their other cases. This policy urges governments to ensure that law-enforcement-involved shootings are investigated by special prosecutors who are fully independent from the entity under investigation.

Campaign Zero was created in an attempt to push local and state governments to step up and protect the communities that are most affected by police violence and mass incarceration. It is a data-informed platform that “presents comprehensive solutions to end police violence in America.” Their solutions take into account community demands as well as policy recommendations from research organizations and former President Obama’s Task Force on 21st Century Policing.

The solutions, themselves, include lowering the standard of proof for Department of Justice civil rights investigations of police officers, using federal funds to encourage independent investigations and prosecutions, establishing a permanent Special Prosecutor’s Office at the State level for cases of police violence, and requiring independent investigations of all cases where police kill or seriously injure civilians.

Not only are citizens campaigning for change, researchers have also been exploring how conflicts of interest in crimes of this manner require independent investigation. In 2018, Caleb J. Robertson wrote the article “Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police” for the Emory Law Journal. Robertson points out that conducting independent investigations is not necessarily meant to ensure police convictions. Instead, it creates a process that will increase the public’s acceptance of the substantive outcomes in these cases, whether the outcome is non-indictment or conviction.

Some states across the U.S. are making efforts to incorporate the use of independent investigators in officer-involved shootings. For example, Governor Phil Murphy, of New Jersey, signed S1036 into law in 2019. It stated that the Attorney General would be the one to investigate and prosecute crimes that relate to officer-involved deaths. Other legislative and local officials agreed that by providing an independent investigator in law enforcement-related deaths would remove the potential conflict of interest.

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14 As Kate Levine has noted: [Prosecutors] rely on the police for successful convictions, and therefore, must have a good working relationship with the police for professional advancement. A prosecutor who reports police crimes or advocates zealous prosecution of the police will necessarily run afoul of law enforcement's good graces, which may impact conviction rates and therefore her career advancement. Id. at 1472.


18 New Jersey Senate Bill 1036

Additionally, Congressional bills have addressed the lack of independent investigations of crimes where there was an officer-involved death. On May 13, 2015, Congressman Steve Cohen proposed bill H.R. 2302 (Police Training and Independent Review Act of 2015), which would require that States receiving Byrne JAG funds to provide sensitivity training for law enforcement officers of that State and to incentivize States to enact laws requiring the independent investigation and prosecution of the use of deadly force by law enforcement officers, and for other purposes.20

III. An Objective Standard of Reasonable Necessity Should Be Applied When Lethal Force is Used By Law Enforcement

Governments should enact legislation that requires a showing of objective reasonable necessity to establish a defense in criminal cases involving lethal force use by a police or other law enforcement officer. This resolution urges that stricter standard of review. While many police departments already employ those stricter standards, departmental regulations do not have the force of law and do not act as an adequate deterrent against the use of deadly force.21

The United States Supreme Court, in *Tennessee v. Garner*, held that the use of deadly force is only constitutionally reasonable to effectuate the arrest of a fleeing felon when law enforcement has probable cause to believe the individual poses a threat of death or serious bodily injury.22 “The number of persons shot and killed by police decreased dramatically after the *Garner* decision.23 The new legal standard announced in *Garner*, coupled with the net increase in the number of police departments with more restrictive shooting policies after *Garner*, resulted in a substantial reduction in both the number of police shootings and the number of persons shot and killed by police, proving how a change in the law can have a significant impact on the ground.”24

Thereafter, the Court in *Graham v. Connor*, 490 U.S. 386 (1989) held that all excessive use of force claims must be examined by a balancing test, weighing the individual's Fourth Amendment interests against the governmental interests. The Court indicated that an objective standard of reasonableness should be applied to use of force cases, stating that “'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the twenty-twenty vision of hindsight.”25 This reasonableness should be based on the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he or she is actually resisting arrest or attempting to evade arrest by flight.26 The *Graham* decision has two major concerns: (1) the Court ignored race and (2) it gave little

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21 Id.
24 Id.
25 Id at 396.
26 Id.
instruction on how to weigh the factors which determine reasonableness. 27 “Racial stereotypes about Blacks and other racial minorities can affect perceptions of whether an officer’s use of force was reasonable. Blacks are often associated with aggression, violence, and criminality.” 28

On a departmental and State level, the currently required showing for officer immunity is too low, as there only needs to be a reasonable use of force. If the officer can prove his or her actions were “reasonable” under the circumstances, this is enough to avoid any consequences. Reasonableness in these cases is a low standard because it is generally based solely on the officer’s perception of danger and not the officer’s or victim’s actions. 29 A showing of necessity would require the officer to show what actions were taken to de-escalate the situation, whether the victim had or appeared to have a deadly weapon, and whether a less deadly means of force was available.

Overall, the police officer will enjoy the benefit of the doubt not only by virtue of being a law enforcement official sworn to protect and serve, but because a jury will only be able to hear one side of the story and will be unlikely to convict a person that says he or she feared for their life.

In September 2018, Amber Guyger, an off-duty Dallas police officer shot and killed Botham Shem Jean, her neighbor, in his very own apartment, claiming she thought the unit was her own. “I feared for my life.” These five words are routinely asserted by police officers as justification for killing innocent Americans. Starkly, as of March 7, 2020, it has been found that 99% of cases between the years 2013 and 2019 have not resulted in any officer(s) involved being convicted of a crime.

CONCLUSION

According to the Washington Post, since 2015, there have been over 5,000 recorded deaths at the hands of law enforcement. 30 This resolution urges governments and law enforcement agencies to recognize the existence of implicit biases that adversely affect law enforcement actions, to take the necessary steps to gather information and to appoint a special prosecutor in criminal cases involving the use of lethal force by a police or other law enforcement officer.

Respectfully submitted,

Wendy K. Mariner
Chair, ABA Section of Civil Rights and Social Justice
August 2020

28 Id.
29 Id. at 637.
30 Id.
GENERAL INFORMATION FORM

Submitting Entity: ABA Section of Civil Rights and Social Justice

Submitted By: Wendy K. Mariner, Chair

1. **Summary of Resolution(s).** The ABA urges federal, state, local, territorial, and tribal governments to enact legislation requiring the appointment of an independent special prosecutor that has no association with or dependence on police in any jurisdiction, enact legislation that requires law enforcement agencies to keep records of instances in which lethal force is used and enact legislation that establishes the burden of proof to establish a defense to a police-involved killing to objective reasonable necessity.

2. **Approval by Submitting Entity.**

   The Section of Civil Rights and Social Justice approved the resolution on April 24, 2020.

   The Coalition on Racial and Ethnic Justice approved cosponsorship of the resolution on May 26, 2020.

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

   Over the last two decades, the ABA has supported policy that addresses officer-involved deaths. The previous resolutions include Resolution 04A121B (Elimination of actual and perceived racial and ethnic bias in the criminal justice system) and Resolution 08A104C (Use of racial profiling by law enforcement).

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

   In 1979, the ABA adopted the Criminal Justice Standards on The Urban Police Function. Specifically, standard 1-2.4(d) states:

   \[
   \text{In order to maximize the use of the special authority and ability of the police, it is appropriate for government, in developing objectives and priorities for police services, to give emphasis to those social and behavioral problems which may require the use of force or the use of special investigative abilities which the police possess. Given the awesome authority of the police to use force and the priority that must be given to preserving life, however, government should firmly establish the principle that the police should be restricted to using the amount of force reasonably necessary in responding to any situation.}^{31}
   \]

   Additionally, Criminal Justice Standard 1-5.3 Sanctions provides an overarching framework for this resolution when it states in pertinent part:

   \[\text{31 CJS 1-2.4(d).}\]
Legislatures should clarify the authority of police agencies to develop substantive and procedural rules controlling police authority – particularly regarding investigatory methods, the use of force, and enforcement policies – and creating methods for discovering and dealing with abuses of that authority. Where adequate administrative sanctions are in effect, evidence obtained in violation of administrative rules should not be excluded in criminal proceedings.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A


7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Section will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.

8. Cost to the Association. The 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.

9. Disclosure of Interest. N/A

10. Referrals.

Center for Human Rights
Commission on Homelessness and Poverty
Commission on Racial & Ethnic Diversity in the Profession
Commission on Youth at Risk
Government and Public Sector Lawyers Division
Law Practice Division
National Conference of Federal Trial Judges
Section of Litigation
Standing Committee on Legal Aid & Indigent Defense
Criminal Justice Section
Section of State & Local Government Law
Diversity and Inclusion Center
National Association of Criminal Defense Lawyers
Coalition on Racial and Ethnic Justice

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The ABA urges federal, state, local, territorial, and tribal governments to enact legislation requiring the appointment of an independent special prosecutor that has no association with or dependence on police in any jurisdiction, enact legislation that requires law enforcement agencies to keep records of instances in which lethal force is used and enact legislation that increases the burden of proof for a defense to a police-involved killing to reasonable objective necessity.

2. Summary of the Issue that the Resolution Addresses

In cases involving police violence, prosecutors cannot and should not rely on the police to investigate themselves but should rely rather on an independent prosecutor.

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

The proposed policy position addresses the issue by calling for independent investigators in law-enforcement-involved shootings and establishing that a defense in an officer involved killing should be based on the standard of reasonable objective necessity.

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

None have been identified.