RESOLUTION 15-01-2017

DIGEST
Law Enforcement: Limiting the Use of Facial Recognition Technology
Adds Penal Code sections 639, 639.01, 640, 640.01, 640.02, 640.03, 640.04, 640.05, 640.06, 640.07, 640.08, 641, and 641.01 to limit use of facial recognition technology by law enforcement.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 11-01-2014, which was approved in principle.

Reasons:
This resolution adds Penal Code sections 639, 639.01, 640, 640.01, 640.02, 640.03, 640.04, 640.05, 640.06, 640.07, 640.08, 641, and 641.01 to limit use of facial recognition technology by law enforcement. This resolution should be disapproved because the proposed limitations would hamper law enforcement's ability to solve crimes and save lives.

This resolution would bar law enforcement from using facial recognition technology, except to identify a person who has committed or is about to commit a felony or a criminal suspect that an officer has personally encountered. It would also prohibit law enforcement's use of facial recognition technology in conjunction with DMV photos and surveillance camera images, limiting any such search to arrest photo databases only and requiring photos of suspects who are not convicted to be purged.

Facial recognition technology not only helps identify criminal suspects, but can also be used to identify a dead body, a missing child, or a human trafficking victim. However, these uses would be prohibited by this resolution. Further, no legitimate purpose is served by limiting facial recognition technology to arrest photo databases, while excluding DMV photographs and surveillance camera images that are accessible to law enforcement. Currently, DMV photographs of random individuals who fit a suspect profile are routinely used in photographic arrays, commonly known as "6-packs," in order to test the strength of an eyewitness identification. Excluding this dataset, which contains images that are of better quality than arrest photos and are more representative of the general population, would diminish the reliability and effectiveness of facial recognition technology.

Finally, the fear that facial recognition technology will undermine freedom of speech or result in self-censorship is belied by the massive stream of images that are posted on Facebook daily, which are subject to facial recognition technology and are shared with third parties, including law enforcement. (See, Zoppo, "Police Stop Teen Girl's Facebook Live Suicide Attempt" (May 4, 2017) NBC News <http://www.nbcnews.com/news/us-news/police-stop-teen-girl-s-facebook-live-suicide-attempt-n754796>.)

This resolution is related to S.B. No. 21 (Hill), which is based on Resolution 11-01-2014, and is currently pending in the Assembly. Senate Bill 21 would require local law enforcement agencies to obtain permission from their local governing body, before obtaining any surveillance technology.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Penal Code sections 639, 639.01, 640, 640.01, 640.02, 640.03, 640.04, 640.05, 640.06, 640.07, 640.08, 641, 641.01 to read as follows:

§ 639
Sections 639 through 641 shall be known and may be cited as the "Face Recognition Act of 2017 (FACE OFF)"

§ 639.01
Definitions. As used in this Act—

(a) "Face recognition" means the automated or semi-automated process by which a person is identified or attempted to be identified based on the characteristics of his or her face.

(b) "Targeted face recognition" means the use of face recognition to identify or attempt to identify a specific person as part of a specific criminal investigation

(c) "Continuous face recognition" means the use of face recognition to identify or attempt to identify groups of persons as part of a criminal investigation or general surveillance, including the use of face recognition to continuously identify persons whose images are captured or recorded by a surveillance camera.

(d) "Arrest photo database" means a database populated primarily by booking or arrest photographs or photographs of persons encountered by investigative or law enforcement officers.

(e) "California identification photo database" means a database populated primarily by photos from driver's licenses or identification documents made or issued by or under the authority of the State, or a political subdivision of the State.

(f) "State investigative or law enforcement officer" means any officer of the State or a political subdivision the State who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in the State criminal code, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

§ 640
Use of Face Recognition by Law Enforcement

§ 640.01
Targeted Face Recognition.

(a) Arrest photo databases.—

(1) General. A state investigative or law enforcement officer shall not use or request targeted face recognition in conjunction with an arrest photo database except as provided in this paragraph 2 below.

(2) Permitted uses. A state investigative or law enforcement officer may use or request targeted face recognition in conjunction with an arrest photo database maintained pursuant to

paragraph (3) (A)To identify any individual whom the officer encounters in person under circumstances which provide the officer a reasonable suspicion that the person has committed, is committing or is about to commit a criminal offense;

(B) To identify any individual whom the officer reasonably suspects has committed, is committing or is about to commit an offense punishable by imprisonment for more than one year.

(4) Any custodian of an arrest photo database used by or at the request of an investigative or law enforcement officer in conjunction with targeted face recognition shall, every six months, eliminate from that database photos of persons—

(A) Released without a charge;

(B) Released after charges are dropped or dismissed or a nolle prosequi notice is entered; or

(C) Not convicted of the charged offense.

(b) Identification Photo Databases.—Any investigative or law enforcement officer, state or federal, shall not use targeted face recognition in conjunction with a state identification photo database, or acquire in bulk the photos in that database.

§ 640.02

Continuous Face Recognition - A state investigative or law enforcement officer shall not use continuous face recognition within the State.

§ 640.03

Civil Rights and Civil Liberties - A state investigative or law enforcement officer shall not—

(a) use face recognition to create a record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual for whom the record is created or unless pertinent to and within the scope of an authorized law enforcement activity where there is reasonable suspicion to believe the individual has engaged, is engaging, or is about to engage in criminal activity; or

(b) rely on actual or perceived race, ethnicity, national origin, religion, disability, gender, gender identity, or sexual orientation in selecting which person to subject to face recognition, except when there is reasonable suspicion, relevant to the locality and timeframe, that links a person with a particular characteristic described in this subsection to an identified criminal incident or scheme.

§ 640.04

Logging of Searches. A state law enforcement agency whose investigative or law enforcement officers use targeted or continuous face recognition shall log its use of the technology to the extent necessary to comply with the public reporting and audit requirements of sections 640.05 and 640.06 of this Act.

§ 640.05

Public Reporting.

(a) In March of each year, the principal prosecuting attorney for the State, or the principal prosecuting attorney for any political subdivision of the State, shall report to the chief judge of the highest court of the State, with respect to the preceding calendar year—

(1) For the use targeted face recognition in conjunction with an arrest photo database—

(A) the number of such searches run;

(B) the offenses that those searches were used to investigate, and for each offense, the number of searches run;

(C) the arrests that resulted from such searches, and the offenses for which arrests were made;

(D) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained; and

(E) the number of motions to suppress made with respect to those searches, and the number granted or denied.

(2) In June of each year the chief judge of the highest court of the State shall release to the public, post online, and transmit to the State Legislature a full and complete report concerning the use of targeted face recognition in conjunction with arrest photo databases. A summary and analysis of the data required to be filed with the chief judge of the highest court of the State by subsection (a) of this section and sections 640.06 and subsection (b) of 640.07 of this Act.

(b) The chief judge of the highest court of the State is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsection (a) of this section and section 640.06 and subsection (b) of 640.07 of this Act.

§ 640.06

Audits. Any state law enforcement agency whose state investigative or law enforcement officers use targeted face recognition, regardless of whether they use a system operated by that agency or another agency, shall annually audit that use to prevent and identify misuse and to ensure compliance with sections 640.01, 640.02, and 640.03 of this Act, and shall report—

(a) summary of the findings of the audit, including the number and nature of violations identified, to the chief judge of the highest court of the State, and subsequently release that information to the public and post it online; and

(b) any violations identified to the principal prosecuting attorney for the state.

§ 640.07

Accuracy and Bias Testing.

(a) Any state law enforcement agency whose state investigative or law enforcement officers operate a system of targeted face recognition shall regularly submit that system to independent testing to determine—

(1) the accuracy of the system; and

(2) whether the accuracy of the system varies significantly on the basis of race, ethnicity, gender or age.

(b) A summary of the findings of the tests required by subsection (a) shall be submitted to the chief judge of the highest court of the state, released to the public, and posted online.

§ 640.08

Enforcement.

(a) Suppression. Whenever targeted or continuous face recognition has occurred, no results from those searches and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer,

agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the use of face recognition violated sections 640.01, 640.02 or 640.03 of this Act.

(b) Administrative Discipline. If a court or law enforcement agency determines that an investigative or law enforcement officer has violated any provision of this Act, and the court or agency finds that the circumstances surrounding the violation raise serious questions about whether or not the officer acted willfully or intentionally with respect to the violation, the agency shall promptly initiate a proceeding to determine whether disciplinary action against the officer is warranted.

(c) Civil Action.

(1) In General. Any person who is subject to targeted identification or attempted identification through targeted continuous face recognition in violation of this Act may in a civil action recover from the state investigative or law enforcement officer or the state or enforcement agency which engaged in that violation such relief as may be appropriate.

(2) Relief. In an action under this subsection, appropriate relief includes—

(A) such preliminary and other equitable or declaratory relief as may be appropriate;

(B) damages under subparagraph (2) and punitive damages in appropriate cases; and

(C) a reasonable attorney's fee and other litigation costs reasonably incurred.

(3) Computation of Damages. The court may assess as damages whichever is the greater of—

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $500 a day for each day of violation or $50,000;

(1) Limitation. A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

§ 641

Funding for Law Enforcement Face Recognition Systems and Research

§ 641.01

Law Enforcement.

(a) No state financial assistance or funds may be expended for the creation, maintenance, or modification of a law enforcement face recognition system unless the agency operating that system—

(1) certifies compliance with sections 640.04, 640.05, 640.06 and 640.07 of this Act;

(2) certifies that the algorithm employed by its face recognition system has been submitted for testing in the most recent Face Recognition Vendor Test administered by the National Institute of Standards and Technology;

(3) provides documentation to confirm that the agency has released to the public and posted online a use policy governing its use of face recognition and, in the case of a law enforcement agency serving a subdivision of a State, has secured approval for that policy from a city council or other body primarily comprised of elected officials.

(b) Subsection (a) shall take effect 18 months after the enactment of this Act, except for paragraph (2) of that subsection, which shall take effect five years after enactment.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: The use of facial recognition databases by law enforcement has grown rapidly in recent years, usually conducted with minimal legal oversight beyond the requirement that searches are conducted for "law enforcement purposes." A study conducted by the University of Georgetown, *The Perpetual Line-Up: Unregulated Police Face Recognition in America,* found that half of all American adults are in a police face recognition database. Sixty-four million of these adults are law abiding citizens, who are in the database solely because they obtained a driver's license. As a result of their desire to drive a vehicle, they have now unknowingly and involuntarily become regular participants in repetitive, virtual perp walks where their faces are scanned against an unknown subject's face for a possible match. This technology allows law enforcement to compile, in effect, digital dossiers on people's actions and movements throughout creating a huge risk to personal privacy. Despite this, to date, no state has passed a law comprehensively regulating police face recognition.

There is a real risk that police face recognition will be used to stifle free speech and lead to a society based on self-censorship. Moreover, deployment of technology that transmits facial recognition data in real-time will transform the nature of public spaces. Shockingly, Georgetown University's study found that only one law enforcement agency in the entire country expressly prohibits its officers from using facial recognition to track individuals engaging in political, religious, or other protected free speech. In April of 2016, the Baltimore Police Department used facial recognition technology to locate, identify and arrest certain people protesting Freddie Gray's death in police custody. The ability for law enforcement officers to use facial recognition technology to generate a precise, comprehensive record of a person's public movements that reflects a wealth of detail about his or her familial, political, professional, religious, and sexual associations is massively concerning. Even the most modest imagination can conjure indisputably private aspects of an individual's intrinsic nature that may be disclosed via the use of facial recognition technology: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on.

As noted in the Georgetown University study, law enforcement agencies do little to ensure that the facial recognition systems they employ are accurate. "One major face recognition company, FaceFirst, publicly advertises a 95% accuracy rate but disclaims liability for failing to meet that threshold in contracts with the San Diego Association of Governments." In fact, facial recognition technology is likely to be less accurate, but most impactful on the African American community. A study co-authored by the FBI, found that facial recognition technology may be less accurate on African Americans. Also, because the African American community is subject to disproportionately high arrest rates, members of that community will be more affected than other populations by facial recognition systems that rely on mug shot databases. Despite these findings, racially biased error rates have not been independently tested. In fact, several major

providers of face recognition technology have admitted that they failed to run test on their technology, even internally, for racial biases.

The law enforcement agencies that use facial recognition technology rarely, if ever, audit the use of the technology for misuse or abuse. Police officers across the country misuse confidential law enforcement databases to get information on romantic partners, business associates, neighbors, journalists and others for reasons that have nothing to do with daily police work, an Associated Press investigation found. Through records requests to state agencies and big-city police departments, the Associated Press found that law enforcement officers and employees who misused databases were fired, suspended or resigned more than 325 times between 2013 and 2015. They received reprimands, counseling or lesser discipline in more than 250 instances, the review found. Among those punished: an Ohio officer who pleaded guilty to stalking an ex-girlfriend and who looked up information on her; a Michigan officer who looked up home addresses of women he found attractive; and two Miami-Dade officers who ran checks on a journalist after he aired unflattering stories about the department. It's not difficult to imagine how facial recognition technology could easily be abused by a rogue law enforcement officer to locate a victim of domestic violence attempting to hide from her abuser or as blackmail in an attempt to stifle our free press.

The Solution: This resolution would limit the use of facial recognition technology by law enforcement and require certain audits and reports to monitor how the technology is being used by law enforcement agencies.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 15-02-2017

DIGEST

Law Enforcement: Limiting Communications with Federal Immigration Authorities

Adds Chapter 17.25 (commencing with section 7284) to Division 7 of Title 1 of the Government Code, repeals Health and Safety Code section 11369, and adds Penal Code sections 3058.10 and 3058.11 to limit communication between California law enforcement and federal immigration agencies.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution adds Chapter 17.25 (commencing with section 7284) to Division 7 of Title 1 of the Government Code, repeals Health and Safety Code section 11369, and adds Penal Code sections 3058.10 and 3058.11 to limit communication between California law enforcement and federal immigration agencies. This resolution should be disapproved because it obstructs federal immigration authorities and federal immigration courts from being able to remove deportable aliens, and endangers public safety by allowing foreign nationals who have committed aggravated felonies to remain in the United States illegally.

There is no evidence that illegal immigrants residing in "sanctuary cities" are any more cooperative with law enforcement than those living elsewhere. On the other hand, preventing local law enforcement from disclosing the presence of deportable aliens who are in custody to federal immigration authorities has resulted in the commission of violent crimes that could have been prevented. (See, Almasy, "Suspect in Killing of San Francisco Woman Had Been Deported Five Times" (Jul. 3, 2015) CNN, http://www.cnn.com/2015/07/03/us/san-francisco-killing-suspect-immigrant-deported/index.html.)

Senate Bill No. 54 (DeLeon), which passed the Senate and is pending in the Assembly, would achieve the same objectives as this resolution.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Chapter 17.25 (commencing with Section 7284) to Division 7 of Title 1 of the Government Code, to repeal Health and Safety Code Section 11369 and add Penal Code sections 3058.10 and 3058.11 to read as follows:

CHAPTER 17.25. Cooperation with Federal Immigration Authorities

§ 7284

This chapter shall be known, and may be cited, as the California Values Act.

§ 7284.2

The Legislature finds and declares the following:

(a) Immigrants are valuable and essential members of the California community. Almost one in three Californians is foreign born and one in two children in California has at least one immigrant parent.

(b) A relationship of trust between California's immigrant community and state and local agencies is central to the public safety of the people of California.

(c) This trust is threatened when state and local agencies are entangled with federal immigration enforcement, with the result that immigrant community members fear approaching police when they are victims of, and witnesses to, crimes, seeking basic health services, or attending school, to the detriment of public safety and the well-being of all Californians.

(d) Entangling state and local agencies with federal immigration enforcement programs diverts already limited resources and blurs the lines of accountability between local, state, and federal governments.

(e) State and local participation in federal immigration enforcement programs also raises constitutional concerns, including the prospect that California residents could be detained in violation of the Fourth Amendment to the United States Constitution, targeted on the basis of race or ethnicity in violation of the Equal Protection Clause, or denied access to education based on immigration status.

(f) This act seeks to ensure effective policing, to protect the safety, well-being, and constitutional rights of the people of California, and to direct the state's limited resources to matters of greatest concern to state and local governments.

§ 7284.4

For purposes of this chapter, the following terms have the following meanings:

(a) "California law enforcement agency" means a state or local law enforcement agency, including school police or security departments.

(b) "Civil immigration warrant" means any warrant for a violation of federal civil immigration law, and includes civil immigration warrants entered in the National Crime Information Center database.

(c) "Federal immigration authority" means any officer, employee, or person otherwise paid by or acting as an agent of United States Immigration and Customs Enforcement or United States Customs and Border Protection, or any division thereof, or any other officer, employee, or person otherwise paid by or acting as an agent of the United States Department of Homeland Security who is charged with immigration enforcement.

(d) "Health facility" includes health facilities as defined in Section 1250 of the Health and Safety Code, clinics as defined in Sections 1200 and 1200.1 of the Health and Safety Code, and substance abuse treatment facilities.

(e) "Hold request," "notification request," "transfer request," and "local law enforcement agency" have the same meaning as provided in Section 7283. Hold, notification, and transfer requests include requests issued by United States Immigration and Customs Enforcement or United States Customs and Border Protection as well as any other federal immigration authorities.

(f) "Immigration enforcement" includes any and all efforts to investigate, enforce, or assist in the investigation or enforcement of any federal civil immigration law, and also includes

any and all efforts to investigate, enforce, or assist in the investigation or enforcement of any federal criminal immigration law that penalizes a person's presence in, entry, or reentry to, or employment in, the United States, including, but not limited to, violations of Section 1253, 1324c, 1325, or 1326 of Title 8 of the United States Code.

(g) "Joint law enforcement task force" means a California law enforcement agency collaborating, engaging, or partnering with a federal law enforcement agency in investigating, interrogating, detaining, detecting, or arresting persons for violations of federal or state crimes.

(h) "Judicial warrant" means a warrant based on probable cause and issued by a federal judge or a federal magistrate judge that authorizes federal immigration authorities to take into custody the person who is the subject of the warrant.

(i) "Public schools" means all public elementary and secondary schools under the jurisdiction of local governing boards or a charter school board, the California State University, and the California Community Colleges.

(j) "School police and security departments" includes police and security departments of the California State University, the California Community Colleges, charter schools, county offices of education, schools, and school districts.

§ 7284.6

(a) California law enforcement agencies shall not do any of the following:

(1) Use agency or department moneys, facilities, property, equipment, or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes, including, but not limited to, any of the following:

(A) Inquiring into or collecting information about an individual's immigration status, except as required to comply with Section 922(d)(5) of Title 18 of the United States Code.

(B) Detaining an individual on the basis of a hold request.

(C) Responding to requests for notification or transfer requests.

(D) Providing or responding to requests for nonpublicly available personal information about an individual, including, but not limited to, information about the person's release date, home address, or work address for immigration enforcement purposes.

(E) Making arrests based on civil immigration warrants.

(F) Giving federal immigration authorities access to interview individuals in agency or department custody for immigration enforcement purposes.

(G) Assisting federal immigration authorities in the activities described in Section 1357(a)(3) of Title 8 of the United States Code.

(H) Performing the functions of an immigration officer, whether pursuant to Section 1357(g) of Title 8 of the United States Code or any other law, regulation, or policy, whether formal or informal.

(2) Make agency or department databases, including databases maintained for the agency or department by private vendors, or the information therein other than information regarding an individual's citizenship or immigration status, available to anyone or any entity for the purpose of immigration enforcement. Any agreements in existence on the date that this chapter becomes operative that conflict with the terms of this paragraph are terminated on that date. A person or entity provided access to agency or department databases shall certify in writing that the database will not be used for the purposes prohibited by this section.

(3) Place peace officers under the supervision of federal agencies or employ peace officers deputized as special federal officers or special federal deputies except to the extent those

peace officers remain subject to California law governing conduct of peace officers and the policies of the employing agency.

(4) Use federal immigration authorities as interpreters for law enforcement matters relating to individuals in agency or department custody.

(b) Nothing in this section shall prevent any California law enforcement agency from doing any of the following:

(1) Responding to a request from federal immigration authorities for information about a specific person's criminal history, including previous criminal arrests, convictions, and similar criminal history information accessed through the California Law Enforcement Telecommunications System (CLETS), where otherwise permitted by state law.

(2) Participating in a joint law enforcement task force, so long as the purpose of the joint law enforcement task force is not immigration enforcement, as defined in subdivision (f) of Section 7284.4.

(c) If a California law enforcement agency chooses to participate in a joint law enforcement task force, it shall submit a report every six months to the Department of Justice, as specified by the Attorney General. The reporting agency or the Attorney General may determine a report, in whole or in part, is not a public record for purposes of the California Public Records Act pursuant to subdivision (f) of Section 6254 to prevent the disclosure of sensitive information, including, but not limited to, an ongoing operation or a confidential informant.

(d) The Attorney General, within 14 months after the effective date of the act that added this section, and twice a year thereafter, shall report on the types and frequency of joint law enforcement task forces. The report shall include, for the reporting period, assessments on compliance with paragraph (2) of subdivision (b), a list of all California law enforcement agencies that participate in joint law enforcement task forces, a list of joint law enforcement task forces operating in the state and their purposes, the number of arrests made associated with joint law enforcement task forces for the violation of federal or state crimes, and the number of arrests made associated with joint law enforcement task forces for the purpose of immigration enforcement by all task force participants, including federal law enforcement agencies. The Attorney General shall post the reports required by this subdivision on the Attorney General's Internet Web site.

(e) Notwithstanding any other law, in no event shall a California law enforcement agency transfer an individual to federal immigration authorities for purposes of immigration enforcement or detain an individual at the request of federal immigration authorities for purposes of immigration enforcement absent a judicial warrant. This subdivision does not limit the scope of subdivision (a).

(f) This section does not prohibit or restrict any government entity or official from sending to, or receiving from, federal immigration authorities, information regarding the citizenship or immigration status, lawful or unlawful, of an individual pursuant to Sections 1373 and 1644 of Title 8 of the United States Code.

§ 7284.8

The Attorney General, within three months after the effective date of the act that added this section, in consultation with the appropriate stakeholders, shall publish model policies limiting assistance with immigration enforcement to the fullest extent possible consistent with federal and state law at public schools, health facilities operated by the state or a political subdivision of the state, courthouses, Division of Labor Standards Enforcement facilities, and

shelters, and ensuring that they remain safe and accessible to all California residents, regardless of immigration status. All public schools, health facilities operated by the state or a political subdivision of the state, and courthouses shall implement the model policy, or an equivalent policy. All other organizations and entities that provide services related to physical or mental health and wellness, education, or access to justice, including the University of California, are encouraged to adopt the model policy.

§ 7284.10

The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

§ 7284.11

If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

§ 7284.12

This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:
Because changes in federal immigration enforcement policies require a statewide standard that clarifies the appropriate level of cooperation between federal immigration enforcement agents and state and local governments as soon as possible, it is necessary for this measure to take effect immediately.

~~§11369~~

~~When there is reason to believe that any person arrested for a violation of Section 11350, 11351, 11351.5, 11352, 11353, 11355, 11357, 11359, 11360, 11361, 11363, 11366, 11368 or 11550, may not be a citizen of the United States, the arresting agency shall notify the appropriate agency of the United States having charge of deportation matters.~~

§ 3058.10

(a) The Board of Parole Hearings, with respect to inmates sentenced pursuant to subdivision (b) of Section 1168, or the Department of Corrections and Rehabilitation, with respect to inmates sentenced pursuant to Section 1170, shall notify the Federal Bureau of Investigation of the scheduled release on parole or postrelease community supervision, or rerelease following a period of confinement pursuant to a parole revocation without a new commitment, of all persons confined to state prison serving a term for the conviction of a violent felony listed in subdivision (c) of Section 667.5.

(b) The notification shall be made at least 60 days prior to the scheduled release date or as soon as practicable if notification cannot be provided at least 60 days prior to release. The only nonpublicly available personal information that the notification may include is the name of the person who is scheduled to be released and the scheduled date of release.

§ 3058.11

(a) Whenever any person confined to county jail is serving a term for the conviction of a misdemeanor offense and has a prior conviction for a violent felony listed in subdivision (c) of Section 667.5 or has a prior felony conviction in another jurisdiction for an offense that has all the elements of a violent felony described in subdivision (c) of Section 667.5, the sheriff may notify the Federal Bureau of Investigation of the scheduled release of that person, provided that no local law or policy prohibits the sharing of that information with either the Federal Bureau of Investigation or federal immigration authorities.

(b) The notification may be made up to 60 days prior to the scheduled release date. The only nonpublicly available personal information that the notification may include is the name of the person who is scheduled to be released and the scheduled date of release.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Existing law provides that when there is reason to believe that a person arrested for a violation of specified controlled substance provisions may not be a citizen of the United States, the arresting agency shall notify the appropriate agency of the United States having charge of deportation matters.

Existing law also provides that whenever an individual who is a victim of or witness to a hate crime, or who otherwise can give evidence in a hate crime investigation, is not charged with or convicted of committing any crime under state law, a peace officer may not detain the individual exclusively for any actual or suspected immigration violation or report or turn the individual over to federal immigration authorities.

In the current political climate, the threat of deportation for California's undocumented community has already resulted in substantial harm. The immigration raids seen throughout the state and nation have diminished the physical and mental well-being of too many in the undocumented community. One cause of these dehumanizing and dangerous deportations is the cooperation between California law enforcement and federal immigrations agents. Existing law mandates a form of communication between the two government bodies that increases the threat of deportation. This communication often results in the dissemination of identifying information to the federal government for members of the undocumented community. After such information is obtained, federal immigration agents have used it to deport and detain numerous undocumented immigrants. Given recent trends—as well as the pervasive threat of an increase in deportations—California must act in order to protect its vulnerable undocumented community.

The Solution: This resolution would reform existing law that requires California law enforcement to share certain identifying information with federal immigration agents.

Generally, SB 54 would require California schools, hospitals and courthouses to adopt policies that limit immigration enforcement on their premises to the fullest extent possible consistent with federal and state law.

IMPACT STATEMENT
The resolution does not affect any other law, statue or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
This resolution is based off of SB 54, introduced in December 2016.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

SAN DIEGO COUNTY BAR ASSOCIATION

The SDCBA Delegation urges Disapproval of Resolution 15-02-2017. While the Delegation members may support aspects of the Proponent's goal concerning state, county and municipal law enforcement officer cooperation with federal immigration authorities and potential adverse consequences to immigrant trust in California law enforcement officials, on balance this resolution goes too far. Indeed, by eliminating all cooperation between California law enforcement officials and federal immigration officers, this resolution would have the unintended consequence of encouraging federal immigration officers to conduct public raids likely to sweep up otherwise law-abiding immigrants who happen to have illegal status in this country.

Some members of the SDCBA Delegation would support a resolution restricting cooperation to those illegal immigrants convicted of felony offenses and perhaps certain categories of felony offenses. It makes sense to aid federal immigration officials in collecting those individuals directly from prisons or jails for purposes of deportation proceedings. It protects society as a whole from dangerous people. It also protects otherwise law-abiding undocumented immigrants from being swept up in raids by federal agents because there will be less of a need to conduct public enforcement efforts.

RESOLUTION 15-03-2017

DIGEST
Grand Jury: Public Sessions Involving Inquiries of Excessive Force Cases
Amends Penal Code section 917 to require grand jury investigations or inquiries into the fatal use of force by peace officers be heard in public session.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 917 to require grand jury investigations or inquiries into the fatal use of force by peace officers be heard in public session. This resolution should be disapproved because the secrecy of grand juries is an integral part of the prosecutorial system and there is no justification for making alleged police misconduct an exception.

"The secrecy of all grand jury proceedings is 'deeply rooted in our traditions.'" (*McClatchy Newspapers v. Superior Court* (1988) 44 Cal.3d 1162, 1173.) Since the beginning of the grand jury system, "for the most part, grand jury proceedings have been closed to the public and records of such proceedings have been kept from the public eye." (*Daily Journal Corp. v. Superior Court* (1999) 20 Cal.4th 1117, 1126, quoting *McClatchy, ibid*.) The common law requirement of secrecy was codified in California in 1851 and maintained when the Penal Code was enacted in 1972. (Stats. 1871-1872, §§ 926-927, p. 540.)

There are several purposes for grand jury secrecy. One of the most important is that secrecy encourages prospective witnesses to come forward and testify fully and frankly, knowing those against whom they testify (or others who dislike their testimony) will not be made aware of their participation. "[T]he encouragement of candid testimony and the protection of witnesses and their reputations are best achieved when secrecy is maintained." (*McClatchy, supra*, 44 Cal.3d at p. 1175.) This includes both law enforcement and civilian witnesses. Secrecy also permits the jurors to discuss all aspects of the investigation without concern about any divisive controversy in the community.

The current statutory scheme provides for public access under narrow circumstances. Under Penal Code section 939.1, the jury foreperson and prosecuting authority may jointly make a written request for public sessions. If the superior court "finds that the subject matter of the investigation affects the general public welfare, involving the alleged corruption, misfeasance, or malfeasance in office or dereliction of duty of public officials," the court may order the grand jury to conduct its investigation (but not its deliberations) in public session. Furthermore, if an indictment is handed down, the transcript of the proceedings becomes public record. (Pen. Code, § 938.1.) Portions of the evidentiary material or other information relied on by the grand jury may also be made available to the public. (Pen. Code, § 929.)

This resolution would make fatalities caused by alleged police use of force the exception to grand jury secrecy. The desire for transparency and mistrust of the ability of the judicial system to independently review law enforcement conduct are not enough to justify treating these cases differently than, for example, an investigation into whether a public official took a bribe, or colluded with a foreign nation to affect a local election.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 917 to read as follows:

§ 917

(a) The grand jury may inquire into all public offenses committed or triable within the county and present them to the court by indictment.

(b) ~~Except as provided in Section 918, the grand jury shall not~~ Notwithstanding Sections 939 or 939.1, or any other provision of law restricting access to the proceedings of a grand jury, whenever a grand jury is investigating or inquir~~e~~ing into an offense that involves a shooting or use of excessive force by a peace officer described in Section 830.1, subdivision (a) of Section 830.2, or Section 830.39, that led to the death of a person being detained or arrested by the peace officer pursuant to Section 836, the grand jury shall hear the testimony of all witnesses in a public session.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: Grand jury investigations are conducted in secret, and, if a grand jury fails to indict, the testimony can be made public in very limited circumstances. (Penal Code, § 924.6.)

In 2015, Senate Bill 277 added section 917, subdivision (b), to the Penal Code, as a response to a Missouri prosecutor's failure to obtain an indictment following an officer-involved shooting. The statute attempted to compel district attorneys to be more publicly accountable in prosecuting cases involving police officer shootings by precluding reliance on grand jury secrecy. The El Dorado County District Attorney, ignored the statute and convened a grand jury to investigate a police officer shooting case. In *People v. Superior Court (South lake Tahoe Police Officer's Assn)* (2017) 7 Cal.App.5th 402 (*El Dorado*), the appellate court held that section 917, subdivision (b), was unconstitutional because the Legislature could not limit by statute the grand jury's power to investigate and indict.

The Solution: In *El Dorado*, the appellate court observed that a grand jury's rules of secrecy were purely statutory and could be modified to address the problem SB 277 sought to correct. Specifically, the court observed that the Legislature had created Section 939.1 of the Penal Code, which allows the grand jure foreperson and the prosecutor to request that the court allow a public session. This proposal would compel grand jury testimony, but not deliberations, to be public.

This change would serve the public interest in whether prosecutors are fully and fairly pursuing the unlawful use of deadly force by police officers, and increase confidence in the criminal justice system.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Sean McCoy

RESOLUTION 15-04-2017

DIGEST
Tear Gas: Regulation of Use
Deletes Penal Code section 12403 and adds section 22850 to create a protocol for the use of tear gas by law enforcement agencies.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 04-08-2015, which was withdrawn, and Resolution 01-12-2016, which was disapproved.

Reasons:
This resolution deletes Penal Code section 12403 and adds section 22850 to create a protocol for the use of tear gas by law enforcement agencies. This resolution should be disapproved because it is inconsistent with California's existing policies and procedures for the training and use of tear gas, creates an inconsistency in the law, and the proposed procedure is vague and unworkable.

This resolution cites two incidents from 2011 (in California) and 2015 (in Missouri) and is based on the mistaken premise that California does not currently have any policies or procedures regarding the training and use of chemical agents by law enforcement officers. However, as of March 2015, California's Department of Justice ("DOJ") issued the *Law Enforcement Policy & Procedures Manual*, which includes approximately ten pages on the use, training, supervision, responsibilities, and prohibitions using "control devices and techniques," including tear gas, pepper spray, and other chemical agents. These policies set out definitions for chemical agents, who can authorize their use, when and where they can be authorized, how they can be used, and what safety measures must be in place when they are used.

This resolution ignores the DOJ's policies and procedures and sets out its own vague, unworkable procedures, e.g. confining the area where gas will disperse, requiring officers to divine the "intent" of individuals, and prohibiting the use of gas in residential neighborhoods regardless of the situation. Further this resolution defines what conduct is "objectively reasonable," and thereby usurps the role of the finder of fact in determining the reasonableness of an officer's conduct, without giving any regard for the facts and circumstances of the incident.

Additionally, by deleting section 12403 (authorizing properly trained officers to possess and use tear gas) officers could not comply with the newly proposed section 22850, because the officers would be prohibited from using or possessing tear gas.

Although the DOJ's *Law Enforcement Policy & Procedures Manual* sets forth guidelines rather than statutes, if new statutory law is needed, then, at the very least, it should not create legal contradictions, and should not be more ambiguous than existing, vetted, guidelines.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to repeal Penal Code section 12403 and add section 22850 to read as follows.

~~§ 12403~~

~~Nothing in this chapter shall prohibit any person who is a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, from purchasing, possessing, transporting, or using any tear gas or tear gas weapon if the person has satisfactorily completed a course of instruction approved by the Commission on Peace Officer Standards and Training in the use of tear gas.~~

§ 22850

(a) Except as provided below in this section, every person who fires a tear gas weapon, as defined in § 12402, in a place where other human beings are present shall be punishable by imprisonment for up to six months or a fine not exceeding one thousand dollars ($1,000), or both.

(b) Peace officers may fire a tear gas weapon as described in subsection (a), above, only under the following circumstances.

(1) Every law enforcement agency in the state shall designate a senior officer (sergeant or above) as the agency's Tear Gas Officer. The designated Tear Gas Officer shall be required to have undergone training in the use of tear gas in addition to that currently required under the course of instruction approved by the Commission on Peace Officer Standards and Training in the use of tear gas. The Tear Gas Officer shall have responsibility for the acquisition, storage and dissemination of tear gas within the agency. The tear Gas Officer shall file a pubic annual report with the agency accounting for the tear gas held in storage by the agency, stating if any tear gas was used during the preceding year and describing the circumstances of such use.

(2) No tear gas weapon shall be fired by any peace officer within the agency without an express order from the Tear Gas Officer. In an emergency, the Tear Gas Officer may delegate to other senior officers the authority to authorize the firing of a tear gas projectile; however, such other officers shall, if possible, make all reasonable efforts to consult with the Tear Gas Officer before taking such action

(c) In the event the firing of a tear gas weapon is authorized as above, the following objectively reasonable precautions shall be taken, if under the circumstances doing so is practicable:

(1) Any person firing a tear gas weapon shall confine the area where tear gas projectiles are fired to as small an area as necessary to accomplish the purpose of using tear gas;

(2) Any person firing a tear gas weapon shall avoid directing tear gas projectiles in the direction of persons who are innocent of any criminal conduct or intent and who are not posing any threat of injury to persons or property;

(3) Any person firing a tear gas weapon shall avoid firing tear gas projectiles in residential neighborhoods;

(4) Any person firing a tear gas weapon shall avoid firing tear gas projectiles where children may be congregated; and

(5) Any person firing a tear gas weapon shall assure that medical personnel are available whenever tear gas weapons are fired in order to provide assistance to person injured by tear case,

as necessary.

(d) Following the firing of any tear gas weapons by officers of the agency in which the Tear Gas Officer is employed, the Tear Gas Officer shall file a pubic report with the agency describing a) the reasons for the use of tear gas, b) how many weapons were fired by officers of the agency, and c) whether the tear gas weapons were fired in accordance with subdivision (c), above, and if not why not.

(e) Tear gas weapons may be fired by law enforcement personnel for training purposes in a manner that does not expose non-law enforcement individuals to tear gas.

(f) Any person exposed to tear gas by a peace officer in violation of this section shall have a civil action for damages for his or her injuries.

(g) In order to implement this section, the Commission on Police Officers Standards and Training shall add to the POST course entitled "Chemical Agents for Peace Officers" at least four hours of instruction in compliance with this section regarding the use of tear gas in public areas. Tear Gas Officers shall be required to complete the entire "Chemical Agents for Peace Officers" course before undertaking their duties.

(h) The requirements of subsection (b), above, shall not apply to a law enforcement agency that does not have a present intention of authorizing any of its personnel to fire tear gas weapons. If the agency's intention regarding the use of tear gas weapons changes so as to authorize such use, it shall comply with subsection (b), above."

(Proposed new language underlined; deleted language stricken)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Recent events in Ferguson, Missouri, Oakland, California and elsewhere have demonstrated that the use of tear gas to control crowds is both dangerous to people, especially peaceful persons in such a crowd, and can be counterproductive by making the crowd hostile to the law enforcement agency or agencies that supposedly are ensuring public safety. In short, tear gas is a blunt instrument of crowd control that should be used, if at all, as a last resort. It should not be considered a substitute for more appropriate means of crowd control that are less likely to create hostility toward law enforcement and cause arm to innocent bystanders.
The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has expressed its concerns over the use of such gases in law enforcement. The CPT considers that:

"… [P]epper spray [tear gas] is a potentially dangerous substance and should not be used in confined spaces. Even when used in open spaces the CPT has serious reservations; if exceptionally it needs to be used, there should be clearly defined safeguards in place. For example, persons exposed to pepper spray should be granted immediate access to a medical doctor and be offered an antidote. Pepper spray should never be deployed against a prisoner who has already been brought under control." (CPT/Inf (2009) 25, paragraph 79).
http://worldwithouttorture.org/2012/05/31/tear-gas-is-it-a-violation-of-human-rights/

The Solution: There is no existing law in California on the subject of use of tear gas by law

enforcement. This resolution would provide reasonable safeguards against the indiscriminate use of tear gas by law enforcement personnel in California. It would also expand the Police Officers Standard Training which currently is very superficial. This version gives law enforcement officers using tear gas somewhat more leeway in terms of liability for improper use of tear gas than the earlier version.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: John T. Hansen

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

SAN DIEGO COUNTY BAR ASSOCIATION

The SDCBA Delegation urges Disapproval of Resolution 15-04-2017. The Delegation's concern regards the practicality of the language used and whether it is too overbroad so as to preclude peace officer use of pepper spray which falls within the category of tear gasses. Further, it is too restrictive. The SDCBA Delegation may be persuaded to support this resolution if it just provided that only peace officers trained in the deployment of tear gas canisters be authorized to deploy, except in emergencies.

RESOLUTION 15-05-2017

DIGEST
Chokeholds: Ban on Police Use
Adds Penal Code section 835b to prohibit peace officers from applying carotid restraint holds and choke holds as control holds.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 08-10-2015, which was withdrawn, and Resolution 01-11-2016, which was disapproved.

Reasons:
This resolution adds Penal Code section 835b to prohibit peace officers from applying carotid restraint holds and choke holds as control holds. This resolution should be disapproved because it prohibits officers from properly using less-than-lethal force to subdue violent suspects, and could therefore result in officers increasing their use of lethal force to protect the public.

While this resolution seeks to decrease deaths and injuries from improperly used control techniques on suspects and arrestees, it will likely have the unintended consequence of increasing the use of lethal force by officers in their efforts to protect the public. If officers cannot use less-than-lethal force to physically stop, disarm, and subdue violent suspects and arrestees who are physically threatening the public or officers, then officers will be left with the choice of letting that suspect/arrestee go or using lethal force to ensure that person is stopped before someone else is harmed. Although improperly applied carotid restraints and choke holds have unfortunately resulted in deaths, the problem is the improper application of those restraints, not the availability of them as an option.

Further, although the resolution's section on "legislation" includes case law, one police department's general order, and prior CCBA resolutions that were withdrawn or disapproved, it appears that the only actual legislation related to this matter is HR 2052, "Excessive Use of Force Prevention Act of 2015," 114th Congress (2015-2016), which died in the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations in May 2015.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Penal Code section 835b to read as follows:

§ 835b
Peace Officers are prohibited from using the following control holds:
(a) carotid restraint,
(b) choke hold – choking by means of pressure to the subject's trachea or other means that prevent breathing.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: There are two types of control holds that can be applied to a person's neck. One is a "choke hold," which involves applying pressure across the front of a person's neck in order to cut off the person's air supply and to cause the person to lose consciousness. The other is a "carotid restraint hold." With the carotid restraint hold, the goal is to simultaneous squeeze the two neck arteries, that are located on either side of the windpipe (trachea). When both arteries are squeezed, the flow of oxygenated blood to the brain is cut off, and the person will lose consciousness. And if a person becomes unconscious for a few seconds, then a peace officer has time to put handcuffs on the person to provide more effective control. Unfortunately, a carotid restraint hold can shift into a chokehold, the person's airway can become crushed, and then the person can die.

For example, in 2014, Eric Garner, of Staten Island, New York, died while being taken into police custody. The coroner found that Mr. Garner's windpipe (trachea) had been crushed. As a result, New York City paid a 5.6 million dollar settlement to Mr. Garner's family. Similarly, in 2012, Los Angeles Police Officers applied a chokehold to Mr. Vachel Howard's neck, and the LA City Council paid a 2.85 million dollar settlement. *See also* Ian Millhiser, "How the Supreme Court Helped Make It Possible For Police To Kill by Chokehold," thinkprogress.org (Dec. 4, 2014).

In December 2016, the San Francisco Police Commission established General Order 5.01 for "Use of Force." The introduction explains that the Order is based upon the broad principles in *Graham v. Connor* 490 U.S. 386 (1989), but is "more restrictive than the constitutional standard and state law."

The Order specifies that San Francisco Police Officers are prohibited from applying either carotid restraint holds or choke holds as "control holds." The Order also prohibits "other means that prevent breathing," such as applying pressure to a person's chest to restrict lung function.

The Solution: This resolution copies San Francisco Police Department General Order 5.01, part VI for "Force Options," part (B)(3) for "Prohibited Use of Control Holds" (December 21, 2016) and would place it into Penal Code section 835 for "Arrest, by Whom and How Made."

IMPACT STATEMENT
The resolution does not affect any other statute or case law other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
San Francisco Police Department General Order 5.01, Use of Force, adopted Dec. 21, 2016, available at: http://sanfranciscopolice.org/use-force-documents ("Officers are prohibited from using the following control holds: a. carotid restraint, b. choke hold – choking by means of

pressure to the subject's trachea or other means that prevent breathing.").

Graham v Connor, 490 U.S. 386, 397 (1989) ("The 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.")

City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

See HR 2052, "Excessive Use of Force Prevention Act of 2015," 114th Congress (2015-2016) to amend 18 U.S.C. 242 – Deprivation of rights under color of law.

See CCBA Resolutions 01-11-2016 and 08-10-2015.

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RESPONSIBLE FLOOR DELEGATE: James Brosnahan and Catherine Rucker

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

SAN DIEGO COUNTY BAR ASSOCIATION

The SDCBA Delegation urges Disapproval of Resolution 15-05-2017. Eliminating chokeholds as a method of accomplishing detention and arrest of resisting suspects means there is one fewer means of less-than-lethal force available to peace officers and this has the potential adverse consequence of increasing the risk of use of lethal force. The use of less-than-lethal means of accomplishing arrest and detention should be encouraged and fostered through training in the proper use of such techniques, not their criminalization.

RESOLUTION 15-06-2017

DIGEST
Police Use of Force: Nonlethal Body Targets
Adds Penal Code section 835b to require police officers discharging firearms to direct force toward nonlethal bodily targets when circumstances permit.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution adds Penal Code section 835b to require a police officer, when lawfully discharging a firearm, to direct force toward a "nonlethal" bodily target when circumstances permit. This resolution should be disapproved, because shooting someone is always a use of deadly force and doing so in the manner suggested increases the risk of harm to the public.

Under existing law, "[a]n officer's use of deadly force is reasonable only if 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" (*Scott v. Henrich* (9th Cir. 1994) 39 F.3d 912, 914, citing *Tennessee v. Garner* (1985) 471 U.S. 1, 3.) "We define deadly force as force that creates a substantial risk of causing death or serious bodily injury." (*Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689, 693.)

The resolution's requirement that police officers direct fire at a "nonlethal" bodily target if it can be done without endangering others, is confusing and contradictory. Any discharge of a loaded firearm, even if directed up at the sky or down towards the ground, is an act that creates a substantial risk of death or serious bodily injury. And a bullet that strikes the arm or leg can result in death if it severs an artery or ricochets into a vital organ. By suggesting that there is such a thing as a "nonlethal bodily target," this resolution would have the unintended consequence of allowing an officer to defend or mitigate an unjustified shooting as being "nonlethal."

Also, to the extent that it encourages officers to take aim at a moving target's extremities, this resolution would increase the percentage of shots that miss a dangerous suspect entirely. Officers are trained to fire at center mass to ensure accuracy and to minimize the risk to the public. Being off-target results in stray bullets, which can penetrate objects and strike innocent bystanders over 1,000 feet away, and requires the discharge of additional rounds to remove the threat posed by a dangerous suspect.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Penal Code Section 835b to read as follows:

§ 835b

Consistent with using reasonable force as set forth in Section 835a, a peace officer, when lawfully utilizing a firearm, shall be required to direct force toward nonlethal bodily targets on the person being arrested, if he/she can do so without posing a danger to himself/herself or others. This Section is inapplicable if the officer has reasonable cause to believe that the person to be arrested possesses a firearm or if the officer's acts otherwise fall within the scope of Section 196 and/or Section 197.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: This resolution's aim is to decrease the number of instances in which police officers unnecessarily shoot to kill individuals in the course of their duties.

In 2016, 963 people were shot and killed by police nationwide.[1] This translates to about three deaths per day. Of those 963 individuals, 48 were unarmed and 172 were armed with only a knife. 631 of those individuals were not fleeing the scene. California was the only state which yielded a triple-digit fatality figure: 138, or about 14% of the total (even though California has only 12% of the population).

On December 2, 2015, 26-year-old Mario Woods was shot and killed by police in San Francisco's Bayview neighborhood. Woods, armed with a knife, was surrounded by approximately eight police officers who simultaneously opened fire "firing squad style" on Woods, who was no closer than 15 feet to any of the officers.[2]

The Solution: Currently, it is widespread policing practice for officers to receive use of force guidance from some form of a use-of-force continuum. For example, the San Francisco Police Department has published a General Order governing the use of force, which includes a chart matching a subject's actions to appropriate corresponding force options available to a police

[1] https://www.washingtonpost.com/graphics/national/police-shootings-2016/ (as of Jan. 30, 2017).

[2] Ho et al., *Killing by S.F. police sets off public debate* (Dec. 4, 2015) <http://www.sfgate.com/crime/article/Man-shot-dead-by-S-F-cops-IDd-as-26-year-old-6673167.php#photo-9054615> (as of Jan. 30, 2017).

officer.[3] The problem with this kind of continuum is that it lacks gradations within its highest use-of-force category. Here, one of the listed force option possibilities to address an individual's life-threatening actions is "[u]tilizing firearms or any other available weapon or action in defense of self and others to stop the threat."[4]

However, the SFPD offers no distinctions within this "deadly force" subdivision delineating on the one hand, when it is appropriate for an officer to shoot merely to incapacitate a suspect in order to arrest him, and on the other, when shooting to kill is legally permissible. In the aforementioned Woods scenario, if the proposed Penal Code Section 835b had been in effect at the time, the officers logically would have concluded that because Woods only possessed a knife, and had never suggested he would throw it and certainly could not reach the officers, the greatest amount of force necessary would have been to fire toward the suspect's arms or legs in an attempt to temporarily cripple, but not kill, the young man.

The proposed legislation would require an officer, when using a firearm and when he could safely do so, to utilize his weapon in a non-deadly manner. This Penal Code addendum would insert a midpoint alternative into the binary "shoot to kill or don't shoot at all" policing methodology. It would also provide clarity to the term "reasonable force" under Section 835a. This statutory mechanism's implementation will undoubtedly produce a decline in unnecessary deaths resulting from police firearm use.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
1. *Graham v. Connor* (1989) 490 U.S. 386, 397 ("[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.").
2. *Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639 ("Our response to the Ninth Circuit's question on an issue of state law, as restated by this court, is this: Law enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability.").

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[3] San Francisco Police Department General Order 5.01.VI.G.4. (Dec. 21, 2016) <http://sanfranciscopolice.org/sites/default/files/Documents/PoliceDocuments/DepartmentGeneralOrders/DGO%205.01%20Use%20of%20Force%20%28Rev.%2012-21-16%29.pdf > (as of Jan. 30, 2017).

[4] *Ibid.*

RESPONSIBLE FLOOR DELEGATE: John S. Worden

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

SAN DIEGO COUNTY BAR ASSOCIATION

The SDCBA Delegation urges Disapproval of Resolution 15-06-2017. Unlike TV shows such as Person of Interest where extremities are shot to debilitate dangerous individuals, reality does not make such an idealization possible or even practical. Anyone remotely familiar with the use of firearms, especially pistols, knows how difficult it can be to hit such a small target area under even the ideal situation of a controlled indoor range with a stationary target and no emergency. Add simple factors such as wind, movement, darkness and adrenaline, a peace officer aiming for an extremity will more likely than not miss the dangerous suspect. That, in turn, increases the chances of innocent bystanders being struck.

The Proponent's goal of reducing deadly shooting incidents would be better served by focusing resources on including and requiring peace officers to attend de-escalation training as part of Peace Officer Standards and Training (POST) requirements. Training officers in means and methods to de-escalate situations is more likely to lower police shooting rates and use of force overall than such wishful notions that make for great TV but have no practicality in reality.

SANTA CLARA COUNTY BAR ASSOCIATION

This resolution seeks to require that police officers, under certain circumstances, fire their weapons towards "nonlethal bodily targets." This resolution lacks an understanding of the difficulty of hitting a small target, not to mention the exceptions to the rule are either unrealistic or are so broad as to effectively defeat the purpose of the resolution in the first place.

The proponent, in effect, wants police officers to aim for arms or legs when arresting an individual, unless certain exceptions apply. Thus, the resolution would allow use of deadly force if the suspect had a gun, but not, for example, a machete, or explosive device. Making an exception for firearms but not other equally dangerous weapons is nonsensical. Moreover, the resolution would allow for the use of deadly force if Penal Code sections 196 or 197 applied. Under Section 196, though, officers can use deadly force when "necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty[]" (Pen. Code § 196, subd. (2)), or "when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest." Pen. Code § 196, subd. (3). Many situations could be framed to fit into these exceptions thereby defeating the purpose of the resolution from the outset.

Indeed, in the example of the knife-wielding individual used by the proponent as an example of why this resolution is needed, the SF Gate article referenced states that the police had already sought to restrain the individual using bean bags and pepper spray – without success – and that the suspect refused instructions to drop the knife. Given this, it is arguable that Penal Code

section 196 would apply, and even if this resolution was in force, it would not have barred the use of force in this particular situation.

Furthermore, telling officers, who are not sharpshooters or expert marksmen, that they need to aim for an arm or a leg when it may be nighttime, or the suspect is not standing still, or may be high on PCP, any one of a number of other variables, is not reasonable. Officers are trained to aim at center mass because if they need to fire their weapon, they want to make sure they hit the target. Aiming to hit an arm or a leg only ensures a higher likelihood of ricochets, or misses that may hit innocent bystanders.

The way to address problems of an over-use of deadly force is not telling officers how they should direct their fire, but giving them better options and training in other types of force that could be used (e.g., bean bag guns, Tasers, pepper spray) in different situations, or should be attempted first before having to use a firearm.

For such reasons, Santa Clara County recommends disapproval.

RESOLUTION 15-07-2017

DIGEST
Peace Officers: Appointment of Special Prosecutor in Deadly Force Cases
Adds Penal Code section 11056 to require the Attorney General to appoint a special prosecutor when a peace officer uses force that results in death.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution adds Penal Code section 11056 to require the Attorney General to appoint a special prosecutor when a peace officer uses force that results in death. This resolution should be disapproved because local prosecutorial agencies already investigate cases where police officers use deadly force and there is no evidence that those investigations are inadequate.

Current law provides that law enforcement agencies must establish procedures to investigate complaints against peace officers brought by members of the public. (Pen. Code, § 832.5, subd. (a)(1).) In addition, Penal Code section 149 imposes criminal penalties against peace officers for using force without lawful necessity.

Many law enforcement agencies have policies requiring the agency to report an officer's use of deadly force to the local prosecutorial agency. (See, e.g., Los Angeles Police Department Manual, Vol. 3, § 794.35; San Francisco Police Department, sanfranciscopolice.org/officer-involved-shooting-faq; Fresno Police Department, www.fresno.gov/police/records-reports.) There is no evidence that either the law enforcement agencies are not complying with their reporting requirements or the local prosecutorial agencies are not properly analyzing whether or not to file charges against the peace officers.

There is also no evidence that the local prosecutorial agency is not equipped to handle such cases. Indeed, the Attorney General's Office currently has the power to take over such investigations if it wishes to do so and current law also does not prevent cooperation and consultation between the Attorney General's Office and local district attorney's offices. However, if it were a requirement that the Attorney General's Office handle all of these investigations, it would unfairly burden and tax the limited resources that the office already have. In addition, in many district attorney's office, there are specialized units that handle these investigations and trials. In contrast, the Attorney General's Office is not equipped to handle these cases because it does not have specialized criminal trial units and handles mostly appeals.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Penal Code section 11056 to read as follows:

§ 11056

(a) If a peace officer, in the performance of his or her duties, uses deadly physical force upon another person and that person dies as a result of the use of that deadly physical force, the Attorney General shall appoint a special prosecutor to direct the investigation concerning the use of deadly physical force by the peace officer.

(b) Pursuant to this investigation, the special prosecutor has the sole authority to determine whether criminal charges should be filed.

(c) If the special prosecutor files charges, the special prosecutor shall file those charges in the superior court of the county in which the death occurred.

(d) The special prosecutor is responsible for prosecuting any criminal charges that are filed. Any support the special prosecutor needs to pursue prosecutor needs to pursue prosecution of the criminal charges filed under this section shall be provided by the Office of the Attorney General.

(Proposed new language underlined; language to be deleted stricken)

PROPONENTS: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: With the spate of deaths of civilians attributed to police officers that have been so widely broadcast on national and international media, there has been at least two major issues that concern us all. There is general agreement among those in a position to know that most police officers are conscientious and never fire their weapons in the line of duty throughout an entire career. It is also quite clear that perception often trumps reality. That leads to a wide-spread belief that the police are out of control and should be reined in. The public needs to be reassured that the police are not engaging in less than a thorough job of investigating and determining a fellow officer is guilty of a crime.

Existing law establishes that the Department of Justice is under the direction and control of the Attorney General, and requires the Department of Justice to perform duties in the investigation of crimes as may be assigned by the Attorney General. Existing law requires each department or agency in this State that employs peace officers to establish a procedure to investigate complaints by members of the public against the personnel of these departments of agencies, as specified.

The Solution: This resolution requires the Attorney General to appoint a special prosecutor to direct an independent investigation if a peace officer in the performance of his or her duties, uses deadly physical force upon another person and that person dies as a result of the use of that deadly physical force. The resolution would grant the special prosecutor the sole authority to determine whether criminal charges should be filed. The resolution would make the special prosecutor responsible for prosecuting any chargers filed.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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