



**POLICE ACCOUNTABILITY BOARD
REGULAR MEETING SUPPLEMENTAL AGENDA PACKET #2
Wednesday, October 9, 2024
6:30 P.M.**

Board Members

John Moore III (Chair)
Kitty Calavita
Brent Blackaby
Alexander Mozes

Leah Wilson (Vice-Chair)
Juliet Leftwich
Joshua Cayetano
David Williams

MEETING LOCATION

North Berkeley Senior Center
1901 Hearst Avenue
Berkeley, CA 94709
([Click here for Directions](#))

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Item 9.a.

Draft Correspondence to Council re: “Citygate Associate’s ‘Workload
Organizational Study of the Policy Department’”

DRAFT



John “Chip” Moore
Chair, Police Accountability Board
JoMoore@berkeleyca.gov

October 7, 2024

VIA ELECTRONIC MAIL [Council@berkeleyca.gov]

Honorable Mayor and Members of the City Council
Council@berkeleyca.gov
2180 Milvia Street
Berkeley, CA 94704

Re: Citygate Associate’s “Workload Organizational Study of the Policy Department”

Honorable Mayor and Members of the City Council:

On September 11, 2024, the Berkeley Police Accountability Board (PAB) received Citygate Associate’s (Citygate) “*Workload Organizational Study of the Policy Department*” (report), a review initiated by the Berkeley City Council (Council) as part of the Reimagining Public Safety Process.¹ The report contains 74 key findings and 54 recommendations to improve Berkeley Police Department (BPD) staffing, response times, and organizational deployment. The PAB thanks Citygate for its well-written report. We write separately to raise critical questions about some aspects of the report, as well as to provide recommendations for the City Council’s consideration.

The PAB specifically recommends that the Council:

- 1. Formally Select Comparator Agencies to the Berkeley Police Department.** Comparator agencies matter for benchmarking and accountability purposes; to that end, Citygate benchmarked BPD to comparator agencies throughout its report. Citygate-identified agencies could be formally adopted by Council or the BPD as comparator entities. Alternatively, a set of criteria to be used to identify and select could be established. Once identified, the Council,

¹ Citygate Police Services. (2024, September 4). Workload organizational study of the police department. City of Berkeley. <https://berkeleyca.gov/community-recreation/news/workload-organizational-study-police-department>

the BPD, and the PAB should consistently use these comparator agencies for budget and performance benchmarking purposes.

2. **Formally Adopt Response Time Expectations and Standards.** Expectations about response times reflected in established standards drive requisite patrol staffing levels. As the Citygate report notes, Berkeley has not adopted such standards. As a result, Citygate’s analysis related on externally developed standards to make determinations about needed BPD staffing levels. Citygate’s reliance on the standards it selected—which necessarily do not reflect any local priorities—had a profound effect on the report’s conclusions, highlighting the criticality of the Council initiating, and concluding, this work promptly.²
3. **Ask Citygate to Extend its Comparative Analyses to Include Budget and Expenditures Per Capita.** While the report includes comparative analyses between BPD and selected agencies across several metrics, notably absent is an analysis of budget and expenditures per capita. This is a needed augmentation to Citygate’s comparative analyses that would benefit the Council as it considers future allocations for the BPD
4. **Hold on Funding any New Positions.** The report recommends a significant reallocation of work from sworn officers to Community Service Officers (CSOs), does not account for the expected reduction in sworn officer workload resulting from the Specialized Care Unit (SCU), and estimates the need for patrol staffing based on a “rule of 60” unrelated to any community based or Council-led expectation setting around response times or the impact of the SCU on patrol staffing needs. The BPD should implement the recommended redistribution of work, response time expectations should be established, and the Council should direct a serious inquiry into the relationship between the SCU and BPD workload, prior to approval of funding for any new positions in the department.

The PAB also recommends additional analysis of the following issues:

Recommendation #1, Improve Culture

The report’s first recommendation is as follows:

Given the percentage of Employee Survey respondents who indicated a willingness to leave the Department within three years, Citygate believes there is a pressing need for the Department to implement strategic retention strategies to foster a more supportive organizational culture and mitigate potential turnover.

² The report provides a number of useful resources for use in the standard setting effort including: the International Association of Chiefs of Police (IACP) and the International City/County Management Association (ICMA), which recommend methods for determining appropriate staffing levels based on local priorities; the National Emergency Number Association (NENA), which provides standards for 9-1-1 call answering; and the Association of Public-Safety Communications Officials International (APCO) and the International Academies of Emergency Dispatching (IAED), which provide best practices that illuminate staffing needs for communications centers providing dispatch services.

While staffing levels and a perceived lack of community support are cited as partial drivers for identified challenges of low morale and poor employee retention, Citygate also highlights cultural problems within the department in its report. Policing is a difficult job best performed by experienced, well-trained, and kind professionals who are familiar with the community and are supported by a healthy and well-functioning organization. The Council would be wise to pay attention to these “softer” aspects of the department; further investment of resources, absent shoring up any cultural issues that exist, will minimize the effectiveness of any additional investment made in the department.

Recommendation #7, Revise Use of Force Policy

The report acknowledges that local priorities should shape BPD policies and staffing, yet no consideration of those local priorities is reflected in this recommendation. Analyzing Berkeley’s Use of Force Policy, Citygate notes that Berkeley’s reporting requirements are higher than either California’s minimum standard or those in neighboring cities, like Hayward or San Leandro.³ Citygate recommends lowering Berkeley’s reporting requirements to be aligned with those jurisdictions, in order to relieve officers of an administrative burden.⁴ The report does not mention that the Council adopted stricter reporting requirements in the summer of 2020, in response to community-wide input.⁵ As a result, Berkeley’s reporting requirements provide a greater degree of transparency than is possible in the other jurisdictions; this level of transparency has been prioritized in our community.

Even on its own terms, the recommendation to eliminate Level 1 Use of Force reporting requirements lacks the data the Council would need to make an informed decision. Without elaborating, Citygate says review of Level 1 Use of Force reports “can consume hours of a supervisor’s time,” leaving them unable to supervise their teams.⁶ The report did not measure the time it takes to complete a Level 1 Use of Force report, how many minutes per report supervisors actually dedicate to Level 1 review, if supervisors would spend their additional time in the field, and whether those additional hours spent in the field would serve Berkeley’s local priorities. The PAB would support measures to reduce administrative review without eliminating an important transparency and accountability mechanism.

Impact of the Specialized Care Unit and Reallocation of Work from Sworn to Community Service Officers

The report acknowledges, but does not analyze, Berkeley’s \$4.5 million investment in the Specialized Care Unit (SCU), a non-police crisis response team.⁷ If successful, the SCU will

³ Citygate Report, 75-85.

⁴ Citygate report, 83-85.

⁵ Roseborough, V. (2020, July 27). Berkeley City Council adopts revised police use-of-force policy. The Daily Californian. https://www.dailycal.org/news/berkeley-city-council-adopts-revised-police-use-of-force-policy/article_e5041d34-e8a6-5a64-84ca-336a0b9a2938.html

⁶ Citygate Report, 77.

⁷ Raguso, E. (2024, January 24). Berkeley SCU, a crisis team without cops, starts Tuesday. The Berkeley Scanner. <https://www.berkeleyscanner.com/2023/09/05/policing/berkeley-starts-scu-crisis-response-team-no-police/>

reduce the burden on sworn officers to respond to calls for service and, in turn, decrease the need for additional patrol staffing and overtime. Given the substantial investment into SCUs and their widespread community support, the Board is surprised that Citygate recommends 19 new personnel in addition to the Department's 31 currently vacant sworn positions.⁸ Already, Berkeley's sworn officer staffing per capita is higher than any other comparator jurisdiction.⁹ Nevertheless, Citygate makes a clear choice to not make staffing recommendations based on the per capita ratio of officers to residents, instead opting to use "workload and community priorities"—without mentioning the SCU program.¹⁰ The Board recommends that the Council evaluate the return on its investment in SCUs before funding additional sworn officer positions.¹¹

The PAB Board generally agrees with Citygate's recommendations that pertain to internal organizational restructuring. However, adopting its recommendations would transfer significant public safety responsibilities to Community Service Officers (CSO), who are outside the Board's jurisdiction.¹² For example, Recommendation #9 would have CSOs engage in patrol functions and Recommendation #10 would have CSOs take non-emergency calls, tow vehicles, and transport victims. The PAB recognizes that increasing CSO responsibility can decrease the workload of sworn officers, but believes that those performing public safety duties should still be accountable to the community.

In closing, we note our appreciation for the ability to provide recommendations and observations about Citygate's report and hope that both the Council and the BPD find our feedback useful. As always, we look forward to partnering with the Council and the Department on any follow-up as directed.

Sincerely,

John "Chip" Moore, Chair
Police Accountability Board

Cc: Jennifer Louis, Police Chief

⁸ Citygate Report, 15.

⁹ Citygate Report, 34.

¹⁰ Citygate Report, 35 ("As previously noted, Citygate does not make staffing recommendations based on the per capita ratio of officers to residents, but rather, incorporates this comparison along with several other factors including workload and community priorities.").

¹¹ Citygate suggests using the "Rule of 60" as a benchmark to determine the number of patrol officers needed as opposed to comparing Berkeley to other jurisdictions. (85-87). Applying that Rule-of-60 benchmark, Berkeley achieves a nearly-ideal 57:43 ratio. (87). And yet Citygate suggests adding an additional 15 officers to patrol because BPD relies on overtime to cover patrol shifts. (87). It is possible that both the reallocation of work from sworn officers to CSO's recommended in the report and the SCU program will reduce the need for patrol-shift overtime and allow for positions to be repurposed to address some of the non-patrol related staffing needs identified in the report.

¹² See Recommendations 9, 10, 19, 28, 39, 40. Berkeley City Charter Section 125(1)

Item 10.a.ii.

Policy Review Report: Use of Force



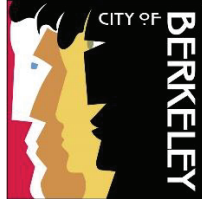
POLICY REVIEW REPORT

ODPA No. 2024-PR-0001

Prepared by:

Office of the Director of
Police Accountability

Presented to the PAB on
October 9, 2024



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Executive Summary:

This report presents a comprehensive review of the Berkeley Police Department's (BPD) Use of Force (UoF) Policy (Policy 300), conducted by the Office of the Director of Police Accountability (ODPA) to support the Police Accountability Board (PAB) in its annual policy review, as mandated under Section 300.13. The review provides a detailed assessment of BPD's use-of-force policies, focusing on key principles such as de-escalation, proportionality, and accountability, as well as the community concerns surrounding the display and use of less-lethal munitions during public demonstrations.

The report identifies several strengths in the BPD's approach, particularly its alignment with California Assembly Bill 392 (AB 392) and national standards on reducing the use of deadly force. Berkeley's policies reflect a commitment to the sanctity of life, with an emphasis on de-escalation and minimizing harm. However, this review also reveals significant gaps in how the policy addresses the display and deployment of less-lethal munitions, which have raised concerns about public trust and community relations, especially in the context of First Amendment rights during peaceful protests.

Additionally, this report analyzes the relevance of the Officer-Created Jeopardy Doctrine, which scrutinizes officers' pre-incident behavior and its contribution to the escalation of force. Although Berkeley's policies emphasize de-escalation, the doctrine highlights the need for further integration of tactical decision-making frameworks to prevent officers from creating jeopardy that could lead to unnecessary use of force.

The report also considers the Active Bystandership for Law Enforcement (ABLE) Project, a promising initiative aimed at fostering peer intervention to prevent misconduct and excessive force. However, the principles of the ABLE Project are not yet codified in BPD policy, which limits their enforceability.

The creation of the Specialized Care Unit (SCU) has been another positive development, offering an alternative response to mental health crises and non-violent situations that do not require police intervention. This initiative reflects a shift toward non-policing solutions, but more effective collaboration between the SCU and BPD is needed to optimize its impact.

The report concludes with several recommendations, including:

- Codifying the principles of the ABLE Project into BPD policy to strengthen internal accountability and ensure peer intervention is a formal requirement.
- Amending Policy 300 to include specific guidelines on the display and use of less-lethal munitions to prevent escalation during peaceful protests and clarify the distinction between less-lethal tools and firearms.
- Integrating the Officer-Created Jeopardy Doctrine into training and policy, to address pre-incident behaviors that can create unnecessary risks.
- Enhancing coordination with the Specialized Care Unit (SCU) to ensure mental health professionals lead non-violent interventions, minimizing police involvement in situations that do not require force.
- Maintaining a balance between use-of-force reporting and workload concerns, as highlighted by the Berkeley Workload Organizational Study (2024), ensuring that reporting structures continue to prioritize transparency and public trust.

In summary, while the BPD's use-of-force policy reflects progressive elements, particularly in its alignment with state laws and de-escalation strategies, there are areas that require refinement to fully meet community expectations and national best practices. Addressing these

gaps will enhance operational clarity, improve accountability, and strengthen public confidence in the department's commitment to ethical policing.

Introduction

Background

At its 2024 annual retreat¹, the PAB discussed its work plan for the year. During that meeting, the PAB delegated the initial review of Policy 300 to the ODPa to aid the Board with its responsibility to review and update this policy annually. To that end, this report examines Policy 300 as a whole. On January 16, 2024, the ODPa received a policy complaint form with additional attachments via email at dpa@cityofberkeley.info. See Appendix 1 "Policy Complaint No. 2024-PR-0001". The complaint raised three questions regarding the use of force, specifically the deployment and use of less-lethal munitions:

- "Are officers allowed to or prohibited from pointing their less-lethal munitions at a crowd or individual at close range? What is considered unacceptable?"
- "Are officers allowed to or prohibited from pointing or displaying their less-lethal weapons at individuals from a car?"
- "Are officers allowed to or prohibited from displaying their less-lethal munitions even when there has been no violence or disturbance to justify their use?"

Given the overlap between these use of force concerns and the review of the entire policy, the PAB elected to incorporate the review of this policy complaint into this annual review of the entire policy. To that end, this review also focuses on the policy's guidance around the use and display of less-lethal munitions. In light of recent community concerns and best practice recommendations, this review assesses the existing policy, the implications for public trust, and the adherence to de-escalation principles.

Objectives

Section 125(17)(A) of the Berkeley City Charter states that the PAB "may review policies, practices, and procedures of the Police Department in its discretion or at the request of a member of the public, due to a policy complaint, or due to a complaint from a member of the public against a police officer."² Additionally, Policy 300.13 POLICY REVIEW AND UPDATES indicates that this policy shall be regularly reviewed and updated to reflect developing practices and procedures. Specifically, it states "At least annually, the Berkeley Police Department and the PAB shall convene to review and update the Use of Force Policy to reflect developing practices and procedures per SB 230."

¹ 2024 PAB Strategic Planning Session Retreat: <https://berkeleyca.gov/sites/default/files/legislative-body-meeting-minutes/2024-03-02%20%20Special%20Meeting%20Minutes.pdf>

² Berkeley City Charter Section 125(17)(A): [https://berkeley.municipal.codes/Charter/125\(17\)\(a\)](https://berkeley.municipal.codes/Charter/125(17)(a))

The objectives of this policy review are:

1. To evaluate Policy 300 as a whole
2. To evaluate Policy 300 as it concerns the use and display of less-lethal munitions.
3. To provide recommendations for improving policy language, transparency, and community relations.

Methodology

This review follows a comprehensive methodology, including:

- A review of the BPD's Policy 300 with a specific focus on Sections 300.1.3 (Core Principles), 300.4.1 (Drawing and Pointing Firearms), and 300.4.3 (Shooting at or from Moving Vehicles).
- An analysis of the policy complaint submitted by the community concerning the use of less-lethal munitions.
- Consultation of best practices and national guidelines, including reports from the International Association of Chiefs of Police (IACP), the National Association for Civilian Oversight of Law Enforcement (NACOLE), and legal frameworks for First Amendment assemblies.
- A literature review of similar policies in California and nationwide, including the City of Berkeley Police Workload Organizational Study and guidance from the California Government Code and AB 392.
- Review of community and public comments related to police practices during public demonstrations.

Literature Review: from local to national Berkeley experience

Since the implementation of the current civilian oversight model under Measure II³, which restructured the civilian oversight of the BPD, the department has been recognized for adopting a progressive use of force policy that places a significant emphasis on de-escalation, minimizing the use of force, and prioritizing the sanctity of life. This policy aligns with the national trend toward reducing the reliance on force by emphasizing communication and crisis intervention as primary tools in law enforcement encounters. Berkeley's Policy 300, updated in line with California's AB 392 and other state regulations, seeks to ensure that force is only used when absolutely necessary, and that it remains proportional to the situation at hand. This progressive stance has been key in fostering Berkeley's tradition of community-oriented policing, which emphasizes cooperation and dialogue between law enforcement and the community.

In addition to policy reforms, Berkeley is actively working to improve its internal systems and responses through culture change initiatives. One significant step in this direction is the

³ City of Berkeley Measure II: <https://www.dropbox.com/scl/fi/zvrw7drgev5yj7ej5h9xd/2020-Measure-II-Berkeley-police.pdf?rlkey=qldyzexhu1g5trj6e1a0n9kxh&st=vy1e0lre&dl=0>

department's participation in the Active Bystandership for Law Enforcement (ABLE) Project⁴. ABLE, developed by Georgetown University Law Center, is designed to train officers to intervene in situations where they observe misconduct or excessive use of force by their peers. The goal is to create a culture in which officers not only feel empowered to intervene but are also held accountable for doing so. By participating in ABLE, Berkeley is striving to build an internal culture of accountability and ethical policing, which aligns with the broader goal of ensuring that the department's use of force remains proportional, justifiable, and respectful of community trust. This program reflects a commitment to proactive leadership and peer intervention, aiming to reduce incidents of unnecessary force and enhance public trust in the police.

Moreover, Berkeley has taken steps to decrease law enforcement's role in handling non-violent, crisis-related situations by establishing the Specialized Care Unit (SCU)⁵. The SCU is a non-police, mental health crisis response team designed to address mental health and homelessness-related crises without involving law enforcement. This initiative acknowledges that many emergency calls do not require a police presence and can be more effectively handled by mental health professionals trained in de-escalation and crisis intervention. The SCU operates alongside the BPD to divert non-violent incidents away from the criminal justice system and towards healthcare and social services, which helps reduce the likelihood of confrontational police encounters and the use of force. This reflects Berkeley's broader commitment to finding community-based alternatives to policing, particularly for vulnerable populations.

Despite the policy's forward-thinking framework, community concerns have emerged, particularly regarding the routine display and use of less-lethal munitions during public gatherings and peaceful protests. In Rachel Harmon's (2021) *The Law of the Police*, she emphasizes that police use of force—whether applied or merely threatened—can have significant impacts on public trust and police legitimacy. Harmon discusses how police legitimacy can be undermined if force is perceived as excessive or unnecessary, even if it is legally justified. She suggests that the public's perception of force is critical, and when police actions are viewed as disproportionate, it can damage relationships between law enforcement and the communities they serve.

California experience

California has been at the forefront of progressive policing reforms, particularly with the passage of Assembly Bill 392 (AB 392) in 2019, which redefined the standards for when police officers can use deadly force. Known as the California Act to Save Lives, AB 392 limits the use of deadly force to situations where it is deemed "necessary to defend against an imminent threat of death or serious bodily injury." This law shifts away from the broader "reasonable" standard that previously allowed for more discretion and encourages officers to utilize de-escalation techniques and alternatives to deadly force.

Building on the momentum of AB 392, California passed Assembly Bill 1506 (AB 1506) in 2020, which mandates the California Department of Justice (DOJ) to investigate all cases where police officers are involved in the fatal shooting of unarmed civilians. This law aims to ensure independent oversight in cases of police violence, particularly those involving unarmed individuals, by assigning these investigations to the state's DOJ instead of local law enforcement (California DOJ, 2021). In addition to the investigations, AB 1506 requires the DOJ to publish a public report on each incident, including a summary of the investigation and any recommended

⁴ For more on the ABLE Project visit: <https://www.law.georgetown.edu/cics/able/>

⁵ For more on the SCU visit: <https://berkeleyca.gov/safety-health/mental-health/crisis-services>

actions. The law also led to the creation of a Police Practices Division within the DOJ, dedicated to improving law enforcement practices across the state.

These legislative changes have been complemented by Senate Bill 1421, passed in 2018, which grants public access to records of police misconduct, including excessive force cases (California Department of Justice, 2019). This initiative focuses on enhancing public transparency and accountability, ensuring that the public has access to critical information about police actions.

Moreover, Peace Officer Standards and Training (POST)⁶ has expanded its programs to include de-escalation and crisis intervention training, aimed at reducing the need for force during police encounters. Many police departments across the state have also implemented body-worn cameras, which have been shown to reduce both use-of-force incidents and citizen complaints (California Department of Justice, 2020).

In addition, initiatives such as the CAHOOTS model⁷ in cities like Oakland and Los Angeles provide non-policing alternatives for responding to mental health crises, where mental health professionals are dispatched to handle non-violent situations. Early reports show that these programs are reducing fatal encounters with law enforcement and alleviating the burden on police officers (White Bird Clinic, 2021).

California has also begun addressing racial disparities in law enforcement practices. The Racial and Identity Profiling Act of 2015 (AB 953) mandates data collection on police stops, searches, and use of force to identify racial bias and guide corrective actions (California Department of Justice, 2020).

National landscape

At the national level, agencies such as the IACP have emphasized the importance of caution and judicious use of less-lethal munitions during public gatherings and protests. According to the National Consensus Policy on Use of Force⁸, co-developed by the IACP, less-lethal munitions should only be used when de-escalation techniques have proven ineffective or are not appropriate for the situation. The policy recommends that police focus on maintaining peaceful order and respecting the constitutional rights of assembly and free expression. Visible displays of force, such as the use of rubber bullets or tear gas, can sometimes create an atmosphere of intimidation that undermines the goal of peaceful crowd management and escalates tensions.

U.S. Department of Justice (USDOJ) also issued recommendations following the 2015 Ferguson, Missouri protests⁹, encouraging its police department to adopt stricter policies for the use of less-lethal munitions during demonstrations. The USDOJ's review emphasized the potential for these tactics to negatively affect community-police relations and stressed the importance of upholding the values of free speech (USDOJ, 2025 pg. 28):

Recording police activity and engaging in public protest are fundamentally democratic enterprises because they provide a check on those “who are granted

⁶ For more on POST guidelines and standards:

https://post.ca.gov/Portals/0/post_docs/publications/Use_Of_Force_Standards_Guidelines.pdf

⁷ For more on CAHOOTS: <https://www.eugene-or.gov/4508/CAHOOTS>

⁸ The National Consensus Policy on Use of Force can be accessed at:

https://www.theiacp.org/sites/default/files/all/n-o/National_Consensus_Policy_On_Use_Of_Force.pdf

⁹ Investigation of the Ferguson Police Department report can be accessed at:

https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf

substantial discretion that may be misused to deprive individuals of their liberties.” Glik, 655 F.3d at 82. Even profane backtalk can be a form of dissent against perceived misconduct. In the words of the Supreme Court, “[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.” Hill, 482 U.S. at 463. Ideally, officers would not encounter verbal abuse. Communities would encourage mutual respect, and the police would likewise exhibit respect by treating people with dignity. But, particularly where officers engage in unconstitutional policing, they only exacerbate community opposition by quelling speech.

Furthermore, the President's Task Force on 21st-Century Policing has encouraged police departments across the U.S. to integrate proportionality and de-escalation techniques into their use-of-force policies, particularly in public demonstrations. The task force’s recommendations promote prioritizing dialogue and non-violent conflict resolution over the routine display of force, reflecting a national trend towards de-escalation as a strategy for maintaining public trust. Specifically, Recommendation 2.7 states (pg. 25):

Law enforcement agencies should create policies and procedures for policing mass demonstrations that employ a continuum of managed tactical resources that are designed to minimize the appearance of a military operation and avoid using provocative tactics and equipment that undermine civilian trust.

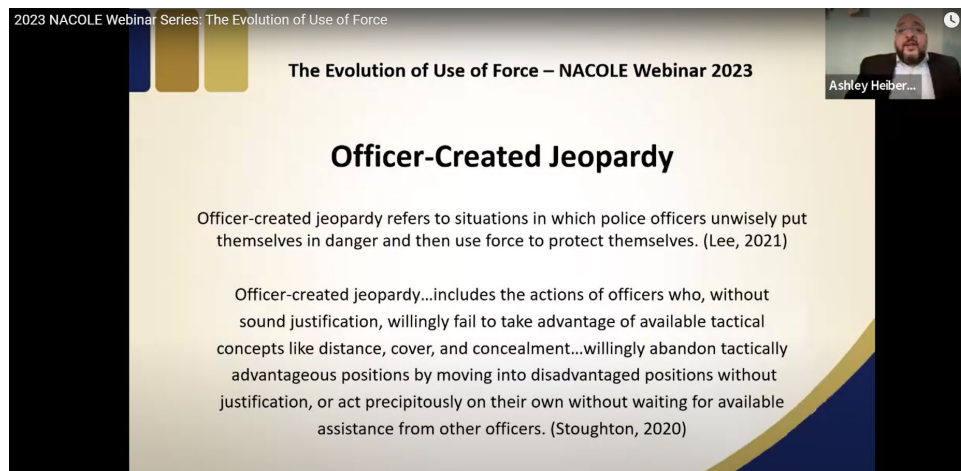
The task force’s Recommendation 2.7 underscores the importance of avoiding militarized approaches to crowd control, instead advocating for a continuum of tactical resources that aim to de-escalate situations and prevent the appearance of a military operation. This approach is rooted in the understanding that the visible display of force—especially when it involves militarized tactics or equipment—can provoke conflict, heighten tensions, and erode civilian trust in law enforcement.

By urging police departments to prioritize dialogue and non-violent conflict resolution, the task force seeks to align policing practices with community policing principles, where the goal is not only to manage public order but also to foster collaborative relationships between law enforcement and the communities they serve. The recommendation reflects a broader national trend towards de-escalation, as departments are encouraged to shift away from relying on provocative tactics during demonstrations. This shift is essential for reducing tensions and ensuring that protests remain peaceful, ultimately supporting long-term public trust and cooperation with law enforcement.

The task force's call for minimizing aggressive postures during mass demonstrations represents a key component of modern policing reforms, with the aim of ensuring that police practices are proportional, justified, and mindful of the constitutional rights of citizens, including the right to assembly and free speech.

Doctrine of Officer-Created Jeopardy

Figure 1 NACOLE Webinar- Evolution of Use of Force by Captain Ashley Heiberger (Ret.), JD



Source: NACOLE https://www.youtube.com/watch?v=nW_qGdzdAps

An important doctrine to consider in use-of-force policies is that of “Officer-Created Jeopardy”. This doctrine, gaining more momentum in policing discussions, emphasizes that officers' actions before a use-of-force incident should be considered when assessing the reasonableness of their use of force. Cynthia Lee (2021) argues that juries should not be limited to examining the moment the officer used force but should also evaluate pre-incident behavior, which may have escalated the situation and led to the deadly confrontation. Lee advocates for broadening the time frame in use-of-force assessments, allowing consideration of officer behavior that contributed to the perceived need for force, aligning with a more comprehensive understanding of the totality of circumstances (Lee, 2021).

Lee (2021) asserts that when officers fail to take advantage of available tactical options, such as using cover or waiting for backup, they create unnecessary jeopardy. For instance, an officer moving into a disadvantageous position without justification can significantly increase the likelihood of a violent outcome. This perspective encourages officers to act with greater caution and to use de-escalation tactics whenever possible to avoid creating such jeopardy. By evaluating an officer's antecedent conduct, courts and juries can better determine whether the use of force was truly necessary and whether the officer's behavior played a role in escalating the situation.

Lee's analysis is supported by Stoughton (2020), who similarly discusses the importance of holding officers accountable for tactical missteps that contribute to escalated encounters. Stoughton emphasizes that failure to use available tactical advantages or de-escalation opportunities places both the officer and the civilian at unnecessary risk, undermining the justification for later use of force (Stoughton et al., 2020).

This doctrine is highly relevant to contemporary discussions around police accountability, particularly in light of legislation like AB 392, which emphasizes that force should only be used when absolutely necessary and after all reasonable alternatives have been exhausted. By integrating this doctrine into police training and use-of-force policies, departments such as the BPD aim to reduce the likelihood of officers unnecessarily creating situations that justify force.

Policy Overview

Policy 300 “Use of Force”:

The policy is a comprehensive document, spanning 18 pages and divided into thirteen primary sections. It provides detailed guidelines and principles for the application of force by officers, focusing on de-escalation, proportionality, and accountability. The policy outlines the conditions under which force can be used and emphasizes protecting the sanctity of life and preserving public trust.

Main Principles

The policy is structured around the following key principles:

1. **Proportionality:** Officers must use only the level of force that is proportional to the threat faced, ensuring that force is minimized and appropriate to the situation.
2. **Sanctity of Life:** Emphasizing the value of life, the policy promotes de-escalation as a critical tactic in encounters to reduce the need for force, particularly lethal force.
3. **Necessity:** Force should only be employed when absolutely necessary. Officers are encouraged to exhaust all reasonable alternatives, such as verbal communication, before resorting to physical force.
4. **De-escalation:** The policy prioritizes de-escalation techniques as the first step in resolving potentially confrontational situations. Officers are trained to use these methods to prevent the escalation of force.
5. **Accountability:** The policy includes detailed provisions for the reporting and review of all use-of-force incidents. Each instance is evaluated to ensure compliance with departmental regulations and best practices.

Key Focus Areas

The policy prioritizes de-escalation and proportional responses to incidents. Less-lethal options are only to be used in situations where verbal negotiation has failed, or there is an imminent threat to the safety of officers or civilians. Accountability mechanisms include thorough documentation and supervisory oversight to ensure that all incidents are reviewed for appropriateness and adherence to departmental standards. The policy integrates use of force standards set by the United States Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989) and updates from California's AB 392 setting clear restrictions on the use of deadly force, ensuring that it is only employed when absolutely necessary.

Policy 428 “First Amendment Assemblies”:

Policy 428 outlines the department’s approach to managing and facilitating the rights of individuals to engage in peaceful protests, demonstrations, and other public gatherings protected under the First Amendment. This policy is particularly relevant to concerns raised in the policy complaint regarding the use of less-lethal munitions and other tactics during public assemblies. The complaint, which highlights the community's unease with the use of force and its potential to escalate otherwise peaceful demonstrations, underscores the importance of ensuring that police responses remain proportionate and respectful of constitutional rights.

In addressing such concerns, the policy emphasizes that officers must balance the protection of free speech and peaceful assembly with maintaining public safety. It provides clear guidelines to ensure that force is minimized and de-escalation is prioritized. This approach is essential for maintaining public trust, particularly in situations where the routine display of force could undermine confidence in the department's commitment to civil liberties.

Main Principles

The policy is structured around several guiding principles:

1. **Protection of Constitutional Rights:** The primary focus of the policy is to ensure that freedom of speech, peaceful assembly, and petition for redress of grievances are protected. Officers are trained to facilitate public demonstrations while respecting the legal rights of participants.
2. **De-escalation and Minimal Use of Force:** In line with broader department goals, the policy emphasizes de-escalation in handling crowds. The use of force, especially force that could disrupt peaceful assembly, is to be minimized.
3. **Proportionality:** Officers are instructed to apply proportional responses to any disturbances that arise during assemblies. The policy prioritizes peaceful resolution and appropriate, measured responses to any threats to public safety.
4. **Clear Communication:** A key principle of the policy is transparent and clear communication with protest organizers and participants. This includes informing participants of their rights and the lawful boundaries of their assembly.
5. **Public Safety:** While facilitating First Amendment rights, the policy also underscores the need for ensuring public safety and protecting property, including both public and private assets.

Key Features

The policy stresses the importance of dialogue between law enforcement and assembly organizers to prevent unnecessary conflict. It outlines specific protocols for managing unlawful assemblies, with a focus on minimizing the disruption to peaceful participants. The policy includes guidelines for handling media, ensuring that members of the press are able to perform their duties without interference, provided they do not interfere with law enforcement actions.

Findings

The review of BPD Policies 300 and 428 reveals several critical insights, reflecting both strengths and areas for improvement. The BPD has made significant strides in aligning its policies with state reforms and national best practices, emphasizing de-escalation, proportionality, and accountability. However, community concerns about the application of these policies, particularly during public demonstrations and the use of less-lethal munitions, highlight ongoing challenges in maintaining public trust and ensuring consistent application of force standards.

1. **Progressive Use of Force Policy:** Berkeley's adoption of a progressive use-of-force policy, rooted AB 392 and national trends towards de-escalation, demonstrates a clear commitment to minimizing the use of deadly force. The policy emphasizes that force must be proportional and necessary, aiming to avoid unnecessary harm and protect the sanctity of life. These principles align with the national shift towards community-oriented policing and ethical decision-making in law enforcement.
2. **Cultural Shifts and Internal Accountability:** The department's participation in the Active Bystandership for Law Enforcement (ABLE) Project is a significant step toward creating a culture of accountability within the BPD. ABLE empowers officers to intervene when they witness excessive force or misconduct by their peers, promoting a system of peer intervention that helps prevent the escalation of force in real-time. This internal reform reflects the department's recognition of the importance of proactive leadership and ethical policing. However, while there are general principles of intervention (i.e. Duty to Intercede) this specific toolkit, is not yet codified in the current policy.
3. **Officer-Created Jeopardy Doctrine:** The Doctrine of Officer-Created Jeopardy, as discussed by Cynthia Lee (2021) and Stoughton (2020), highlights the importance of scrutinizing officers' pre-incident behavior that may contribute to the escalation of force. This doctrine is particularly relevant in assessing whether force was necessary or if officers' actions placed themselves in harm's way, leading to a forced encounter. While the BPD's policies emphasize de-escalation, further integration of this doctrine in training, operational practices and these policies could help reduce instances where officers create jeopardy through poor tactical decisions.\
4. **Use of Less-Lethal Munitions in Public Demonstrations:** A recurring concern among the community involves the use of less-lethal munitions during public gatherings and protests. While the BPD's use of force policy includes provisions for de-escalation and proportionality, the visible display and deployment of less-lethal weapons can escalate tensions, especially in peaceful protests. The national conversation around minimizing the display of force during demonstrations, as recommended by the President's Task Force on 21st Century Policing, underscores the need to avoid militarized approaches to crowd control that could provoke conflict and erode public trust. The current policy guides discussions on firearm display but not less lethal display. Returning to the policy complainants inquires posed in the beginning of this report:
 - "Are officers allowed to or prohibited from pointing their less-lethal munitions at a crowd or individual at close range? What is considered unacceptable?"
 - "Are officers allowed to or prohibited from pointing or displaying their less-lethal weapons at individuals from a car?"
 - "Are officers allowed to or prohibited from displaying their less-lethal munitions even when there has been no violence or disturbance to justify their use?"

a general response would be that each incident described would need to be matched by the totality of the circumstances to determine its appropriateness under use of force analysis. However, there is general guidance regulating firearm usage, but no specified language about the display and use of less-lethal munitions in the described scenarios. Given this gap, there should be consideration for amending the policy to guide the officers in this scenario and clearly articulate whether the expectations would be different than those of a firearm scenario. The ODPa also notes that while “firearm” is used in this policy, it is not defined which could potentially cause confusion in public perception and understanding in whether there is a different protocol for less-lethal tools the Department may have. Equally important, some of the less-lethal tools used by the Department may be physically indistinguishable from a firearm which can further cause community confusion on expectations and in interactions.

5. **Specialized Care Unit (SCU):** The creation of the Specialized Care Unit (SCU) represents an important shift toward non-policing alternatives for managing mental health crises and non-violent incidents. This initiative reflects the BPD’s recognition that not all emergency calls require law enforcement intervention and that trained mental health professionals are better suited for de-escalating certain situations. This model aligns with broader state and national efforts to reduce police involvement in non-criminal crisis situations, decreasing the likelihood of force being used inappropriately.
6. **Community Concerns and Public Trust:** Despite the department’s forward-thinking policies, community concerns persist about the routine display and use of less-lethal munitions, particularly in peaceful settings. The potential for such tactics to undermine police legitimacy, as discussed by Rachel Harmon (2021), remains a critical issue. The perception of force, even when legally justified, can damage community relations if viewed as excessive or unnecessary. This highlights the importance of ensuring that policies not only adhere to legal standards but also consider public perception and community values.
7. **Workload and Resource Constraints:** The Berkeley Workload Organizational Study (2024) highlights the workload challenges within the BPD, with noted concerns on use of force reporting. The reporting, under its current structure endeavors to provide considerable transparency and accountability. Should a different reporting structure be used, it should be balanced by ensuring that there is still some mechanism to review all incidents of force.

Analysis

The review of BPD Policies 300 and 428 highlights significant progress in adopting progressive use-of-force standards, but also reveals areas where policy improvements are necessary to address community concerns and operational challenges. Berkeley has demonstrated a strong commitment to de-escalation, proportionality, and accountability through policies aligned with California’s AB 392 and national best practices. However, the application of these policies—particularly regarding the display and use of less-lethal munitions—has raised concerns about police behavior during public demonstrations and the potential erosion of public trust.

One of the central issues emerging from this review is the gap in policy language addressing the display and use of less-lethal munitions. While the BPD has clear guidelines on the use of firearms, the absence of specific provisions for less-lethal tools creates ambiguity for both officers and the public. This ambiguity can lead to situations where the display or use of less-lethal munitions escalates tensions in peaceful protests, undermining the department's goals of de-escalation and proportionality. The Officer-Created Jeopardy Doctrine, as discussed by Lee (2021) and Stoughton (2020), underscores the need for officers to avoid placing themselves or others in situations that unnecessarily heighten the risk of force. This doctrine has not yet been fully integrated into BPD's operational practices or training, presenting an opportunity to reduce instances of force escalation through better pre-incident decision-making.

Another critical area involves the BPD's engagement with the Active Bystandership for Law Enforcement (ABLE) Project. While this initiative marks a positive shift towards internal accountability, the lack of formal integration into the department's policies weakens its potential impact. Codifying the principles of peer intervention into the Use of Force Policy would institutionalize ethical policing and ensure that officers are both empowered and required to intervene in cases of misconduct or excessive force. This would also support the Berkeley Police Department's broader cultural shift toward proactive leadership.

In addition, the Specialized Care Unit (SCU) represents a promising alternative to police intervention in mental health crises and non-violent incidents. However, further coordination between the SCU and the BPD is needed to optimize its effectiveness. The SCU's potential to reduce the involvement of law enforcement in situations that do not require force is vital to minimizing unnecessary police encounters. Strengthening the SCU's integration with the BPD will ensure that the department continues to align with community-based alternatives to traditional policing.

Lastly, the Berkeley Workload Organizational Study (2024) identifies concerns regarding the department's ability to manage use-of-force reporting amidst heavy workloads. Any modifications to the current reporting structure must strike a balance between operational efficiency and transparency. The department's commitment to public transparency must remain intact while exploring ways to alleviate the strain on resources.

Recommendations:

Based on the review of BPD Policies 300 and 428, the following recommendations are made to address the insights and challenges identified in the Findings section:

1. Codify the ABLE Project Principles into Policy

While the ABLE Project represents a significant step toward improving internal accountability and promoting ethical policing, its principles, such as the duty to intervene in cases of misconduct, should be formally codified into BPD's Use of Force and General Conduct Policies. Doing so would:

- Ensure that all officers understand the specific obligations regarding intervention.
- Provide clear guidelines on peer intervention in scenarios involving excessive force.

- Reinforce a culture of accountability by embedding the principles into the department's policies and making them enforceable.

2. Integrate the Officer-Created Jeopardy Doctrine into Training and Policy

To better align with modern policing standards, the Officer-Created Jeopardy Doctrine should be incorporated into both training curricula and operational policies. This integration would:

- Encourage officers to critically assess their pre-incident behavior and take proactive steps to de-escalate situations, thereby reducing the likelihood of creating jeopardy.
- Revise the Use of Force Policy to include a clear framework on pre-incident conduct and its implications for determining whether force is necessary.
- Enhance training programs to focus on tactical decision-making, ensuring that officers are equipped with skills to avoid escalating encounters.

3. Amend Policy to Clarify the Display and Use of Less-Lethal Munitions

In response to community concerns and the identified gaps regarding the display and use of less-lethal munitions:

- Policy 428 should be amended to include specific guidelines regulating the display of less-lethal weapons during public demonstrations and peaceful gatherings.
- The policy should address whether the standards for displaying less-lethal munitions differ from those governing firearms, with clear guidance on:
 - Pointing less-lethal weapons at crowds or individuals.
 - The appropriateness of displaying less-lethal munitions from vehicles or in situations where no violence or disturbance has occurred.
- Define the term firearm within the policy to differentiate between lethal and less-lethal tools, reducing public confusion about the expectations during police interactions involving these tools.
- Ensure that less-lethal munitions, when physically indistinguishable from firearms, are used in a manner that takes into account public perception and minimizes community anxiety during peaceful protests.

4. Enhance Collaboration and Training for the Specialized Care Unit (SCU)

To further strengthen Berkeley's commitment to reducing police involvement in non-violent crisis situations:

- Expand the collaboration between the SCU and the BPD to ensure that officers are trained on when and how to engage the SCU in relevant incidents.
- Consider implementing joint training sessions between the SCU and BPD officers to foster better coordination and understanding of roles during mental health and crisis interventions.

- Develop clear guidelines for the integration of SCU services into routine police responses, ensuring that mental health professionals are deployed in appropriate situations and that officers defer to the SCU when necessary.

5. Establish Clear Protocols for Use of Force Reporting

The Berkeley Workload Organizational Study (2024) highlighted concerns about the department's workload, especially in relation to use of force reporting. To balance workload demands while maintaining transparency:

- Consider implementing a tiered reporting structure that prioritizes detailed reviews for incidents involving significant force or community concern, while allowing for streamlined reporting on lower-level force incidents.
- Ensure that any modifications to the reporting structure maintain the department's commitment to transparency and accountability by preserving review mechanisms for all use-of-force incidents.

6. Increase Community Engagement and Public Transparency

The ODPA attempted to engage the community through Use of Force Forums to discuss the various aspects of the policy. Unfortunately, the community turnout was low. To address the ongoing community concerns about the use of force and maintain public trust, the BPD, PAB and ODPA should:

- Host regular community forums where the public can engage with the BPD about the use of force policies, including discussions around the display of less-lethal munitions.
- Enhance public education campaigns to explain the department's use-of-force protocols, including the differences between lethal and less-lethal weapons, to ensure greater public understanding and reduce the potential for confusion.
- Develop a strategy for improving public transparency in reporting on incidents involving less-lethal munitions during public demonstrations, ensuring that the community has access to clear and accurate information about police actions.

Conclusion

The review of BPD Policies 300 and 428 reveals a department committed to progressive policing practices but also identifies areas where policy improvements and better alignment with community expectations are needed. Berkeley's adoption of de-escalation and proportionality in its use-of-force policies, particularly under AB 392, reflects the city's efforts to protect the sanctity of life and reduce the likelihood of deadly encounters. However, concerns raised by both the community and the review, particularly around the use and display of less-lethal munitions during public demonstrations, highlight ongoing challenges in fostering public trust and ensuring accountability.

The Officer-Created Jeopardy Doctrine, as discussed by Lee (2021) and Stoughton (2020), emphasizes the importance of addressing officers' pre-incident conduct, and further integration of

this doctrine into the BPD's training and policies would help reduce instances where poor tactical decisions escalate encounters unnecessarily. The review also notes the importance of formally codifying the principles of the ABLE Project into departmental policy to strengthen peer intervention and create a culture of internal accountability.

Additionally, the creation of the Specialized Care Unit (SCU) has been a key step in shifting non-violent crisis responses away from traditional policing. However, deeper coordination between the SCU and the BPD is necessary to fully leverage this approach in reducing the need for police intervention in mental health incidents. Furthermore, any modifications to the use-of-force reporting structure, as outlined in the Berkeley Workload Organizational Study (2024), must balance the department's operational needs with its commitment to transparency.

In summary, the BPD has made considerable strides toward community-oriented policing, but several policy gaps remain, particularly regarding the use of less-lethal munitions and the institutionalization of accountability measures. Addressing these issues through policy amendments, training improvements, and enhanced collaboration with non-policing alternatives will not only improve the BPD's operational clarity but also bolster public trust and police legitimacy. By continuing to evolve and respond to these challenges, the BPD can further strengthen its relationship with the Berkeley community and maintain its leadership in progressive policing reform.

Next Steps

The Board should consider this report, along with any additional assessment and or analysis of the Board, and proceed to convene with the Department to determine what recommendations, modifications, and or amendments should be implemented with the current use of force policy.

References

Reports

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U.S. Department of Justice (USDOJ). (2015). Investigation of the Ferguson Police Department. U.S. Department of Justice, Civil Rights Division. https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf

President's Task Force on 21st Century Policing. (2015). Final Report of the President's Task Force on 21st Century Policing. Office of Community Oriented Policing Services. https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf

Government regulations

Police Accountability Board and Office of the Director of Police Accountability Interim Regulations for Handling Complaints Against Sworn Officers of the Police Department https://berkeleyca.gov/sites/default/files/2022-02/PAB-ODPA.Interim.Reggs_.Approved.2021-10-05.pdf

Berkeley City Charter Section 125

<https://berkeley.municipal.codes/Charter/125#:~:text=Section%20125.%20Police%20Accountability%20Board%20and%20Director%20of>

Berkeley Police Department Policy 300 "Use of Force"

https://berkeleyca.gov/sites/default/files/documents/RELEASE_20240301_T161429_Berkeley%20PD%20Policy%20Manual.pdf#Page=57

Berkeley Police Department Policy 428 "First Amendment Assembly"

https://berkeleyca.gov/sites/default/files/documents/RELEASE_20240301_T161429_Berkeley%20PD%20Policy%20Manual.pdf#Page=439

Appendices

Appendix A- Policy Complaint 2024-PR-0001



MEMORANDUM

Date: January 19, 2024
To: Honorable Members of the Police Accountability Board
From: Hansel A. Aguilar, Director of Police Accountability
Jose Murillo, Program Analyst
Subject: Notice of Policy Complaint No. 2024-PR-0001

The purpose of this memorandum is to introduce Policy Complaint Number 2024-PR-0001 to the Police Accountability Board (PAB) as required by Section G of the PAB's standing rules¹.

Background:

On Tuesday, January 16, 2024, the Office of the Director of Police Accountability (ODPA) received Policy Complaint No. 2024-PR-0001 via email correspondence (See Attachment 1). The complaint raises three questions regarding the use of force, specifically the deployment and use of less-lethal munitions:

- "Are officers allowed to or prohibited from pointing their less-lethal munitions at a crowd or individual at close range? What is considered unacceptable?"
- "Are officers allowed to or prohibited from pointing or displaying their less-lethal weapons at individuals from a car?"
- "Are officers allowed to or prohibited from displaying their less-lethal munitions even when there has been no violence or disturbance to justify their use?"

¹ [Section G. "Policy Complaints and Reviews" of the PAB's Standing Rules](#)

(See Attachment 1, Page 1). The inquiry stems from video recordings that depict Berkeley Police Department (BPD) officers deploying less-lethal equipment during an arrest² and patrol on Telegraph Avenue³.

Upon reviewing the complaint, the ODPa has taken note of the concerns raised by the Complainant. These concerns are particularly focused on the use of less-lethal tools in situations that, traditionally, might have involved the deployment of a baton or a standard police presence. The reported routine deployment and display of less-than-lethal munitions raise questions about whether such actions lead to the creation of Use of Force Reports. The Complainant suggests that, in the absence of such reporting, the BPD should consider implementing these reports.

The Police Review Commission (PRC), the predecessor of the PAB, oversaw the implementation of the current BPD Use of Force Policy. However, the PAB has not formally revisited this policy.

Potential Area(s) of Review:

The Complainant is requesting that the PAB review BPD Policy 300, titled "Use of Force." Specifically, the Complainant would like the PAB to review the following sections:

- Section 300.4.1 Drawing and Pointing Firearms
- Section 300.4.3 Shooting at or from Moving Vehicles.

Recommendation:

Upon receiving a policy complaint, the Board can choose from several potential courses of action⁴, which include:

1. Accepting the policy complaint and assigning a Board member to investigate.
2. Accepting the policy complaint and directing ODPa staff to carry out an investigation.

² Video 1: <https://www.instagram.com/p/C1s-AjflcOQ/>

³ Video 2: <https://drive.google.com/file/d/19PYFnQ358YMfv7lwHmirQKxpaJH6dbHg/view>

⁴ Section G. "Policy Complaints and Reviews" of the PAB's Standing Rules

3. Accepting the policy complaint and establishing a subcommittee to investigate the matter.
4. Temporarily deferring acceptance of the policy complaint and assigning a Board member to investigate it before formal acceptance.
5. Temporarily deferring acceptance of the policy complaint and instructing ODPA staff to investigate the matter.
6. Rejecting the policy complaint.

Policy 300 underwent its latest update on January 3rd, 2024, to align with California Legislative Updates, including AB 350 (Gibson)⁵. Section 300.13, “Policy Review and Updates,” of BPD’s Policy 300, states that the BPD and PAB shall convene at least annually to review and update the Use of Force Policy, as mandated by SB 230 (Caballero)⁶. In considering whether to accept and review the present policy complaint, the ODPA notes that certain facts and circumstances outlined in this policy complaint relate to may also be pertinent to the ODPA’s investigation of the Officer-Involved Shooting (OIS) that occurred on November 6th, 2023⁷.

⁵ [Bill Text - AB-360 Excited delirium. \(ca.gov\)](#)

⁶ [Bill Text - SB-230 Law enforcement: use of deadly force: training: policies. \(ca.gov\)](#)

⁷ Berkeley PD Critical Incident Video Grayson Street November 202: <https://youtu.be/vp567hDw3Hg>

ATTACHMENT 1

POLICY COMPLAINT

Office of the Director of Police Accountability (DPA)

1947 Center Street, 5th Floor, Berkeley, CA 94704

Web: www.cityofberkeley.info/dpa

E-mail: dpa@cityofberkeley.info

Phone: (510) 981-4950 TDD: (510) 981-6903 Fax: (510) 981-4955

Date Received: _____ DPA Case # _____

Name of Complainant: _____

Mailing Address: _____

Primary Phone: _____

E-mail address: _____

Occupation: teacher Gender: F Age: 60 Ethnicity: Caucasian

[2 Identify the Berkeley Police Department \(BPD\) policy or practice you would like the Police Accountability Board to review.](#)

The policies I would like to have examined are these.

- I. Are officers allowed to or prohibited from pointing their less-lethal munitions at a crowd or individual **at close range? What is unacceptable?**
- II. Are officers allowed to or prohibited from pointing or displaying their less-lethal weapons at individuals from a car?
- III. Are officers allowed to or prohibited from **displaying their less-lethal munitions** even when there has been no violence or disturbance to justify their use?

Related to : Policy 300- Use of Force

300.4.1 DRAWING AND POINTING FIREARMS Given that individuals may perceive the display of a firearm as a potential application of force, officers should carefully evaluate each tactical situation and use sound discretion when drawing a firearm in public by considering the following guidelines: (a) If the officer does not initially perceive a threat but it is objectively reasonable that the potential for such threat exists, firearms should generally be kept in the low-ready or other position not directed toward an individual.

300.4.3 SHOOTING AT OR FROM MOVING VEHICLES Absent exigent circumstances, officers shall not discharge firearms from a moving vehicle.

3 Location of Incident (if applicable) Date & Time of Incident (if applicable)

Telegraph Ave. and Dwight way on Jan 4th around 1:15pm.

Provide a factual description of the incident that forms the basis of your complaint. Be specific and include what transpired, and how the incident ended.

As the attached video links show, officers were driving up Telegraph Ave. in unmarked vans with roughly 4-5 other officers in the vehicle. They drove by several times with the door half-open and less lethal munitions in their hands and on their laps

4 What changes to BPD policy, practice, or procedure do you propose?

I would like to see policy clarified/revised to prohibit improper displays of munitions as well as the pointing of these weapons at close range. It seems that they are being used in situations that previously would have been met with a baton or mere police presence. Now, their use and display has become routine. Are these displays of less lethal munitions generating Use of Force Reports? If not, they should.

The common display of these munitions makes BPD look thuggish and scared of the public and detracts from the good relations that BPD claims to want to build.

5 Use this space for any additional information you wish to provide about your complaint. (Or, attach relevant documentation you believe will be useful to the Police Accountability Board in evaluating your complaint.)

- [Video from Instagram](#): Notice that the cops is wrestling a woman in public space WHILE he has his less-lethal munition around his neck and it is getting in his own way.
- [Video of casual display](#): Notice that the officer does not put away his less lethal weapon. The unmarked van drove off with the doors open and officers were seen throughout the day holding these weapons and seemingly looking for opportunities to use them or at least threaten people with them.

6 CERTIFICATION I hereby certify that, to the best of my knowledge, the statements made on this complaint are true.





Signature of Complainant

Date

7 How did you hear about the Director of Police Accountability or Police Accountability Board? Internet Berkeley Police Dept. Newspaper:

Referred by:

Other: Already familiar with its existence and functioning.

ATTACHMENT 2

Use of Force

300.1 SANCTITY OF LIFE

The Berkeley Police Department's highest priority is safeguarding the life, dignity, and liberty of all persons. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to protect and serve. The Department is committed to accomplishing this mission with respect and minimal reliance on the use of force by using rapport-building communication, crisis intervention, and de-escalation tactics before resorting to force. Officers must respect the sanctity of all human life, act in all possible respects to preserve human life, do everything possible to avoid unnecessary uses of force, and minimize the force that is used, while still protecting themselves and the public.

300.1.1 PURPOSE AND SCOPE

This policy sets forth criteria governing the use of force. All officers are responsible for knowing and complying with this policy and conducting themselves in a manner that reflects the Berkeley Police Department's Use of Force Core Principles. Violations of this policy may result in disciplinary action, including and up to termination, and may subject the officer to criminal prosecution. Supervisors shall ensure that all personnel in their command know the content of this policy and operate in compliance with it.

300.1.2 USE OF FORCE STANDARD

In dealing with suspects, officers shall use alternatives to physical force whenever reasonably possible. In all cases where physical force is used, officers shall use a minimum amount of force that is objectively reasonable, objectively necessary, and proportional to effectively and safely resolve a conflict.

The United States Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989), held that, in order to comply with the U.S. Constitution, an officer's use of force must be objectively reasonable under the totality of circumstances known to the officer at the time. Additionally, Penal Code section 835(a) imposes further restrictions on an officer's use of force. But these standards merely set the minimum standard for police conduct, below which an officer's conduct would be regarded as unlawful.

In fulfilling this Department's mission to safeguard the life, dignity, and liberty of officers themselves and all members of the community they are sworn to protect and serve, this policy requires more of our officers than simply not violating the law. As a result, this policy is more restrictive than the minimum constitutional standard and state law in two important respects.

First, it imposes a higher duty upon officers to use a minimal amount of force objectively necessary to safely achieve their legitimate law enforcement objective. And, second, this policy imposes a stricter obligation on officers to exert only such force that is objectively proportionate to the circumstances, requiring a consideration of the seriousness of the suspected offense, the availability of de-escalation and other less aggressive techniques, and the risks of harm presented to members of the public and to the officers involved.

Berkeley Police Department

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Use of Force

Additionally, Penal Code section 835(a) imposes further restrictions on an officer's use of force.

300.1.3 CORE PRINCIPLES

A. DE-ESCALATION AND FORCE MINIMIZATION. Every officer's goal, throughout an encounter with a member of the public, shall be to de-escalate wherever possible and resolve the encounter without resorting to the use of force. Wherever possible, officers shall employ de-escalation techniques to increase the likelihood of voluntary compliance with law enforcement requests or directives and, thereby, decrease the likelihood that a use of force will become necessary during an incident. Further, in any encounters that do call for applying force, officers must always use a minimal amount of force that is objectively reasonable and objectively necessary to safely achieve their legitimate law enforcement objective.

B. PROPORTIONALITY. When determining the appropriate level of force, at all times officers shall balance the severity of the offense committed and the level of resistance based on the totality of the circumstances known to or perceived by the officer at the time. It is particularly important that officers apply proportionality and critical decision making when encountering a subject who is unarmed or armed with a weapon other than a firearm.

C. MINIMIZING THE USE OF DEADLY FORCE. Deadly force may only be used when it is objectively reasonable that such action is immediately necessary to protect the officer or another person from imminent danger of death or serious bodily harm. Officers shall not use deadly force if it is objectively reasonable that alternative techniques will eliminate the imminent danger and ultimately achieve the law enforcement purpose with less risk of harm to the officer or to other persons

D. DUTY TO INTERCEDE. Whenever possible, officers shall intervene when they know or have reason to know that another officer is about to use, or is using, unnecessary force. Officers shall promptly report any use of unnecessary force and the efforts made to intervene to a supervisor.

E. VULNERABLE POPULATIONS. Officers should be particularly sensitive when considering the use of force against vulnerable populations, including children, elderly persons, pregnant women, people with physical and mental disabilities, and people with limited English proficiency.

F. FOSTER STRONG COMMUNITY RELATIONSHIPS. The Berkeley Police Department understands that uses of force, even if lawful and proper, can have a damaging effect on the public's perception of the Department and the Department's relationship with the community. The Department is committed to fostering strong community relations by building on its historic tradition of progressive policing, ensuring accountability and transparency, and striving to increase trust with our community.

G. FAIR AND UNBIASED POLICING. Members of the Berkeley Police Department shall carry out their duties, including the use of force, in a manner that is fair and unbiased, in accordance with Policy 401, Fair and Impartial Policing.

300.1.4 DEFINITIONS

Definitions related to this policy include:

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Minimal amount necessary – The least amount of force within a range that is objectively reasonable and objectively necessary to safely effect an arrest or achieve some other legitimate law enforcement purpose.

Deadly force - Any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm.

Feasible - Reasonably capable of being done or carried out under the circumstances to successfully achieve the arrest or lawful objective without increasing risk to the officer or another person.

Force - The application of physical techniques or tactics, chemical agents or weapons to another person. It is not a use of force when a person allows themselves to be searched, escorted, handcuffed or restrained.

Less-Than-Lethal Force – Any use of force which, due to possible physiological effects of application, presents less potential for causing death or serious injury than conventional lethal force options. Less-than-lethal force options include, but are not limited to, a specialized launcher, or other authorized device that can discharge, fire, launch or otherwise propel single or multiple flexible or non-flexible projectiles designed to cause physiological effects consistent with blunt force impact.

Non-Lethal Force – Any use of force other than lethal force or less-than lethal force.

Compliant Suspect – Cooperative and/or responsive to lawful commands.

Passive Resistance - When an individual does not follow the lawful verbal commands of a police officer, but does not physically resist in any way.

Examples: A person who goes completely limp, sits down and refuses to stand or walk, or who may stand with arms at their sides without attempting to strike at or physically resist officers.

Active Resistance - An individual who is uncooperative and fails to comply with the lawful verbal commands of a police officer, and attempts to avoid physical control and/or arrest by physically struggling to free oneself from being restrained. The individual may also use verbal non-compliance (refusing a lawful order or direction).

Examples: A person who attempts to avoid physical control and/or arrest by pulling or pushing away from the officer, tensing arm or muscles, hiding from the officer, and/or fleeing.

Combative Resistance - An individual not only resists the officer, but poses a threat of harm to the officer or others, in an aggressive manner that may cause physical injury.

Examples: A person who violently attempts to or attacks an officer. This action is sometimes preceded by “pre-assault” cues such as taking a threatening stance (clenching fists, facial expressions, threats, etc.) and verbal non-compliance.

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Control Hold - Any Department approved hold, designed to allow an officer to control the movement of a subject (e.g., twist lock, rear wrist lock, finger lock, etc.). A control hold can be applied without implementing pain.

Pain Compliance Technique - Involves either the manipulation of a person's joints or activating certain pressure points intended to create sufficient pain for the purpose of motivating a person to comply with verbal commands (examples of pressure points include buccal nerve, gum nerve, sternum rub).

Control Techniques – Personal Impact Weapons and Take Downs.

Personal Body Weapons - An officer's use of his/her body part, including but not limited to hand, foot, knee, elbow, shoulder, hip, arm, leg or head by means of kinetic energy transfer (impact) to gain control of a subject.

Blue Team (BT) – Computer software that allows officers to enter use of force and other incidents from a Department computer.

Concealment - Anything which conceals a person from view.

Cover - Anything which provides protection from bullets or other projectiles fired or thrown. Cover is subjective and its effectiveness depends upon the threat's ballistic capability (handgun, rifle, etc.).

Blocking - The positioning of a police vehicle in the path of an occupied subject vehicle where contact between the vehicles is not anticipated or is anticipated to be minimal.

Ramming - The use of a vehicle to intentionally hit another vehicle

Serious bodily injury - A bodily injury that creates a substantial risk of death, causes serious, permanent disfigurement or results in a prolonged loss or impairment of the functioning of any bodily member or organ

Officer (or) Police Officer - Any sworn peace officer.

Authorized Employee - Any non-sworn employee who has received defensive tactics training and has been authorized by the Chief of Police to use non-lethal force.

Employee – Any non-sworn employee of the Berkeley Police Department, including those deemed “authorized employees.”

Objectively Reasonable – “Objectively reasonable” means an officer’s conduct will be evaluated through the eyes of the hypothetically reasonable officer standing in the shoes of the involved officer.

Totality of the circumstances – All facts known to the officer at the time, including the conduct of the officer and the subject leading up to the use of force.

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300.2 DUTY TO INTERCEDE AND DUTY TO REPORT

Any officer who observes another officer or member of the Berkeley Police Department using force that is clearly in violation of this policy shall immediately take reasonable action to attempt to mitigate such use of force. This may include verbal intervention or, when in a position to do so, physical intervention. Further, any officer who learns of a potentially unauthorized use of force, even if the officer did not witness it personally, shall promptly report this information to an on-duty sergeant or a command officer at the first opportunity.

Any officer who observes an employee or member of a different law enforcement agency use force that exceeds the degree of force permitted by law shall promptly report these observations to an on-duty sergeant or a command officer at the first opportunity.

300.2.1 FAILURE TO INTERCEDE

An officer who has received the required training on the duty to intercede and then fails to act to intercede when required by law, may be disciplined in the same manner as the officer who used force beyond that which is necessary (Government Code § 7286(b)).

300.3 USE OF FORCE TO EFFECT AN ARREST

Any peace officer may use objectively reasonable, objectively necessary, and proportional force to effect an arrest, to prevent escape, or to overcome resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his/her efforts by reason of resistance or threatened resistance on the part of the person being arrested; nor shall an officer be deemed the aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest, prevent escape, or to overcome resistance. For the purpose of this policy, "retreat" does not mean tactical repositioning or other de-escalation tactics.

300.3.1 FACTORS USED TO DETERMINE THE REASONABLENESS, NECESSITY, AND PROPORTIONALITY OF FORCE

When determining whether to apply force and evaluating whether an officer has used reasonable, objectively necessary, and proportional force, a number of factors should be taken into consideration, as time and circumstances permit. These factors include but are not limited to:

- (a) The apparent immediacy and severity of the threat to officers or others.
- (b) The conduct of the individual being confronted, as reasonably perceived by the officer at the time.
- (c) Officer/subject factors (age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers available vs. subjects).
- (d) The conduct of the involved officer.
- (e) The effects of drugs or alcohol.
- (f) The individual's apparent mental state or capacity.
- (g) The individual's apparent ability to understand and comply with officer commands.
- (h) Proximity of weapons or dangerous improvised devices.

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- (i) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
- (j) The availability of other reasonable and feasible options and their possible effectiveness.
- (k) Seriousness of the suspected offense or reason for contact with the individual.
- (l) Training and experience of the officer.
- (m) Potential for injury to officers, suspects, bystanders, and others.
- (n) Whether the person appears to be resisting, attempting to evade arrest by flight, or is attacking the officer.
- (o) The risk and reasonably foreseeable consequences of escape.
- (p) The apparent need for immediate control of the subject or a prompt resolution of the situation.
- (q) Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.
- (r) Prior contacts with the subject or awareness of any propensity for violence.
- (s) Any other exigent circumstances.

The level of resistance that an officer encounters is a key factor in determining the proportionate amount of force. It is not possible to determine ahead of time what the proportionate level of force is for every possible situation that officers may face. Nevertheless, one of the key factors in determining what level of force is objectively reasonable, objectively necessary, and proportionate in a given situation is the level of resistance that an officer encounters. In general, the less resistance an officer faces, the less force the officer should use. The types of resistance officers may encounter fall along a continuum, from a cooperative person to an active assailant. Consistent with training, the following general rules apply when officers are exercising judgment in determining what level of force is necessary and proportionate:

- Compliant – In general, when dealing with a compliant person, officers may rely on police presence and/or verbal control techniques, but should not use greater force.
- Passive resistance – In general, when dealing with a suspect involved in passive resistance, officers may rely on police presence, verbal control techniques, or control holds, but should not use greater force.
- Active resistance – In general, in dealing with a suspect involved in active resistance, in addition to the options available for passive resistance, officers may rely on pain compliance techniques or takedowns, but should not use greater force.
- Combative resistance – In general, in dealing with a suspect involved in combative resistance, officers have all use-of-force options available to them, but deadly force shall only be used in compliance with this policy as described in Section 300.4.

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300.3.2 USE OF FORCE CONTINUUM

The Department uses a "use of force continuum" that refers to the concept that there are reasonable responses for every threat an officer faces in a hostile situation. The force utilized need not be sequential (e.g., gradual or preceded by attempts at lower levels of force) if those lower levels are not appropriate. All Uses of Force must be objectively reasonable, objectively necessary, and proportional, based on a totality of the circumstances. All progressions must rest on the premise that officers shall escalate and de-escalate their level of force in response to the subject's actions.

Continuum of Force

- **Officer Presence — No force is used. Considered the best way to resolve a situation.**
 - The mere presence of a law enforcement officer works to deter crime or diffuse a situation.
 - Officers' attitudes are professional and nonthreatening.
- **Verbalization — Force is not physical.**
 - Officers issue calm, nonthreatening commands, such as "Let me see your identification and registration."
 - Officers may increase their volume and shorten commands in an attempt to gain compliance. Short commands might include "Stop," or "Don't move."
- **Weaponless defense — Officers use bodily force to gain control of a situation.**
 - Pain Compliance and control holds. Officers use grabs, holds and joint locks to restrain an individual.
 - Personal body weapons. Officers may use punches and kicks to restrain an individual.
- **Less-Lethal Force Methods — Officers use less-lethal technologies to gain control of a situation.**
 - Blunt impact. Officers may use a baton or projectile to immobilize a combative person.
 - Chemical. Officers may use chemical sprays or projectiles embedded with chemicals to restrain an individual (e.g., pepper spray).
- **Lethal Force — Officers may use lethal weapons only in compliance with Section 300.4.**

300.3.3 USE OF FORCE TO SEIZE EVIDENCE

In general, officers may use reasonable force to lawfully seize evidence and to prevent the destruction of evidence. However, officers are discouraged from using force solely to prevent a person from swallowing evidence or contraband. In the instance when force is used, officers should not intentionally use any technique that restricts blood flow to the head, restricts respiration or which creates a reasonable likelihood that blood flow to the head or respiration would be

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restricted. Officers are encouraged to use techniques and methods taught by the Berkeley Police Department for this specific purpose.

300.3.4 DE-ESCALATION TACTICS

De-escalation tactics and techniques are actions used by officers which seek to minimize the need to use force during an incident. Such tactics and techniques may increase the likelihood of voluntary compliance when employed and shall be used when it is safe to do so. De-escalation tactics emphasize slowing an incident down to allow time, distance and flexibility for the situation to resolve. Officers shall continually assess the dynamics of a situation, and modulate their response and actions appropriately. Officers may be justified in using force at one moment, but not justified in using force the next moment due to a change in dynamics.

The application of these tactics is intended to increase the potential for resolution with a minimal reliance on the use of force, or without using force at all.

If immediate action is not necessary, an officer(s) shall attempt to use verbal de-escalation techniques. When available and when practicable, a Crisis Intervention Team (CIT) officer, crisis negotiator, or Berkeley Mental Health Mobile Crisis Team member shall be called upon as a resource.

Officers shall gather information about the incident, assess the risks, assemble resources, attempt to slow momentum and communicate and coordinate a response. In their interaction with subjects, officers should use advisements, warnings, verbal persuasion and other tactics and alternatives to any levels of force. Officers should move to a position that is tactically more secure or allows them greater distance to consider or deploy a greater variety of force options.

- (a) De-escalation techniques may include verbal persuasion, warnings and tactical de-escalation techniques, such as: slowing down the pace of an incident; "waiting out" subjects; creating distance (and thus the reactionary gap) between the officer and the threat; and requesting additional resources (e.g., specialized units, mental health care providers, negotiators, etc.) to resolve the incident.
- (b) Officers should recognize that they may withdraw to a position that is tactically advantageous or allows them greater distance to de-escalate a situation.
- (c) Officers should consider a variety of options, including lesser force or no force options.
- (d) Officers should attempt to understand and consider possible reasons why a subject may be noncompliant or resisting arrest.
- (e) A subject may not be capable of understanding the situation because of a medical condition; mental, physical, or hearing impairment; language barrier; drug interaction; or emotional crisis, and have no criminal intent. These situations may not make the subject any less dangerous, but understanding a subject's situation may enable officers to calm the subject and allow officers to use de-escalation techniques while maintaining public and officer safety.
- (f) Officers should continue de-escalation techniques, when feasible and appropriate, and take as much time as reasonably necessary to resolve the incident, in effort to avoid and/or minimize the use of force.

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- (g) When an officer recognizes that mental illness, post-traumatic stress disorder, alcohol and/or drug addictions, or other health issues are causing an individual to behave erratically, the officer shall, when feasible and appropriate, try to de-escalate the situation using de-escalation and/or crisis Intervention techniques.
- (h) Establishing communication with non-compliant subjects is often most effective when officers establish rapport, use the proper voice intonation, ask questions and provide advice to defuse conflict and achieve voluntary compliance before resorting to force options.
- (i) The officer's physical actions may also de-escalate a potentially volatile/violent situation; e.g., exhibiting relaxed body language.

When time and circumstances allow, officers shall consider the following tactical principles:

1. Make a tactical approach to the scene.
2. Maintain a safe distance.
3. Use available cover or concealment and identify escape routes.
4. Stage Berkeley Fire Department.
5. Control vehicle and pedestrian traffic.
6. Establish communication, preferably with one officer.
7. Create an emergency plan and a deliberate plan with contingencies.
8. The officer's physical actions may also de-escalate a potentially volatile/violent situation; e.g., exhibiting relaxed body language.

300.3.5 PAIN COMPLIANCE TECHNIQUES

Pain compliance techniques may be effective in controlling a physically or actively resisting individual. Officers may only apply those pain compliance techniques for which they have successfully completed department-approved training. Officers utilizing any pain compliance technique should consider:

- (a) The degree to which the application of the technique may be controlled given the level of resistance.
- (b) Whether the person can comply with the direction or orders of the officer.
- (c) Whether the person has been given sufficient opportunity to comply.

The purpose of pain compliance is to direct a person's actions. The application of any pain compliance technique shall be discontinued once the officer determines that compliance has been achieved.

300.3.6 USE OF NON-LETHAL FORCE

When lethal force and less-than-lethal force are not authorized, officers and authorized employees may use objectively reasonable, objectively necessary, and proportional approved non-lethal force techniques and weapons in the following circumstances:

- (a) To protect themselves or another person from physical injury;

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- (b) To restrain or subdue a resistant individual; or
- (c) To bring an unlawful situation safely and effectively under control.

300.3.7 RESTRAINT AND CONTROL DEVICES

Restraint and control devices shall not be used to punish, to display authority or as a show of force. Handcuffs, body wraps and spit hoods shall only be used consistent with Policy 302. Batons, approved less-lethal projectiles, and approved chemical agents shall only be used consistent with Policy 303. As per City Council resolution (June 9, 2020), the use of tear gas by employees of the Berkeley Police Department, or any outside department or agency called to respond to mutual aid in Berkeley, is prohibited. Pepper spray or smoke for crowd control by employees of the Berkeley Police Department, or any outside department or agency called to respond to mutual aid in Berkeley, is prohibited during the COVID-19 pandemic, or until such time as the City Council removes the prohibition.

300.3.8 CHOKEHOLD PROHIBITION

The use of a Carotid Restraint Hold is prohibited. Carotid Restraint Hold: Council Resolution No. 52,605 - N.S., February 14, 1985, "Prohibiting use of 'chokehold' for law enforcement purposes in the City of Berkeley" states: "Be it resolved by the Council of the City of Berkeley as follows: That the chokehold, including but not limited to the carotid restraint and the bar-arm hold, is hereby banned from use for law enforcement purposes in the City of Berkeley."

The term bar-arm refers to a variety of techniques. The use of any chokehold is strictly prohibited. A chokehold is any hold or contact with the neck – including a carotid restraint -- that may inhibit breathing by compression of the airway in the neck, may inhibit blood flow by compression of the blood vessels in the neck, or that applies pressure to the front, side, or back of the neck. As defined in the City Council Resolution, "bar-arm hold" refers to use of the forearm to exert pressure against the front of the neck. However, other types of arm hold techniques (e.g., those that involve control of the arm, wrist or elbow) remain authorized.

300.3.9 ADDITIONAL RESTRICTIONS

Terms such as "positional asphyxia," "restraint asphyxia," and "excited delirium" continue to remain the subject of debate among experts and medical professionals, are not universally recognized medical conditions, and frequently involve other collateral or controlling factors such as narcotics or alcohol influence or pre-existing medical conditions. While it is impractical to restrict an officer's use of reasonable control methods when attempting to restrain a combative individual, officers are not authorized to use any restraint or transportation method which might unreasonably impair an individual's breathing or respiratory capacity for a period beyond the point when the individual has been adequately and safely controlled. Once the individual is safely secured, officers should promptly check and continuously monitor the individual's condition for signs of medical distress (Government Code § 7286.5).

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300.4 USE OF DEADLY FORCE

An officer's use of deadly force is justified only when it is objectively reasonable, based on the totality of the circumstances, that such force is objectively necessary to, 1) defend against an imminent threat of death or serious bodily injury to the officer or another or 2) apprehend a suspected fleeing person for any felony that threatened or resulted in death or serious bodily injury, provided that it is objectively reasonable that the person will cause imminent death or serious bodily injury to another unless immediately apprehended.

Where feasible, the officer shall, prior to the use of deadly force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless it is objectively reasonable that the person is aware of those facts.

An officer shall not use deadly force against another person if it reasonably appears that doing so would unnecessarily endanger innocent people.

Lethal force is prohibited when its sole purpose is to effect an arrest, overcome resistance or prevent a subject from escaping when the subject does not present an immediate danger of death or serious bodily injury. Lethal force is also prohibited solely to prevent property damage or prevent the destruction of evidence.

An "imminent" threat of death or serious bodily injury exists when, based on the totality of the circumstances, it is objectively reasonable to believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the officer or another person. An officer's subjective fear of future harm alone is insufficient as an imminent threat. An imminent threat is one that from appearances is reasonably believed to require instant attention.

300.4.1 DRAWING AND POINTING FIREARMS

Given that individuals may perceive the display of a firearm as a potential application of force, officers should carefully evaluate each tactical situation and use sound discretion when drawing a firearm in public by considering the following guidelines:

- (a) If the officer does not initially perceive a threat but it is objectively reasonable that the potential for such threat exists, firearms should generally be kept in the low-ready or other position not directed toward an individual.
- (b) If it is objectively reasonable that a significant threat exists based on the totality of circumstances presented at the time (e.g., high-risk stop, tactical entry, armed encounter), firearms may be directed toward said threat until the officer no longer perceives such threat.

Once it is reasonably safe to do so, officers should carefully secure all firearms.

300.4.2 DIRECTED FIRE

Officers may use controlled gunfire that is directed at the suspect, reducing the suspect's ability to return fire while a group or individual movement is conducted, such as in a rescue operation.

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Officers may only employ this tactic when dealing with a suspect who poses an immediate and ongoing lethal threat and only under circumstances where the use of deadly force is legally justified. Target acquisition and communication are key elements in the successful use of this tactic. Officers remain accountable for every round fired under these circumstances. Officers must consider their surroundings and potential risks to bystanders, to the extent reasonable under the circumstances, before discharging a firearm.

300.4.3 SHOOTING AT OR FROM MOVING VEHICLES

Absent exigent circumstances, officers shall not discharge firearms from a moving vehicle.

Firearms shall not be discharged at a stationary or moving vehicle, the occupants of a vehicle, or the tires of a vehicle unless a person in the vehicle is imminently threatening an officer or another person present with deadly force. The moving vehicle alone does not presumptively constitute a threat that justifies the use of deadly force.

Officers shall not move into, remain, or otherwise position themselves in the path of a vehicle in an effort to detain or apprehend the occupants. Any officer in the path of a moving vehicle shall immediately attempt to move to a position of safety rather than discharging a firearm at the vehicle or any of the occupants.

Because this policy may not cover every situation that may arise, a deviation from this policy may be objectively reasonable and objectively necessary depending on the totality of the circumstances. A deviation from this policy would, for instance, be justified if the officer used a firearm in an attempt to stop an imminent vehicle attack on a crowd or a mass casualty terrorist event.

Factors that may be used to evaluate the reasonableness of the use of a firearm against a vehicle include:

- (a) The availability and use of cover, distance and/or tactical relocation
- (b) Incident command and personnel placement
- (c) Tactical approach
- (d) Regard for viable target acquisition and background including location, other traffic, the presence of innocent persons, and police officers.

300.5 USE OF VEHICLES

Officers shall not use police vehicles to ram or block other vehicles, persons, or moving objects in a manner that reasonably appears to constitute the use of lethal force, except under circumstances outlined in section 300.4 and in Policy V-6 that covers vehicle operations.

The Vehicle Containment Technique (VCT) is the positioning of a police vehicle in the path of a suspect vehicle where contact between the vehicles is not anticipated or is anticipated to be minimal. VCT shall only to be used on vehicles that are either stationary or moving at a slow speed. This technique is designed to contain a suspect vehicle to a single stationary location, thereby

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preventing a pursuit from initiating, or a potentially violent situation (e.g. a hostage situation or person barricaded inside a vehicle) from becoming mobile.

When properly utilized, the VCT can give officers time, distance, and cover in order to safely and effectively resolve a situation.

300.6 REPORTING REQUIREMENTS

All uses of force shall be documented promptly, completely and accurately in an appropriate report, depending on the nature of the incident and the level of force used. The officer should articulate the factors perceived and why they believed the use of force was objectively reasonable and objectively necessary under the circumstances. Whenever an officer or employee uses Oleoresin Capsicum (pepper spray) they must also complete a "Use of Pepper Spray Report." Whenever an officer or employee use body wrap or spit hood restraint devices they must also complete a "Use of Restraint Device Report" and document, review and report such uses in accordance with section 300.11.

Upon receiving notification of a use of force, an uninvolved supervisor, when feasible, shall determine the level of force reporting level, investigation, documentation and review requirements.

300.6.1 SUPERVISOR RESPONSIBILITY

A supervisor should respond to any reported use of force, if reasonably available. The responding supervisor is expected to:

- (a) Obtain the basic facts from the involved officers. Absent an allegation of misconduct or excessive force, this will be considered a routine contact in the normal course of duties.
- (b) Ensure that any injured parties are examined and treated.
- (c) Once any initial medical assessment has been completed or first aid has been rendered, ensure that photographs have been taken of any areas involving visible injury or complaint of pain, as well as overall photographs of uninjured areas. These photographs should be retained until all potential for civil litigation has expired.
- (d) Identify any witnesses not already included in related reports.
- (e) Review and approve all related reports.
- (f) Review body worn camera footage related to the incident.

In the event that a supervisor is unable to respond to the scene of an incident involving the reported application of force, the supervisor is still expected to complete as many of the above items as circumstances permit.

300.6.2 USE OF FORCE REPORTING LEVELS

Level 1

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The officer used any of the following, and the circumstances of the application would lead an objectively reasonable officer to conclude that the subject did not experience more than momentary discomfort:

1. Control holds/ pain compliance techniques
2. Leverage
3. Grab
4. Bodyweight
5. The officer lowered the subject to a seated position or to the ground while partially or completely supporting the person's bodyweight.
6. Takedown

If the incident fits the parameters for a Level 1 incident, the supervisor will enter all applicable data into the Blue Team template with a brief summary.

Level 2

- (a) No suspect injury or complaint of continuing pain due to interaction with officer.
- (b) Officer's use of force was limited to the following:
 1. Firearm drawn from the holster or otherwise deployed during an interaction with an individual, and/or pointed at an individual. For the purposes of this section, "interaction" shall be defined as a situation in which an individual could reasonably believe the deployment and/or pointing of a firearm could be an attempt to gain compliance.
 2. Control hold, pressure point, leverage, grab, takedown, and/or bodyweight, and the application would lead a reasonably objective officer to conclude that the individual may have experienced more than momentary discomfort.

An uninvolved supervisor, when feasible, will respond to the scene and conduct a Use of Force Investigation, ensuring that statements are taken from the suspect and witnesses, and that photos are taken of all involved parties. If the incident fits the parameters for a Level 2 incident, the supervisor will enter all applicable data into the Blue Team template with a brief summary.

Level 3

- (a) Suspect has sustained an injury or complains of injury or continuing pain due to interaction with the officer.
- (b) Would have otherwise been classified as a Level 2, except officer body worn camera was not activated in a timely manner, prior to the enforcement contact, per policy.
- (c) The officer used any of the following force options:
 1. Chemical Agents/Munitions
 2. Impact Weapon Strikes

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3. Personal Body Weapons

An uninvolved supervisor, when practical, will respond to the scene and conduct a Use of Force Investigation, ensuring that statements are taken from the suspect and witnesses. If the incident fits the parameters for a Level 3 incident, the supervisor will enter all applicable data into the Blue Team template.

The supervisor will also complete a Use of Force Investigation Report narrative in Blue Team for review through the Use of Force Review process. Suspect and witness statements from the crime report will be attached to the use of force investigation.

Level 4

Any incident involving deadly force or any force likely to cause death or serious bodily injury will be investigated under the protocols outlined in Policy P-12.

300.6.3 EMPLOYEE USE OF FORCE

When any Berkeley Police Department employee has engaged in a use of force as defined in this policy, the use of force must be reported to a Berkeley Police supervisor and investigated in accordance with this policy.

- (a) In the event a use of force as described as Level 1, Level 2, or Level 3 occurs during an unusual occurrence, such as a widespread disaster or civil disturbance, the officer shall prepare a supplemental report as soon as practical following the incident.
- (b) Each officer shall include in the report, to the extent possible, specific information regarding each use of force, e.g. the reason for the use of force, location, description of the individual(s) upon whom force was used, type of force used, etc.

300.6.4 REPORT RESTRICTIONS

Officers shall not use the term "excited delirium" to describe an individual in an incident report. Officers may describe the characteristics of an individual's conduct, but shall not generally describe the individual's demeanor, conduct, or physical and mental condition at issue as "excited delirium" (Health and Safety Code § 24402).

300.6.5 PUBLIC RECORDS

Records related to use of force incidents shall be retained and disclosed in compliance with California Penal Code section 832.7, California Government Code section 6254(f), and the Records Management and Release policy.

300.7 MEDICAL CONSIDERATIONS

Once it is reasonably safe to do so, properly trained officers should promptly provide or procure medical assistance for any person injured or claiming to have been injured in a use of force incident (Government Code § 7286(b)).

Prior to booking or release, medical assistance shall be obtained for any person who exhibits signs of physical distress, who has sustained visible injury, expresses a complaint of injury or continuing

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pain, or who was rendered unconscious. Any individual exhibiting signs of physical distress after an encounter should be continuously monitored until the individual can be medically assessed.

Based upon the officer's initial assessment of the nature and extent of the subject's injuries, medical assistance may consist of examination by fire personnel, paramedics, hospital staff, or medical staff at the jail. If any such individual refuses medical attention, such a refusal shall be fully documented in related reports and, whenever practicable, should be witnessed by another officer and/or medical personnel. If a recording is made of the contact or an interview with the individual, any refusal should be included in the recording, if possible.

The on-scene supervisor or, if the on-scene supervisor is not available, the primary handling officer shall ensure that any person providing medical care or receiving custody of a person following any use of force is informed that the person was subjected to force. This notification shall include a description of the force used and any other circumstances the officer reasonably believes would be potential safety or medical risks to the subject (e.g., prolonged struggle, extreme agitation, impaired respiration).

Persons who exhibit extreme agitation, violent irrational behavior accompanied by profuse sweating, extraordinary strength beyond their physical characteristics and imperviousness to pain, or who require a protracted physical encounter with multiple officers to be brought under control, may be at an increased risk of sudden death. Calls involving these persons should be considered medical emergencies. Officers who reasonably suspect a medical emergency should request medical assistance as soon as practicable and have medical personnel stage away if appropriate.

See the Medical Aid and Response Policy for additional guidelines.

300.8 USE OF FORCE ADMINISTRATIVE REVIEW

The Division Captain shall review the Use of Force Report (and when applicable, Use of Pepper Spray Report or Use of Restraint Device Report) and route the report to the Chief of Police with a recommendation of findings. The Chief of Police may convene a Review Board as outlined in Policy 301 instead of utilizing Division Captain Review.

The Chief of Police shall make a finding that the use of force was either within policy or initiate additional administrative review/investigation as may be appropriate.

Any determination concerning the propriety of force used shall be based on the facts and information available to the officer at the time the force was employed, and not upon information gained after the fact.

All Use of Force Reports shall be reviewed to determine whether Departmental use of force regulations, policies, or procedures were: 1) violated or followed; 2) clearly understood, effective, and relevant to the situation; 3) require further investigation; and/or, 4) require revision or additional training.

Use of Force Reports shall be held in file for at least five (5) years

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300.9 WATCH COMMANDER RESPONSIBILITY

The Watch Commander shall review each use of force by any personnel within his/her command to ensure compliance with this policy.

300.10 TRAINING

Officers, investigators, and supervisors will receive periodic training on this policy and demonstrate their knowledge and understanding (Government Code § 7286(b)).

Subject to available resources, the Personnel and Training Sergeant should ensure that officers receive periodic training on de-escalation tactics, including alternatives to force.

Training should also include (Government Code § 7286(b)):

- (a) Guidelines regarding vulnerable populations, including but not limited to children, elderly persons, pregnant individuals, and individuals with physical, mental, and developmental disabilities.
- (b) Training courses required by and consistent with POST guidelines set forth in Penal Code § 13519.10.

See the Training Policy for restrictions relating to officers who are the subject of a sustained use of force complaint.

300.11 USE OF FORCE ANALYSIS

The Professional Standards Division Captain or his or her designee shall prepare a comprehensive analysis report on use of force incidents. The report shall not contain the names of officers, suspects or case numbers, and should include but not be limited to:

- (a) An analysis of use of force incidents with demographic details of the individual impacted including, but not limited to race, gender and age.
- (b) All types of force as delineated in Levels 1, 2, 3 and 4 in Section 300.6.(2).
- (c) The identification of any trends in the use of force by members.
- (d) Training needs recommendations.
- (e) Equipment needs recommendations.
- (f) Policy revisions recommendations.

300.11.1 REPORTING FREQUENCY

- (a) On a quarterly basis via the City's Open Data Portal website;
- (b) On a quarterly basis to the Police Accountability Board; and
- (c) On a yearly basis as part of the Police Department's Annual Report to City Council

300.12 CIVILIAN COMPLAINTS

Complaints by members of the public related to this policy may be filed with the Berkeley Police Department Internal Affairs Bureau (IAB) and/or the Police Accountability

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Board (PAB). Complaints will be investigated in compliance with the respective applicable procedures of the IAB and the PAB.

300.13 POLICY REVIEW AND UPDATES

This policy shall be regularly reviewed and updated to reflect developing practices and procedures.

At least annually, the Berkeley Police Department and the PAB shall convene to review and update the Use of Force Policy to reflect developing practices and procedures per SB 230.