

January 17, 2020

Eileen Decker  
Los Angeles Board of Police Commissioners  
100 West 1st Street, Suite 134  
Los Angeles, California 90012

**Re: Policing Project at New York University School of Law's Comment in  
Response to the LAPD's Revised Use of Force Policy**

Dear President Decker,

On behalf of the Policing Project at New York University School of Law, I would like to thank you for the opportunity to comment on the Los Angeles Police Department's revised "Use of Force Policy" ("Revised Policy"). As an organization that is dedicated to strengthening policing through democratic governance, the Policing Project commends the LAPD and the Los Angeles Board of Police Commissioners for seeking public input on the Revised Policy.

This brief comment shares the Policing Project's views, informed by thorough research and previous experience. In particular, we recently worked closely with the Camden County Police Department to revise their use of force policy, a copy of which we have attached for your review. These comments both are praiseful of some high points in the Revised Policy, and offer suggestions about others. If the Board of Police Commissioners would like for the Policing Project to expound on our views or provide further feedback, we would gladly oblige.

**I. General Comments**

The Revised Policy generally conforms to California Penal Code § 835a, as amended by AB-392, which effectively redefines the circumstances under which LAPD officers are authorized to use deadly force under California law. We are aware that the LAPD revised this policy in collaboration with the Commission, and we want to commend several high points. The Policy as written has several strengths including: the "necessary" standard; the requirement to issue a warning prior to the use of deadly force; and the definitions of "imminent" and "totality of the circumstances," each of which draw upon best practices within policing.

As one of the largest and most innovative law enforcement agencies in the country, the LAPD has the opportunity to lead by example and go beyond the principles and standards set forth by AB-392. For that reason, in the "Additional Recommendations" section we offer several other provisions the LAPD might consider including in its Revised Policy, to further strengthen it and make it consistent with some of the national best practices on use of force.

## II. Specific Comments

After carefully reviewing the Revised Policy and comparing it in detail to § 835a, as amended by AB-392, we noticed two major differences we would like to highlight and discuss: (1) unlike AB-392, the Revised Policy does not provide guidance for officers to determine *ex ante* (before the fact) whether deadly use of force is “necessary” under certain circumstances; and (2) the Revised Policy uses the *Graham v. Connor* objective reasonableness standard, as articulated by AB-392, but replaces the standard’s “a reasonable officer” with “Los Angeles Police Officer with similar training and experience” thereby adding a layer of subjectivity to an objective standard.

We elaborate on these two points below.

### *(1) The “Necessary” Standard*

Although the LAPD’s policy on the use of deadly force has been updated to conform with AB-392 and uses the language from AB-392 nearly verbatim,<sup>1</sup> an important difference remains between how the two policies determine whether deadly force is “necessary.” Section 835a(a)(2), as amended by AB-392, creates a standard that gives guidance to officers in the field (*ex ante*), whereas the Revised Policy explains how incidents involving the use of deadly force will be evaluated after the fact (*ex post*) by the Department.<sup>2</sup>

In an ideal world, *ex post* standards determine *ex ante* performance, but this subtle difference is nonetheless significant. We have no doubt that the LAPD provides officers with substantial training on when and how to use (and avoid using) force. We recommend the Revised Policy better reflect that training. In its current form, the Revised Policy does not specify how officers should evaluate, in real time, whether deadly force is “necessary” and importantly, does not require “other resources and techniques” be used first. Instead, the Revised Policy focuses on how the *Department* will evaluate a use of force after the fact.

We recommend you consider revising this provision to include language similar to that of § 835a(a)(2), as amended by AB-392, in order to help officers better understand how to determine whether deadly force is in fact necessary in certain circumstances in the field.

### *(2) Objective Reasonableness*

The Revised Policy’s standard for determining the objective reasonableness of a use of force differs in a slight but not inconsequential way from the standard articulated by § 835a(a)(4), as amended by AB-392.

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<sup>1</sup> Section 835a(c)(1)(A), § 835a(c)(1)(B), and § 835a(c)(2), as amended, are all copied word for word by the Revised Policy.

<sup>2</sup> Section 835a(a)(2), as amended, states: “In determining whether deadly force is necessary, *officers shall evaluate* each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer.”

Compare that to the Revised Policy: “The *Department* examines the necessity of deadly force by evaluating each situation in light of the particular circumstances of each case, and whether other available resources and techniques were reasonably safe and feasible to an objectively reasonable officer. The *Department* shall also consider the totality of circumstances, including the officer’s tactics and decisions leading up to the use of deadly force.”

The standard set out by AB-392 (§ 835a(a)(4)) states:

[T]he decision by a peace officer to use force shall be evaluated from the perspective of *a reasonable officer* in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.

The Revised Policy replaces “a reasonable officer” with “Los Angeles Police Officer with similar training and experience.” This substitution is understandable, as it likely provides LAPD officers with a relatively clear understanding of what “reasonable” means in this context. In fact, given LAPD’s training practices, this substitution may, in certain circumstances, hold officers to a higher standard.

But not all agencies are the LAPD. If this same approach were taken by law enforcement agencies across California, the standard may stray from its origin as an objective one, to one unique to particular agencies, no matter how appropriate each agency’s officers’ use of force typically were. Furthermore, this substitution creates a discrepancy between the standard employed by Section II of the Revised Policy (“Factors Used to Determine Whether Deadly Force Was Necessary”) and the definition the Revised Policy provides for “Objectively Reasonable.”

### **III. Additional Recommendations**

What we have said above covers the specific question regarding AB-392, but because you are looking at the use of force policy, we would like to offer a few items for your consideration. The Policing Project recommends that the Los Angeles Board of Police Commissioners consider including provisions in this policy that capture, in some capacity, the following principles, which are based on the “PERF 30” principles and are used by law enforcement agencies that lead the nation with their innovative use of force policies.<sup>3</sup>

#### *(1) De-Escalation*

Although AB-392 ultimately was passed without the de-escalation provision that was included in its initial version, the Revised Policy might include a provision that explicitly requires officers to de-escalate situations or “attempt to control an incident through sound tactics, including the use of time, distance, communication, tactical repositioning and available resources, in an effort to avoid the need to use force whenever it is safe, feasible, and reasonable to do so.”<sup>4</sup>

The Revised Policy’s “Preamble to Use of Force” already states that “[o]fficers shall attempt to control an incident by using time, distance, communication, and available resources in an effort to de-escalate the situation, whenever it is safe and reasonable to do so.” By expounding on this same

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<sup>3</sup> Police Executive Research Forum, *Guiding Principles on Use of Force, Critical Issues in Policing Series* (2016), <http://www.policeforum.org/assets/30%20guiding%20principles.pdf>.

<sup>4</sup> AB 392, § 835a(a)(5)(c), 2019-2020 Leg., Reg. Sess. (Cal. 2019). For an example of a de-escalation provision, see Camden County Police Department’s Use of Force Policy, Core Principle #2.

principle in the Policy section of the Department Manual Section 1/556.10, the LAPD could emphasize—both to officers and to the public—the importance of de-escalation and its use as a tactic prior to *any* use of force.

*(2) Officers Must Promptly Provide or Request Medical Aid*

The Revised Policy does not contain a provision that requires LAPD officers to administer aid but it does require (pursuant to Department Manual Section 4/210.15) that all employees request aid on an injured person’s behalf, if it is apparent they are unable to request the aid themselves.<sup>5</sup>

Given that the Revised Policy’s guiding principle regarding use of force is the reverence for human life, it follows that the policy should include a provision requiring officers not only to request medical aid, but to provide it themselves if they are able.<sup>6</sup>

*(3) Officers Must Prevent, Stop and Report Improper Uses of Force by Other Officers*

A robust use of force policy must do more than explain when and to what degree officers can use force; it must make clear that officers are accountable to ensure their fellow officers are following the rules. Some departments, such as Camden County, New Jersey, include an affirmative obligation to intervene if colleagues are in violation of the use of force policy.<sup>7</sup> We believe that with the addition of an affirmative duty to intervene, the Revised Policy would be taking an important step to ensuring accountability among all LAPD officers.

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Please do not hesitate to contact us if we can provide additional assistance.

Sincerely,

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<sup>5</sup> LAPD General Manual, § 4/210.15, [http://www.lapdonline.org/lapd\\_manual/volume\\_4.htm#210](http://www.lapdonline.org/lapd_manual/volume_4.htm#210).

<sup>6</sup> See Camden County Police Department’s Use of Force Policy, Core Principle #5.

<sup>7</sup> See Camden County Police Department’s Use of Force Policy, Core Principle #6.