

## U.N. Code of Conduct for Law Enforcement Officials

In 1979, the U.N. General Assembly adopted the Code of Conduct for Law Enforcement Officials (U.N. Code of Conduct) which was intended to ensure law enforcement officials perform their duties “with dignity and in compliance with the principles of human rights,” but recognized the “potential for abuse ... the exercise of such duties entails.”<sup>19</sup> A Code of Conduct provides the core set of standards for human rights compliant policing practices, concretizing the rights guaranteed through human rights treaties, including the right to life and freedom from torture and cruel, inhumane and degrading treatment and the right to equal treatment. The U.N. Code of Conduct was drafted by the Committee on Crime Prevention and Control and approved by the Commission for Social Development and the Economic and Social Council to “provide[] the citizenry ... with protection of all their rights and interests”<sup>20</sup> and ensure law enforcement officials “protect human dignity and maintain and uphold the human rights of all persons” in the performance of their duty.<sup>21</sup>

The U.N. Code of Conduct provides guidance to police departments for directing and constraining police use of force. While it is not binding law, the Code is a highly persuasive authority for how to interpret treaty obligations which are binding on states. Article 3 of the U.N. Code of Conduct specifies: “Law enforcement officials may use force only when *strictly necessary* and to the extent required for the performance of their duty” (emphasis added).<sup>22</sup> This principle of *necessity* explained in detail below has become a key international standard limiting police use of lethal force. Commentary on Article 3 introduces the “last resort” element of necessity and the principle of accountability:

“In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.”<sup>23</sup>

The commentary also introduces the principle of proportionality and the principle of legality, requiring that restrictions on the use of force be provided in law.<sup>24</sup>

## U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

The U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (U.N. Basic Principles) were adopted in 1990 by the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders to clarify aspects of the U.N. Code of Conduct and to provide guidelines Member States are encouraged to implement.<sup>25</sup> They aim, in part, to ensure protection of the rights to life, liberty and security of the person, as guaranteed in the UDHR and reaffirmed in the ICCPR, the latter of which the

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<sup>19</sup> UN Code of Conduct, *supra* note 16.

<sup>20</sup> UN Code of Conduct, *supra* note 16, at preamble.

<sup>21</sup> UN Code of Conduct, *supra* note 16.

<sup>22</sup> UN Code of Conduct, *supra* note 16.

<sup>23</sup> See UN Basic Principles, *supra* note 17.

<sup>24</sup> UN Code of Conduct, *supra* note 16, at article 3, commentary (b).

<sup>25</sup> See UN Basic Principles, *supra* note 17.

United States ratified in 1992.<sup>26</sup> In particular, the U.N. Basic Principles are meant to “assist Member States in their task of ensuring and promoting the proper role of law enforcement officials.”<sup>27</sup> While they are not legally binding, the U.N. Basic Principles represent consensus among U.N. member states on rules and regulations based on international human rights law for the use of force by law enforcement agencies.

## Report of the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, formerly Mr. Christof Heyns and currently Ms. Agnès Callamard, is an international human rights expert appointed by the U.N. Human Rights Council, an inter-governmental body of 47 U.N. member states charged with protecting and enforcing human rights. Among other things, the Special Rapporteur’s mandate requires her/him to report to the U.N. Human Rights Council and U.N. General Assembly “on the situation worldwide in regard to extrajudicial, summary or arbitrary executions and [make] recommendations for more effective action to combat this phenomenon.”<sup>28</sup> Towards this end, and to support implementation of the U.N. Basic Principles by law enforcement agencies, Mr. Heyns, then the Special Rapporteur, issued a report with a series of recommendations in 2014.<sup>29</sup> In a section devoted to the use of lethal force by domestic law enforcement officials, the U.N. Special Rapporteur outlined four requirements for the use of lethal force: sufficient legal basis, necessity, proportionality and provision of accountability.<sup>30</sup> Subsequent non-government actors have provided interpretations of the requirements.<sup>31</sup> These requirements align with and support the four principles used in this report, as defined below.

## International Standards on Police Use of Lethal Force: Legality, Necessity, Proportionality and Accountability

### Legality

**The principle of legality requires authority for the use of lethal force to be provided in a domestic law that complies with international standards.** This principle is derived from the U.N. Code of Conduct, the U.N. Basic Principles and the U.N. Special Rapporteur report. The U.N. Code of Conduct notes that national law “ordinarily restricts the use of force by law enforcement officers ...”<sup>32</sup> The U.N. Basic Principles call on governments to “adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials.”<sup>33</sup> They further state that governments “shall ensure that

<sup>26</sup> International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976; adopted by the United States Sept. 8, 1992).

<sup>27</sup> UN Basic Principles, *supra* note 17, at preamble.

<sup>28</sup> OHCHR, Overview of the Mandate, at <http://www.ohchr.org/EN/Issues/Executions/Pages/Overview.aspx>.

<sup>29</sup> See UNSR Report, *supra* note 18.

<sup>30</sup> See UNSR Report, *supra* note 18, at ¶¶ 86-100. More recently, in response to police use of “less-than-lethal weapons” at protests across the United States following the killing of George Floyd by Minneapolis police, Ms. Callamard has stated that their use “must be restricted to situations of necessity and in proportion to the associated risks.” See Agnès Callamard, *Police in the U.S. are abusing tear gas and rubber bullets in possible violations of international law*, The Washington Post (Jun. 1, 2020) <https://www.washingtonpost.com/opinions/2020/06/01/police-us-are-abusing-tear-gas-rubber-bullets-possible-violations-international-law/>.

<sup>31</sup> See Amnesty International, *Use of Force: Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Amnesty International (Aug. 2015) [hereinafter *Amnesty Guidelines*].

<sup>32</sup> UN Code of Conduct, *supra* note 16, at article 3, commentary (b).

<sup>33</sup> UN Basic Principles, *supra* note 17, at general provisions 1.

arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.”<sup>34</sup> The U.N. Special Rapporteur report establishes, more specifically, that in order for use of lethal force not to be arbitrary, it must have a sufficient legal basis provided in a domestic law that itself complies with international human rights law and standards.<sup>35</sup>

The principle of legality is also reflected in United States domestic law. In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Supreme Court endorsed the principle of legality through its emphasis on state law in determining whether use of lethal force in the case was constitutional. Though the law in question was found constitutionally invalid, the Court’s decision and reasoning were based on the premise that the state statute provided the authority upon which the officer employed lethal force.<sup>36</sup>

## Necessity

**The principle of necessity permits use of lethal force only in response to an imminent and particularized threat, and only as a last resort.** The U.N. Basic Principles explain that “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”<sup>37</sup> Article 3 of the U.N. Code of Conduct states that law enforcement officials “may use force only when strictly necessary and to the extent required for the performance of their duty” (emphasis added).<sup>38</sup> The Code further explains that use of firearms is “an extreme measure” allowed only “when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.”<sup>39</sup>

Necessity, therefore, requires an immediate threat—immediacy; the threat must be particularized—particularized threat; and lethal force must be only used as a last resort—last resort. This report will employ the necessity principle with these three elements.

Immediacy establishes that lethal force is only authorized against a person who presents an immediate or imminent threat. The U.N. Basic Principles state that firearms may only be used “in self-defence or defense of others against the imminent threat of death or serious injury” (emphasis added).<sup>40</sup> Similarly, the U.N. Special Rapporteur report explains that “force may also only be used in response to an imminent or immediate threat—a matter of seconds, not hours.”<sup>41</sup>

In U.S. domestic law, the Supreme Court emphasizes the importance of a similar immediacy requirement in justifying use of force. In *Graham v. Connor*, 490 U.S. 386 (1989), the Court held that an assessment of whether a police officer’s decision to use force is reasonable, and therefore constitutionally valid,

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<sup>34</sup> UN Basic Principles, *supra* note 17, at general provisions 7.

<sup>35</sup> See UNSR Report, *supra* note 18, at ¶¶ 55-56.

<sup>36</sup> See, *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (the Court stated that the “Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects,” implying that authorization for the use of lethal force derives from the state law—constitutionally valid or not).

<sup>37</sup> UN Basic Principles, *supra* note 17, at special provision 9.

<sup>38</sup> UN Code of Conduct, *supra* note 16.

<sup>39</sup> UN Code of Conduct, *supra* note 16, at article 3, commentary (c).

<sup>40</sup> UN Basic Principles, *supra* note 17, at special provision 9.

<sup>41</sup> UNSR Report, *supra* note 18, at ¶ 59.

“requires careful attention to the facts and circumstances of each particular case, including ... whether the suspect poses an immediate threat to the safety of the officer or others.”<sup>42</sup>

In accordance with the particularized threat component of necessity, lethal force may only be used in response to a specific heightened risk or threat. The U.N. Basic Principles define a heightened risk as one of “death or serious injury.”<sup>43</sup> The U.N. Special Rapporteur further distinguishes force from lethal force by describing the only “legitimate objective” for lethal force as the protection of life or serious injury.<sup>44</sup> The particularized threat requirement is thus closely related to the principle of proportionality (discussed below). However, particularized threat requires police only to identify a particular, as opposed to a generalized, risk or threat, which in the case of use of lethal force must be of death or serious injury, in line with the principle of proportionality.

*Tennessee v. Garner* also establishes a particularized threat requirement analogous to the principle of necessity. In *Garner*, the Supreme Court held that lethal force cannot be used unless 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.”<sup>45</sup> The Court based its decision on the constitutionality of the use of lethal force in the case, in part, on whether the officer “had an actual basis to think [the suspect] was armed” and thus “posed any physical danger to himself or others.”<sup>46</sup>

The last resort component of necessity prohibits the use of lethal force until after other non-lethal options have been considered or “whenever the lawful use of force and firearms is unavoidable.”<sup>47</sup> The U.N. Code of Conduct explains that the use of lethal force is only permitted when “less extreme measures are not sufficient.”<sup>48</sup> The U.N. Basic Principles state that law enforcement officials “shall, as far as possible, apply non-violent means before resorting to the use of force and firearms.”<sup>49</sup> They further state that police “may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.”<sup>50</sup> The U.N. Special Rapporteur explains that “force should be the last resort ..., and if it is needed, graduated force (the minimum required) should be applied.”<sup>51</sup>

## Proportionality

**The principle of proportionality limits use of lethal force only in response to threats to life or serious bodily harm to the officer or others.** The principle requires a balance between the harm done in applying force on one side and the interest protected on the other.<sup>52</sup> Proportionality applies to all use of force by police, not just lethal force. As applied to *lethal* force, the U.N. Special Rapporteur describes the value

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<sup>42</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989).

<sup>43</sup> UN Basic Principles, *supra* note 17, at special provision 9.

<sup>44</sup> UNSR Report, *supra* note 18, at ¶ 58.

<sup>45</sup> *Garner*, *supra* note 36, at 3.

<sup>46</sup> *Garner*, *supra* note 36, at 20–21.

<sup>47</sup> UN Basic Principles, *supra* note 17, at principle 5.

<sup>48</sup> UN Code of Conduct, *supra* note 16, at article 3, commentary (c).

<sup>49</sup> UN Basic Principles, *supra* note 17, at principle 4.

<sup>50</sup> *Id.*

<sup>51</sup> UNSR Report, *supra* note 18, at ¶ 59.

<sup>52</sup> UNSR Report, *supra* note 18, at ¶ 65.

underlying proportionality as the “protect life” precept: “a life may be taken intentionally only to save another life.”<sup>53</sup> The U.N. Code of Conduct notes that “national principles of proportionality are to be respected” and that lethal force should only be used when a subject “offers armed resistance or otherwise jeopardizes the lives of others.”<sup>54</sup> The U.N. Basic Principles expand the principle to allow use of firearms in response to threats of “serious injury,”<sup>55</sup> which may be referred to as a threat of serious bodily harm.

The Supreme Court affirmed the principle of proportionality in *Tennessee v. Garner*, requiring the subject to pose “a significant threat of death or serious physical injury to the officer or others” for use of lethal force to be constitutional.<sup>56</sup> *Graham v. Connor* also implies that an officer’s use of force must be proportional, stating that the test for constitutionality “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue.”<sup>57</sup>

## Accountability

**The principle of accountability requires an effective review process, involvement of an external oversight body and issuance of a report in all instances of the use of lethal force.** The U.N. Special Rapporteur describes the primary role of accountability as ensuring that police officers are not above the law when they use force.<sup>58</sup> The U.N. Code of Conduct establishes that, “in every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.”<sup>59</sup> The U.N. Basic Principles require “a system of reporting whenever law enforcement officials use firearms in the performance of their duty.”<sup>60</sup> The Principles further call for an “effective review process,” with “independent administrative or prosecutorial authorities” in a position to exercise jurisdiction, and, in cases of death or serious injury, the submission of a prompt, detailed report to the “authorities responsible for administrative review and judicial control.”<sup>61</sup> The U.N. Special Rapporteur goes even further and requires involvement of an external oversight body with “necessary powers, resources, independence and transparency[,] ... community and political support, and civil society involvement.”<sup>62</sup>

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<sup>53</sup> UNSR Report, *supra* note 18, at ¶ 70.

<sup>54</sup> UN Code of Conduct, *supra* note 16, at article 3, commentary (b) and (c).

<sup>55</sup> UN Basic Principles, *supra* note 17, at special provision 9.

<sup>56</sup> *Garner*, *supra* note 26, at 3.

<sup>57</sup> *Graham*, *supra* note 32, at 396.

<sup>58</sup> See UNSR Report, *supra* note 18, at ¶ 100.

<sup>59</sup> UN Code of Conduct, *supra* note 16, at article 3, commentary (c).

<sup>60</sup> UN Basic Principles, *supra* note 17, at special provision 11(f).

<sup>61</sup> UN Basic Principles, *supra* note 17, at reporting and review procedures 22.

<sup>62</sup> UNSR Report, *supra* note 18, at ¶ 84.



# Evaluation of Police Department Use of Lethal Force Policies in the 20 Largest U.S. Cities

As explained above, police department use of lethal force policies are the primary source of guidance for police officers as to the circumstances and conditions in which use of lethal force is permitted. Policies are produced by the police departments at a management level and generally approved and adopted by police boards.<sup>63</sup> Police officers are trained on the content of policies in order to operationalize the rules and principles the policies contain.<sup>64</sup> Police department policies do not carry the force of law, i.e., officers may not be held legally accountable simply for failing to follow an internal policy; however, policy violations often result in departmental disciplinary measures and may trigger external investigations, including criminal investigations.

In order to evaluate the 2017-2018 use of lethal force policies of the 20 largest U.S. cities, the authors developed a grading system based on the four principles derived from international law and standards presented above—legality, necessity, proportionality and accountability. The system also reflects meaningful differences observed in police policies.

Importantly, the grading system is designed to evaluate the written policies' compliance with the four key international principles. The grading system does not measure how these policies are implemented, or whether effective institutional processes are in place to ensure policies shape practice. It also does not establish an exhaustive list of best practices for police use of lethal force policies. In other words, the grading system developed for this report does not measure whether there exists, for example, effective officer training on de-escalation and human rights compliant use of force strategies, whether officers are provided with less lethal tools to ensure use of deadly force is minimized, whether processes are in place for reporting and reviewing each instance of the use of force, or whether police leadership is committed to promoting effective internal accountability. These practices are vital for proper implementation and operationalization of the written policies and the principles they contain.

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<sup>63</sup> The authority of police boards and processes for adopting police policies are typically provided for in the relevant municipal codes. See e.g. Municipal Code of Chicago, Chapter 2-84, §010-030; Los Angeles City Charter, §§ 570-576.

<sup>64</sup> See generally U.S. Commission on Civil Rights, Briefing Report, Police Use of Force: An Examination of Modern Policing Practices (Nov. 2018) Executive Summary; Police Executive Research Forum, *Guiding Principles on Use of Force, Critical Issues in Policing Series* (2016).

Nevertheless, policies matter, especially in a decentralized context in which police officer monitoring and accountability is largely left to city governments and/or individual departments. What police departments put down on paper to instruct police officers on the proper use of lethal force expresses priorities to the individual officers, demonstrates a commitment to modes of operation and establishes the institutional foundation necessary to ensure respect for the human rights of the people they serve.

## Use of Lethal Force Policy Grading System and Grade Results

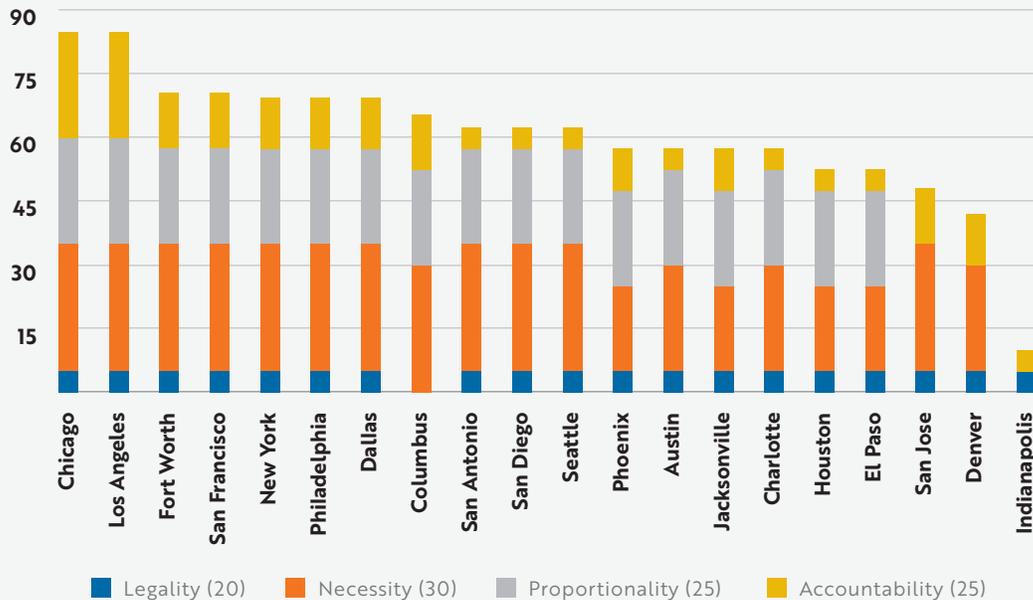
Figure 1

### Use of Lethal Force Policy Grades and City Rankings

(1)	Chicago	85
(2)	Los Angeles	85
(3)	Fort Worth	73
(4)	San Francisco	73
(5)	New York	72
(6)	Philadelphia	72
(7)	Dallas	72
(8)	Columbus	68
(9)	San Antonio	65
(10)	San Diego	65
(11)	Seattle	65
(12)	Phoenix	60
(13)	Austin	60
(14)	Jacksonville	60
(15)	Charlotte	60
(16)	Houston	55
(17)	El Paso	55
(18)	San Jose	48
(19)	Denver	42
(20)	Indianapolis	10

Figure 2

## Lethal Use Force Policy Grades



As the visuals above illustrate, under the grading system used by this report, a policy that fully complies with international standards could receive a total of 100 points. As described in detail below, each principle was assigned a point value as follows: legality 20 points; necessity 30 points; proportionality 25 points; accountability 25 points. The principle point assignments were developed taking into account the need to create a functional, coherent grading system and the relative substantive value of each principle. In other words, differing point values were assigned to principles to account for important distinctions in the international human rights law and standards from which the principles are derived and observed differences in the policies themselves. The authors disaggregated three principles—legality, necessity and accountability—into constituent elements (1) based on the content of the principle derived from international human rights law and standards and (2) to ensure grades reflected meaningful distinctions observed in the policies. Only policies in full compliance with a principle received the maximum points available.

No city policy satisfied all four international principles and received the full 100 points. In other words, **none of the police use of lethal force policies from the 20 largest U.S. cities during 2017-2018 complied with basic international human rights law and standards.** Every city fell short of the international standard for legality and most failed to fully satisfy accountability. **Los Angeles** and **Chicago** stand out as the only policies that met the international standard for accountability and received the full 25 points for the principle. As a result, Los Angeles and Chicago received the highest overall grade of the 20 cities with 85 points. Seventeen of the 20 cities satisfied proportionality; **San Jose**, **Indianapolis**, and **Denver** are the only cities not to have met the principle to receive its 25 points. **Indianapolis** received the lowest

grade for necessity, at 0 points, with all other cities scoring 20, 25 or 30. As a result, Indianapolis received the lowest overall grade with 10 points.

## 1. Legality (20 points)

The principle of legality was assigned 20 points in total. The authors assigned legality less total points—20 compared to 25 and 30 for the other principles—because state legislatures, not police departments, draft and enact use of lethal force laws. State legislatures are thus responsible for whether these laws comply with international human rights law and standards. Police departments, however, can and must ensure their policies align with the laws of their state.

Policies received the following grades according to increasing levels of compliance with the principle:

- **Not based on state law (0 points)—policies that were not based on state law granting authorization for use of lethal force;**
- **Based on noncompliant state law (5 points)—policies that were based on a state law authorizing use of lethal force, but for which the law did not comply with international human rights law and standards; and**
- **Based on compliant state law (20 points)—policies based on a state law authorizing use of lethal force that complied with international human rights law and standards.**

The principle of legality is founded, generally, on the principle of the rule of law. The rule of law requires, among other things, that governments and their officials are accountable under clear and just laws that are consistent with human rights norms.<sup>65</sup> The principle of legality thus has two interrelated components: first, the principle of the rule of law requires police policies to be based on enacted law that authorizes and limits police conduct; second, the substantive component requires that the law upon which the policy is based must comply with international human rights law and standards.

The third element of legality represents the international standard, comprising both interrelated components, and is awarded the full 20 points. The first two elements fall below the international standard and are not assigned the full 20 points available for the principle. Police policies based on an enacted state law—meeting the rule of law component—but for which the law itself did not comply with international human rights law and standards—thus failing to meet the substantive component—received 5 points. Points for the second and third elements—5 and 20 respectively—are awarded independently, rather than added together, because the elements are mutually exclusive.

A police policy was “based” on a state law granting it authorization for use of lethal force if the policy used exact or substantially similar language to the main parts of the state statute. The table in Appendix B displays the textual comparison conducted by the authors to determine whether police use of lethal force policies used exact or substantially similar language to their corresponding state laws.

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<sup>65</sup> See, e.g., Report of the U.N. Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, U.N. Doc. S/2004/616, at ¶ 6 (August 23, 2004); World Justice Project, *What is the Rule of Law?*, available at <https://worldjusticeproject.org/about-us/overview/what-rule-law>.

## Legality Grades Discussion

As noted above, Amnesty International’s 2015 report, “Deadly Force: Police Use of Lethal Force in the United States”, found that no state law fully complied with international human rights law and standards.<sup>66</sup> The authors re-examined state statutes as of June 2018 and found that no state law was compliant with international human rights standards. As a result, no police policy received the full 20 points for legality.

One state—Ohio—did not have a law governing police use of force in 2018. **Columbus** therefore received 0 points, because no state law existed to grant authorization for use of lethal force upon which the city policy could be based. The remaining 19 cities’ policies were based on state law granting authorization for use of lethal force that did not comply with international human rights law and standards. These 19 cities received 5 points.

For example, **Jacksonville’s** policy included multiple examples of exact or substantially similar language from the Florida state law. The Florida law authorized use of lethal force when an officer “reasonably believe[d] [it] to be necessary to defend himself or herself or another from bodily harm while making [an] arrest”;<sup>67</sup> Jacksonville’s policy permitted use of lethal force “when the officer reasonably believe[d] such force [was] necessary to prevent imminent death or great bodily harm to themselves or another person.”<sup>68</sup>

The Florida law authorized use of lethal force against fleeing felons when, among other things, the officer “reasonably believe[d]” the felon had “committed a crime involving the infliction or threatened infliction of serious physical harm to another person;”<sup>69</sup> Jacksonville’s policy permitted use of lethal force when an officer had “probable cause to believe,” among other things, that “the person fleeing committed a violent felony which involved the infliction or threatened infliction of great bodily harm or death ...”<sup>70</sup>

Though not required by international human rights law and standards, it is noteworthy that a number of cities explicitly referenced specific state laws in their policies as the authorization for use of lethal force. For example, **Indianapolis** included a section in its policy in which it presented the text of provisions from the Indiana state code of laws, including for the definitions of “deadly force,” “forcible felony” and “serious bodily injury.”<sup>71</sup> **Denver** directly quoted the Colorado statute on the use of force.<sup>72</sup> **San Jose** directed police officers to “follow established authorizations to use force provided by state law (Penal Code Sections 835 and 835a).”<sup>73</sup> Most cities did not reference specific state laws, or they did not reference state law as an underlying authorization for the use of lethal force. For example, **Los Angeles** referenced California state law, but only to define “serious bodily injury,” not as the statutory authority for the use of lethal force.<sup>74</sup> **San Antonio** and **Jacksonville** referenced state law generally, indicating that officers must follow state and federal law in their use of force, but they failed to designate specific statutory

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<sup>66</sup> Amnesty International, *Deadly Force: Police Use of Lethal Force in the United States*, 4 Amnesty International (2015).

<sup>67</sup> Fla. Stat. § 776.05 (1) Law enforcement officers; use of force in making arrest.

<sup>68</sup> Jacksonville’s Sheriff’s Office Order Number 551(A)(Ver 2), Response to Resistance, II.C.1 (a).

<sup>69</sup> Fla. Stat. § 776.05 (3)(a) Law enforcement officers; use of force in making arrest.

<sup>70</sup> Jacksonville’s Sheriff’s Office Order Number 551(A)(Ver 2), Response to Resistance, II.C.1 (b).

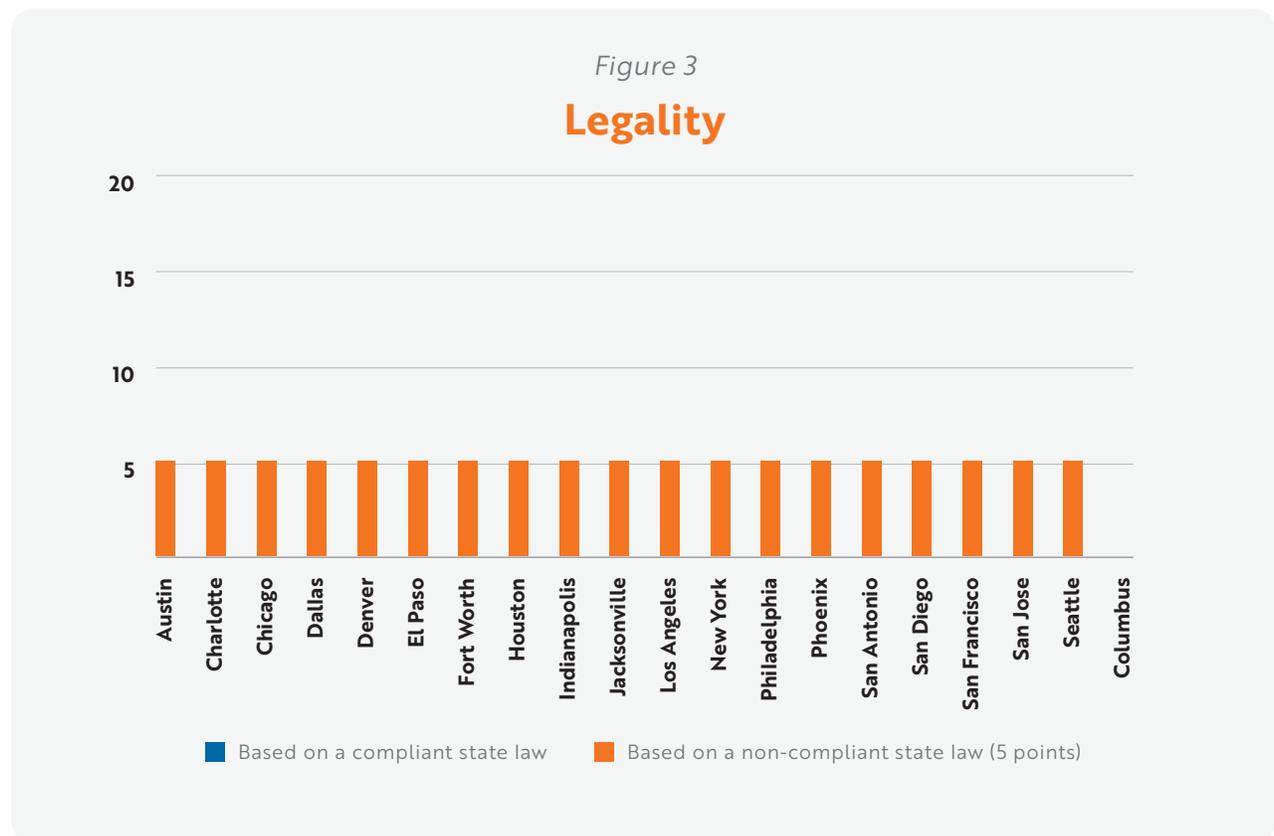
<sup>71</sup> Indianapolis Metropolitan Police Department, General Order 1.30, Use of Force.

<sup>72</sup> Operations Manual Denver Police Department 105.00 Use of Force Policy (2) State Statutes.

<sup>73</sup> San Jose Police Department, Duty Manual L 2600.

<sup>74</sup> Los Angeles, Office of the Chief of Police, Special Order No. 5, Policy on the Use of Force-Revised, II. Definitions.

provisions. **San Antonio**, for example, stated that “officers must be aware unnecessary or excessive force violates Federal Statutes, the Texas Penal Code and departmental policy.”<sup>75</sup>



## 2. Necessity (30 points)

The principle of necessity was assigned 30 points because (1) it provides a substantive limit on police use of force and (2) it includes three conceptually distinct and equally important elements taken directly from the international standards discussed above. Ultimately, necessity serves to direct officers to determine whether use of force is needed at all, and if so, how much force is justified.<sup>76</sup>

The authors disaggregated the principle of necessity into three elements with equal total point assignments:

- **Immediacy (10 points)—policies that only allowed use of lethal force when a person presented an immediate or imminent threat;**
- **Policies that included an exception for the immediacy requirement for fleeing felons received only 5 points of the 10 points;**

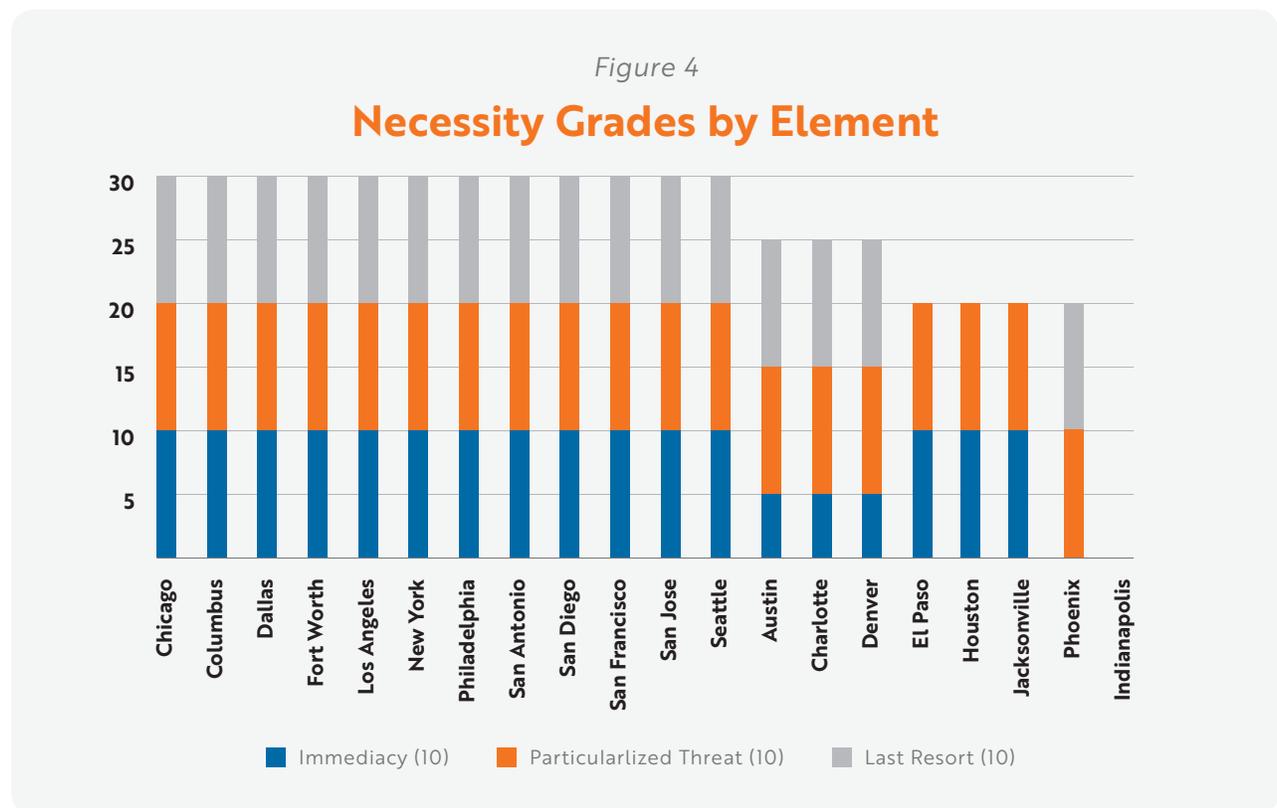
<sup>75</sup> San Antonio Police Department, Policy 501.03(C).

<sup>76</sup> There are other ways in which this principle can be conceptualized and elaborated. The formulation adopted in this report is the most useful for evaluating the language within use of force policies (it tracks the kind of language used) and captures the core requirements provided in international instruments. For a different formulation see e.g. Amnesty Guidelines, *supra* note 31 at 18 (“The principle of necessity has three components: Qualitative: Is force necessary at all or is it possible to achieve the legitimate objective without resorting to force? Quantitative: How much force is needed to achieve the objective? The level of force used should be the minimum that can still be considered effective. Temporary: The use of force must stop once the objective has been achieved or is no longer achievable.”)

- **Particularized Threat (10 points)**—policies that only allowed use of lethal force in response to a specific heightened risk or threat; and
- **Last Resort (10 points)**—policies that only allowed use of lethal force after other non-lethal options had been considered or whenever it was unavoidable.

The policies of all 20 cities required that officers act with an *objectively* reasonable belief or *probable cause* to *believe* that the circumstances required by the necessity elements were present to allow use of lethal force. For example, in a city with an immediacy requirement, officers could only use lethal force if they had an objectively reasonable belief or probably cause to believe that the subject posed an immediate threat. This is in line with the standard used by the Supreme Court to determine the constitutionality of police use of force as established in *Graham v. Connor*. “[the] 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 ...”<sup>77</sup>

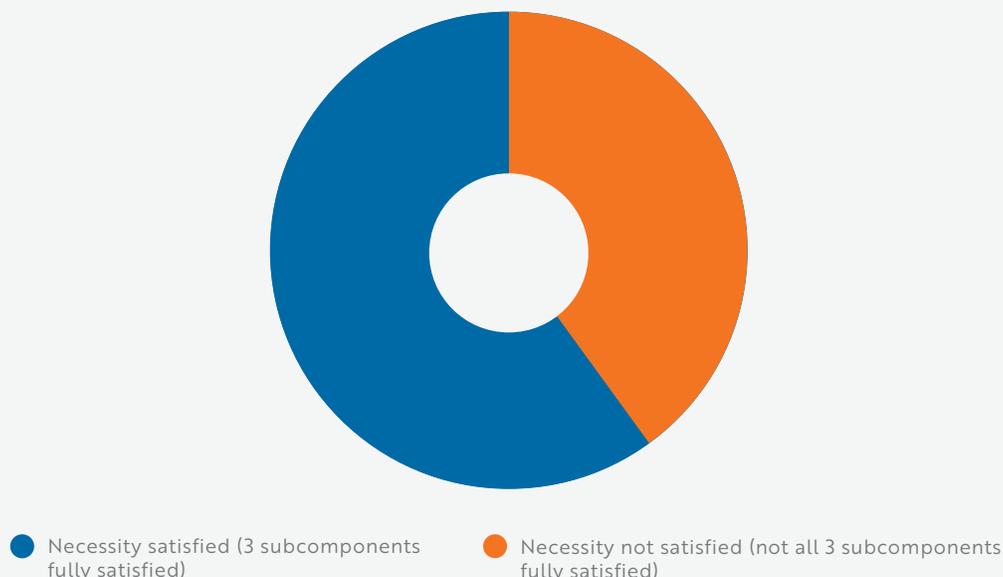
### Necessity Grades Discussion



<sup>77</sup> *Graham, supra* note 42, at 397.

Figure 5

## Cities Satisfying Necessity



### i. Immediacy (10 points):

A policy that required an immediate or imminent threat in all situations to allow use of lethal force received 10 points. However, some policies provided more guidance than others on graduated levels of threat and commensurate force permitted. **Philadelphia**, for instance, prohibits an officer from “using deadly force at any point in time when there is no longer an objectively reasonable belief that the suspect is dangerous, even if the deadly force would have been justified at an earlier point in time.”<sup>78</sup> **Philadelphia** also required police officers to de-escalate their use of force if the threat allowing lethal force had subsided. **Phoenix** also required lethal force to “immediately be discontinued” when “the circumstances justifying the use of deadly force no longer exist[ed].”<sup>79</sup> A policy received 5 points where immediacy was generally required for use of lethal force, but where an exception was provided for fleeing felons—allowing use of lethal force against someone suspected of a felony without requiring the threat they pose to be immediate or imminent.<sup>80</sup> The UN Basic Principles anticipate such situations, but nonetheless require the threat posed by fleeing subjects to be immediate or imminent.<sup>81</sup> Therefore, a policy that makes this exception fails to comply with international human rights law and standards.

<sup>78</sup> Philadelphia Police Department, Directive 10.1(I)(C).

<sup>79</sup> Phoenix Police Department, Operations Order 1.5(4)(H).

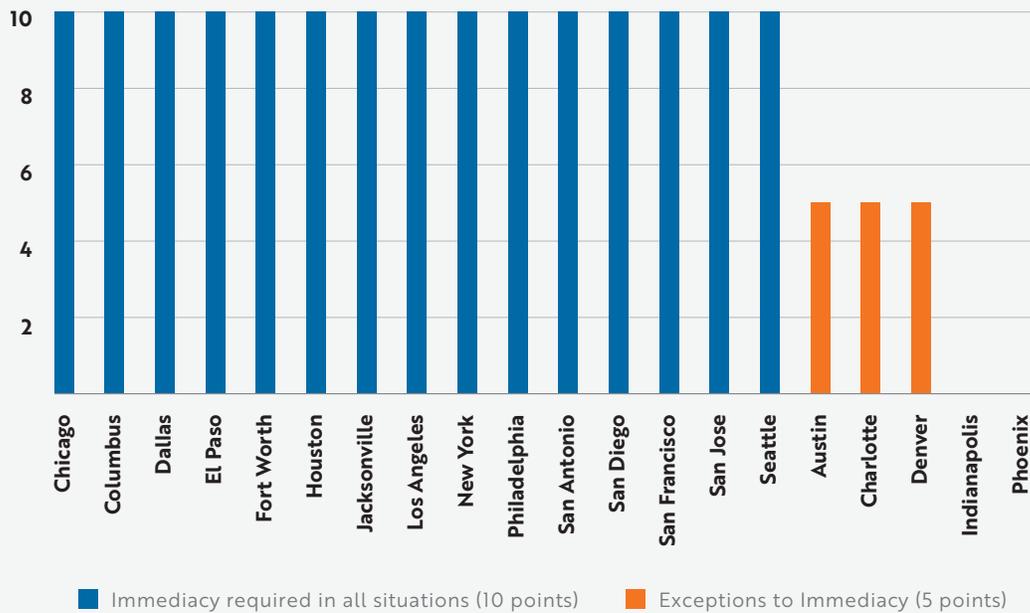
<sup>80</sup> The Charlotte and Austin policies contained fleeing felon exceptions to immediacy. Charlotte-Mecklenburg Police Department, I.D.G.600-018(IV)(A)(2) Procedures for the Use of Deadly Force; Austin Police Department, Policy Manual 200.3 Deadly Force Applications.

<sup>81</sup> Special Provision 9 of the Basic Principles permits lethal force to prevent an escape when the subject presents a threat of death or serious injury or the threat to commit a crime that would involve those risks. Special Provision 9 also requires such a threat to be imminent. See UN Basic Principles, *supra* note 17, at special provision 9.

**San Diego** appropriately carried immediacy through to instances of escaping suspects, allowing lethal force only when suspects pose an “imminent” threat. Some cities, such as **Chicago**, required immediacy in all circumstances, not distinguishing between threats posed by fleeing felons and other subjects. Like San Diego, **Austin** established two different situations in which an officer was authorized to use lethal force. In one situation, officers were permitted to use lethal force to protect themselves and others from “an imminent threat of death or serious bodily injury.”<sup>82</sup> In the second situation, an officer was justified in using lethal force to make an arrest or prevent an escape when a subject had committed or intended to commit an offense involving the infliction or threatened infliction of serious bodily injury or death. However, the policy failed to require an immediate or imminent threat in the second situation, failing to satisfy the immediacy element.

Figure 6

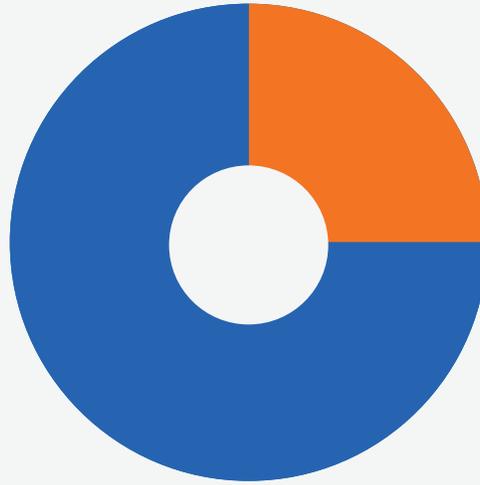
### Immediacy Grade by Element



<sup>82</sup> Austin Police Department, Policy Manual 200.3 Deadly Force Applications.

Figure 7

## Cities Satisfying Immediacy



● Immediacy required in all situations    ● Immediacy not required in all situations

### ii. Particularized Threat (10 points):

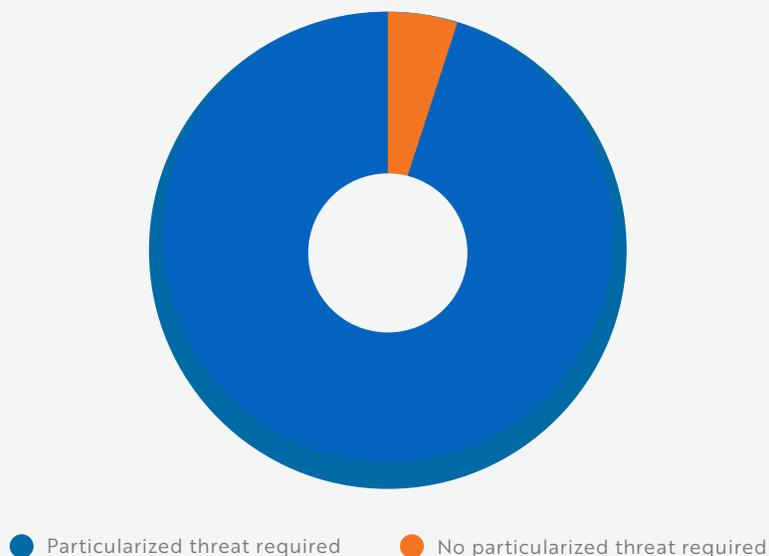
Policies received 0 or 10 points for the particularized threat element of necessity. A policy satisfied this principle if it required a specific heightened risk or threat to allow use of lethal force. All but one of the 20 cities satisfied particularized threat, only allowing use of lethal force in response to a threat of death or serious bodily harm or injury—specific, heightened risks. **Indianapolis** failed to satisfy this element because the policy allows the use of deadly force to prevent the commission of a forcible felony, without limiting or specifying the relevant felonies or the kind of force or threat of force involved in the commission of the felony.<sup>83</sup> **Fort Worth**, for example, established that use of lethal force was authorized “only when it is necessary for officers to protect themselves or others from an immediate *threat of death or serious bodily injury*” (emphasis added).<sup>84</sup>

<sup>83</sup> Indianapolis Metropolitan Police Department, General Order 1.30 Use of Force – Principles.

<sup>84</sup> Indianapolis Metropolitan Police Department, General Order 306.06 Use of Deadly Force.

Figure 8

## Cities Satisfying Particularized Threat



### iii. Last Resort (10 points):

Policies received either 0 or 10 points for the last resort element of necessity. A policy satisfied this principle and received 10 points if it only allowed use of lethal force after other non-lethal options had been considered or whenever it was unavoidable. It is important to note that while a written policy may direct police officers to make sure lethal force is used as a last resort, training and command must equip officers with the skills to take proactive steps to de-escalate and resolve tense and difficult situations, and to use persuasion and negotiation techniques to avoid circumstances wherein use of lethal force becomes necessary.<sup>85</sup>

There was greater variation in policy language across cities for the last resort element of necessity than for others. Policies that used “last resort,” or an equivalent phrase, received the full 10 points. **Dallas**, for example, stated: “Deadly force will be used with great restraint and as a last resort only when the level of resistance warrants the use of deadly force” (emphasis added).<sup>86</sup> **Columbus** described “use of force levels of control,” in which the degree of force authorized for use increases according to the level of the threat. Lethal force is defined as the eighth and final “level of control” for officers.<sup>87</sup> **Fort Worth** established that “an officer shall use de-escalation techniques...whenever possible and appropriate before resorting to force and to reduce the need for force.”<sup>88</sup>

<sup>85</sup> For more on these measures see Amnesty Guidelines *supra* note 31, at 34-35.

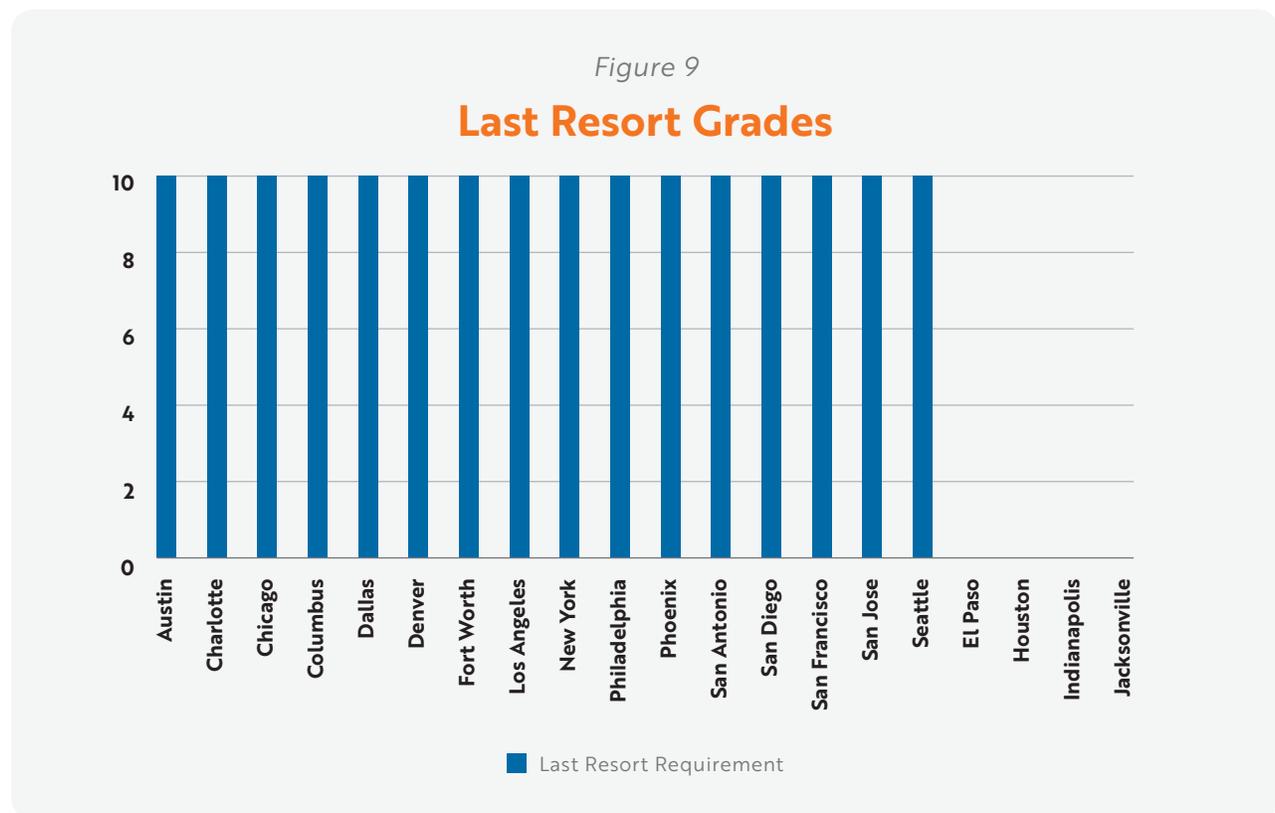
<sup>86</sup> Dallas Police Department, General Order 906.01(C) Use of Deadly Force, Philosophy.

<sup>87</sup> Columbus Police, Division Directive 2.01(I)(B) Use of Force Levels of Control.

<sup>88</sup> Fort Worth Police Department, General Orders, General Order Section 306.04 Use of Force: De-Escalation.

Policies also satisfied the last resort element through description of a variety of escalating measures to be used, where feasible, prior to use of lethal force. **Philadelphia** and **Chicago** for example, included graphical representations of escalating use of force options corresponding to escalating threats. (See Appendix A). For example, **Philadelphia** placed use of lethal force at the apex of a triangle in their Use of Force Decision Chart, indicating lethal force may only be used after non-lethal options are exhausted. The **Seattle** policy included a provision titled “Officers Should Use De-Escalation Tactics in Order to Reduce the Need for Force” that listed and explained the relevant circumstances and techniques.<sup>89</sup> It also stated that officers “shall issue a verbal warning to the subject, other officers, and other individuals present, that a firearm will be shot and defer shooting the firearm a reasonable amount of time to allow the subject to comply with the warning.”<sup>90</sup> The **Chicago** policy described types of subjects and their actions, then detailed the corresponding level of force police may use in response, escalating upwards from the presence of officers and verbal warnings to lethal force with several options in between.

Cities that did not use “last resort,” or an equivalent phrase, and did not require use of escalating measures prior to use of lethal force received 0 points. **Jacksonville** and **Indianapolis**, for example, failed to satisfy the element with their requirement to use a “verbal warning, if feasible,” without more. **Houston** also did not meet the element because it only required police officers “to constantly assess the situation and adjust the use of force accordingly.”<sup>91</sup>



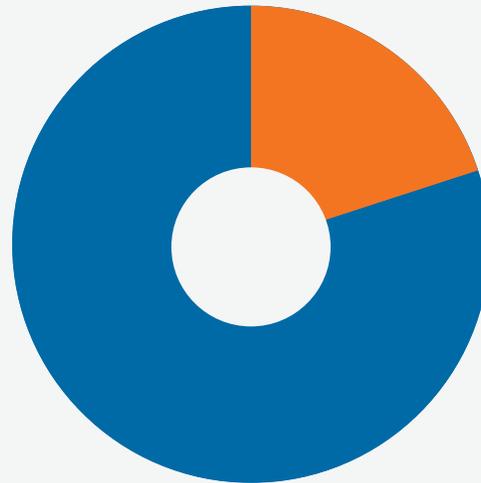
<sup>89</sup> Seattle Police Department, Manual 8.100(2) De-Escalation.

<sup>90</sup> Seattle Police Department, Manual 8.300-POL-4 (7) Firearms.

<sup>91</sup> Houston Police Department, General Order 600.17(I) General Use of Force Principles.

Figure 10

### Cities Satisfying Last Resort



● Last resort requirement      ● No last resort requirement

### 3. Proportionality (25 points)

The principle of proportionality was assigned 25 points because it directly constrains police conduct to ensure lethal force is only applied in response to a proportional threat of death or serious bodily injury to the officer or others. The principle of proportionality “serves to determine whether there is a balance between the benefits of the use of force and the possible consequences and harm caused by its use.”<sup>92</sup> It establishes that ends do not justify all means. Policies received 25 points where use of lethal force was only permitted in response to a proportional threat of death or serious bodily injury to the officer or others and where explicit and clear language was used to describe the required threat. If such language was missing, policies received 0 points. Use of lethal force to counter lesser threats would be disproportional—i.e., it would fail to strike the right balance—and would therefore violate the principle of proportionality.

#### Proportionality Grades Discussion

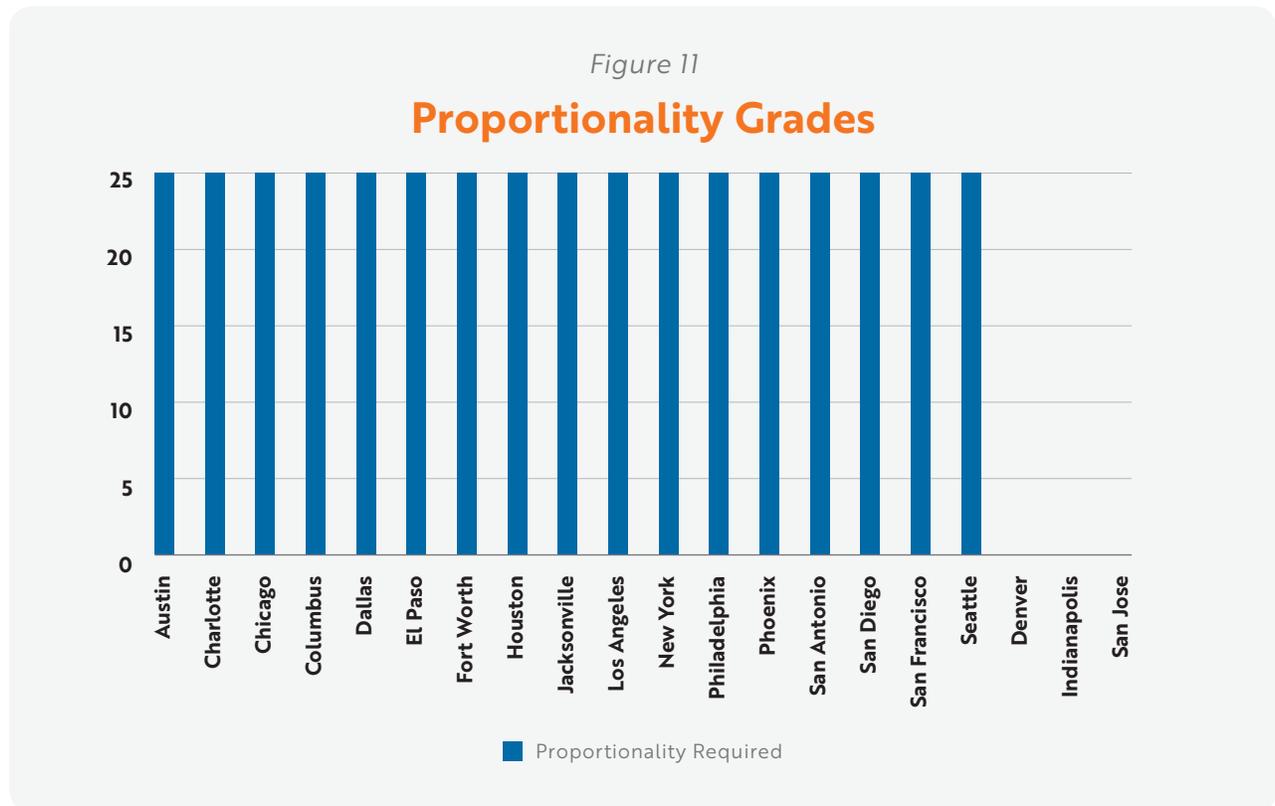
Seventeen cities satisfied the principle of proportionality and received 25 points. Each of these policies used “death,” “serious bodily injury,” or equivalent terms to describe the threat justifying use of lethal force. **Chicago** and **Seattle** both used the specific term “proportional” in their policies. The term appeared four times in Seattle’s Use of Force Core Principles, which required officers “use only the force necessary to perform their duties and that such force be proportional to the threat or resistance of the subject under the circumstances” (emphasis added).<sup>93</sup> **Houston** and **San Antonio** used language

<sup>92</sup> See Amnesty Guidelines, *supra* note 31, at 18. See also UN Basic Principles, *supra* note 17, principle 5.

<sup>93</sup> Seattle Police Department, Manual 8.000 Use-of-Force Core Principles.

conveying a scale of assessment with which an officer was to re-evaluate the kind of force permitted as circumstances changed during an incident. **Houston** included a duty to “constantly assess” the situation and “adjust the use of force accordingly.”<sup>94</sup> **San Antonio** required a de-escalation of the level of force in response to changing circumstances: “As a subject decreases his or her level of resistance, the responding officer also decreases the level of force required to gain compliance.”<sup>95</sup> In addition to limiting use of lethal force in response to threats of death or serious bodily injury, **Chicago** and **Philadelphia** (as noted above) graphically depicted the proportionality principle, illustrating escalating levels of force to be used in response to escalating threat levels, reserving greater force for more grave threats.

**San Jose** did not satisfy proportionality because it allowed for an exception: officers were authorized to use lethal force when it was “objectively reasonable in self-defense” without clearly requiring that the threat the officer was defending against be to his life or of serious bodily harm. **Indianapolis** likewise failed to satisfy proportionality because it authorized the use of deadly force in response to a forcible felony. Indiana law defines a forcible felony to include any felony that “involves the use or threat of force,” failing to limit the definition to the threat of deadly force or of serious bodily injury. Finally, **Denver** also did not satisfy proportionality because the policy permitted the use of deadly force to “arrest or prevent the escape from custody” of someone who had committed a felony with the use of a deadly weapon, without requiring that the person pose a threat of death or serious injury.<sup>96</sup>



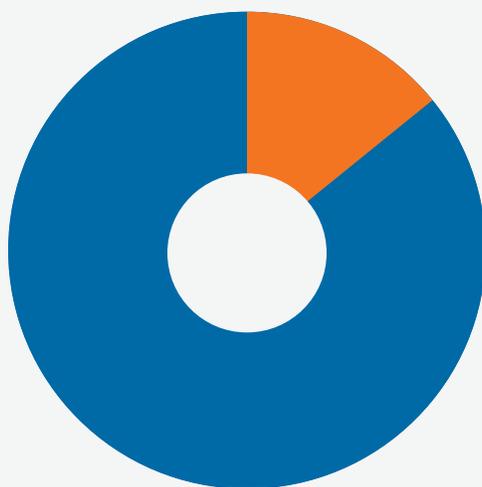
<sup>94</sup> Houston Police Department, General Order 600-17(1) General Use of Force Principles.

<sup>95</sup> San Antonio Police Department, General Manual, Procedure 501-5(f)(3) Use of Force.

<sup>96</sup> Denver Police Department, Operations Manual 105.00 Use of Force Policy (2).

Figure 12

## Cities Satisfying Proportionality



● Proportionality    ● No proportionality

### 4. Accountability (25 points)

The principle of accountability was assigned 25 points because it requires specific action on the part of police departments following the use of lethal force to ensure accountability in line with international human rights law and standards. The authors disaggregated the principle into five elements with increasing, aggregative point assignments:

- **Mandatory internal reporting for all instances of use of lethal force (5 points);**
- **Mandatory external contact only when death or injury results from use of lethal force (5 points);**
- **Mandatory external contact for all instances of use of lethal force (7 points);**
- **Mandatory external reporting only when death or injury results from use of lethal force (8 points); and**
- **Mandatory external reporting for all instances of use of lethal force (25 points).**

International human rights law and standards require independent review and issuance of a report in all instances of use of lethal force. Unlike necessity, however, international standards do not establish clearly defined sub-elements, thereby requiring exercise of judgement in interpretation of the law and definition of the standards. The five accountability elements are thus based on meaningful distinctions