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Proposed Revisions to the Las Vegas Metropolitan Police Department's Use of Force Policy

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I. INTRODUCTION

On January 13, 2012, the American Civil Liberties Union of Nevada (“ACLU”) submitted a petition to the U.S. Department of Justice (“DOJ”) requesting for a “patterns and practices” investigation of the Las Vegas Metropolitan Police Department (“LVMPD”). Consistent with the ACLU’s petition, the ACLU reviewed the LVMPD’s Use of Force Policy (“LVMPD Policy” or “Policy”) with the goal of improving the Policy and preventing the unreasonable use of force by LVMPD officers. The ACLU reviewed use of force policies from various police departments and law enforcement agencies in Los Angeles, Denver, Louisville, Portland (Oregon), Philadelphia, and Washington DC in order to recommend substantive revisions to the LVMPD Policy. The ACLU also reviewed policy recommendations from the International Association of Chiefs of Police and the Police Assessment Resource Center—a non-profit organization that works with “monitors, law enforcement executives, civic and government officials, community groups, and other interested constituencies, [to] strengthen police oversight.”¹

After careful review of the LVMPD Policy and the other policies from around the nation, the ACLU concluded the following:

- In contrast to many police departments and law enforcement agencies around the nation, the LVMPD Policy fails to emphasize the importance of human life above the use of force.
- The LVMPD Policy does not provide officers with specific and adequate directives on the proper use of force.

¹ See http://www.parc.info/about_parc.shtml.



- LVMPD’s failure to provide its officers with adequate directives may lead officers to use force inappropriately and excessively.

Pursuant to these conclusions, the ACLU has summarized its findings and recommendations to improve the LVMPD Policy and ensure that LVMPD comports with national standards regarding the prevention, evaluation, and management of excessive use of force. This is the first of a series of memoranda that the ACLU will submit to LVMPD. The scope of this memorandum is limited to the LVMPD Policy. This memorandum will not discuss, *inter alia*, the ACLU’s recommendations to LVMPD’s training or reporting procedures. The ACLU will submit subsequent memoranda detailing the flaws of, *inter alia*, the LVMPD’s “Post Use of Force Procedures”—LVMPD’s procedures regarding the reporting and investigation of use of force incidents—and the LVMPD use of force training procedures.

Furthermore, LVMPD has expressed that the Policy is currently being revised, and the ACLU is aware that the revision process is ongoing. However, the ACLU’s recommendations should be helpful in the revision process. The ACLU is committed to providing LVMPD with any resources it may need to revise the Policy.

II. **RECOMMENDATIONS TO THE LAS VEGAS METROPOLITAN POLICE**

DEPARTMENT’S USE OF FORCE POLICY

A. Preamble or Mission Statement

Generally, a police department’s “use of force policy should begin with a preamble or general [mission] statement setting forth the police department's basic



doctrine on use of force.”² The purpose of a preamble or mission statement is to “communicate both to the community and to police officers that the preservation of human life is at all times a central tenet of the police agency.”³ A vast majority of police departments including the Los Angeles Police Department, Philadelphia Police Department, and Louisville Metro Police Department have a preamble or mission statement in its respective use of force policies.⁴

The LVMPD currently has an introduction section within the Policy that explains the Policy’s “purpose” and the “law” on the use of force.⁵ However, the Policy does not have a preamble or mission statement that appropriately requires LVMPD officers to value the protection of human life above the use of force. Specifically, the Policy states:

I. Policy

The purpose of this Order is to explain the law and this agency’s policy on the use of force. This explanation will give members the information necessary to perform their duties confidently and wisely, without subjecting themselves to criminal or civil liability or to negative administrative repercussions. To avoid repetition, and to aid in understanding the LVMPD’s universal policy, procedures regarding force are grouped in subsequent sections of this Order. Specific policies regarding certain weapons, tactics, or practices are addressed in relevant sections.⁶

² Memorandum from Shanetta Y. Cutlar, Chief – Special Litigation Section, United States Department of Justice, to the Honorable Roosevelt F. Dorn, Mayor, City of Inglewood, California (December 28, 2009) available at http://www.justice.gov/crt/about/spl/documents/inglewood_pd_Jail_findlet_12-28-09.pdf.

³ *The Portland Police Bureau: Officer-Involved Shootings and In-Custody Deaths*, Police Assessment Resource Center, August 2003, at 25.

⁴ *Id.* at 25-27.

⁵ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force (current as of March 8, 2012).

⁶ *Id.*



The Policy's introduction also fails to instruct LVMPD officers that the use of deadly force is an extreme measure to be employed only in the most limited and extraordinary of circumstances.

In contrast to the LVMPD Policy, the Los Angeles Police Department ("LAPD") sets forth the following preamble in its use of force policy:

PREAMBLE TO USE OF FORCE. The use of force by members of law enforcement is a matter of critical concern both to the public and the law enforcement community. It is recognized that some individuals will not comply with the law or submit to control unless compelled to do so by the use of force; therefore, law enforcement officers are sometimes called upon to use force in the performance of their duties. It is also recognized that members of law enforcement derive their authority from the public and therefore must be ever mindful that they are not only the guardians, but also the servants of the public.

The Department's guiding value when using force shall be reverence for human life. When warranted, Department personnel may objectively use reasonable force to carry out their duties. Officers who use unreasonable force degrade the confidence of the community we serve, expose the Department and fellow officers to legal and physical hazards, and violate the rights of individuals upon whom unreasonable force is used . . .⁷

Similarly, the opening paragraph of the Louisville Metro Police Department's ("Louisville Metro") use of force policy states:

It is the intent of the Louisville Metro Police Department that all members recognize the importance of human life,

⁷ Los Angeles Police Department, Department Manual, 556.10 Policy on the Use of Force available at http://www.lapdonline.org/lapd_manual/.



respect basic human rights and have an intolerant attitude towards the abusive treatment of all persons. Bearing this in mind, officers' use of force shall be value driven, utilizing only the force reasonable under the circumstances so as to minimize the chance of injury to themselves and others.⁸

Louisville Metro and LAPD both explicitly communicate its mission to serve as guardians of the public and to preserve human life above the use of force. Furthermore, the LAPD's preamble also explains the consequences of an officer's violation of the department's use of force policy. In contrast, LVMPD's introduction section does not direct officers to value the preservation of human life over the use of force. LVMPD also fails to provide officers with a succinct description of the consequences of an officer's violation of the Policy.

Thus, the ACLU recommends that LVMPD replace its introduction section with a "Mission Statement" section. The Mission Statement should succinctly include the following: (1) LVMPD's basic doctrine on the use of force; (2) a directive requiring officers to value the sanctity of human life over the use of force; and (3) the consequences of an officer's violation of the Policy including individual consequences (i.e. officer discipline, termination, and/or prosecution) and community ramifications (i.e. unreasonable use of force degrades the confidence of the community).

B. Definitions of Critical Terms

LVMPD must define critical terms in the Policy to ensure that the Policy's directives are clear and consistent. During its review of the Policy, the ACLU concluded

⁸ Louisville Metro Police Department, Standard Operating Procedure (February 2008).

that the Policy uses vague definitions of critical terms. The use of vague definitions may lead to misunderstandings and confusion regarding the parameters of an officer's use of force.⁹ Furthermore, vague definitions result in inconsistent application of a police department's use of force policy and "pervasive underreporting" of use of force incidents.¹⁰ Specifically, the ACLU recommends that the LVMPD revise its explanation and definition of: (1) "Reasonable Force" and "Objective Reasonableness"; and (2) "Deadly Force."

1. **"Reasonable Force" and "Objectively Reasonable"**

The LVMPD uses the term "reasonable force" to determine whether an officer's actions are "objectively reasonable" in light of the totality of the circumstances.¹¹ This section will provide recommendations to improve the Policy's definition and explanation of "reasonable force" and the "objectively reasonable" standard.

In *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court held that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."¹² The propriety of an officer's use of force is judged under "an objective [standard]: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or

⁹ Memorandum from Jonathan M. Smith, Chief – Special Litigation Section, United States Department of Justice, to the Honorable Michael McGinn, Mayor, City of Seattle, Washington at 15 (Dec. 16, 2011) (on file with the ACLU).

¹⁰ *Id.* at 5.

¹¹ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force, "II. Definitions" (current as of March 8, 2012).

¹² 490 U.S. 386, 396 (1989).



motivation.”¹³ Police departments generally cite directly to *Graham* in defining the terms “reasonable force” and/or “objectively reasonable.”¹⁴

The Policy’s “Definitions” section defines “Reasonable Force” to mean:

The degree of force that is appropriate for gaining compliance. In accordance with *Graham v. Connor*, 490 U.S. 386 (1989), the degree of force used in effecting an arrest, investigatory stop or other seizure is evaluated by using a reasonable police member standard: Whether the member’s actions were “objectively reasonable” in light of the surrounding facts and circumstances, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the member or others, and whether the suspect is actively restraining arrest or attempting to evade arrest by flight.¹⁵

Although the Policy correctly cites *Graham*, the first sentence defining reasonable force as a “the degree of force that is appropriate for gaining compliance” is problematic because it is unclear and overly broad. As it is currently formulated, an officer may interpret “reasonable force” as *the force an officer needs to employ to gain another person’s compliance* (i.e. the officer must apply force to gain a person’s compliance). The proper definition of reasonable force must focus on an officer’s objectively reasonable response to a situation based on the totality of the all the facts surrounding the officer’s interaction.

¹³ *Id.* at 397.

¹⁴ See, e.g., Los Angeles Police Department, Department Manual, 556.10 Policy on the Use of Force available at http://www.lapdonline.org/lapd_manual/ (“The Department examines [objective] reasonableness using *Graham* and from the articulated facts from the perspective of a Los Angeles Police Officer with similar training and experience placed in generally the same set of circumstances.”).

¹⁵ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force (current as of March 8, 2012).



The LVMPD must eliminate the first sentence to avoid confusion. Furthermore, the LVMPD must direct its officers that in some circumstances the amount of reasonable force needed to gain compliance may be limited to verbal communication or persuasion without the use of actual physical force. The DOJ, in a recent patterns and practices investigation of the Inglewood Police Department (“Inglewood PD”), stated that an “unclear or overly general” policy may result in “unreasonable or unnecessary” use of force by an officer.¹⁶ **Therefore, the ACLU recommends that the LVMPD eliminate the first sentence of the Policy’s definition of “reasonable force” to avoid unnecessary or unreasonable confusion by officers. Instead, the Policy’s definition of “reasonable force” should be revised to track the language of *Graham* more closely:**

The level of force that is necessary in a particular situation. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. The reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.¹⁷

¹⁶ Memorandum from Shanetta Y. Cutlar, Chief – Special Litigation Section, United States Department of Justice, to the Honorable Roosevelt F. Dorn, Mayor, City of Inglewood, California, at 5 (December 28, 2009) available at http://www.justice.gov/crt/about/spl/documents/inglewood_pd_Jail_findlet_12-28-09.pdf.

¹⁷ 490 U.S. at 396-397.

Members may either escalate or de-escalate the use of reasonable force as the situation progresses or circumstances change. Officers should recognize that their conduct immediately connected to the use of force may be a factor which can influence the level of force necessary in a given situation. When reasonable under the totality of circumstances, officers should use advisements, warnings, verbal persuasion, and other tactics and recognize that an officer may withdraw to a position that is tactically more secure or allows an officer greater distance in order to consider or deploy a greater variety of force options.¹⁸

The Policy's "Statement of Authority" is another area that needs substantive change because of its explanation of "reasonable force."¹⁹ Specifically, the Policy's "Statement of Authority" section expands the Policy's explanation of "reasonable force" by stating the following:

When assessing the need to use force, and the type and degree of force to use, members should consider the nature and extent of any threat posed by the subject, as well as all other circumstances of the encounter. In accordance with *Graham v. Connor*, 490 U.S. 386 (1989), situational factors include but are not limited to the following:

- a. The severity of the crime(s) at issue;
- b. Whether the subject poses an immediate threat to the safety of the officer(s) or others;
- c. Whether the subject is actively resisting arrest of attempting to evade arrest by flight.²⁰

¹⁸ Derived in part from Denver Police Department Use of Force Policy 105.01(1)(a) (2010).

¹⁹ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force (current as of March 8, 2012).

²⁰ *Id.*

The issue with the Policy's current "Statement of Authority" is its failure to provide officers with specific non-exhaustive factors when faced with a use of force situation. A police department's failure to provide "specific policy guidance on the appropriate use of force may lead officers to believe that they are justified in using force in situations in which it would be unreasonable or unnecessary."²¹

Consistent with the notion of greater policy guidance, other police departments have taken steps to expand their explanations of "reasonable force" by providing officers with specific factors to consider when contemplating the use of force. The LAPD, for example, provides its officers with an extensive non-exhaustive list of factors to consider when faced with a potential use of force situation²²:

Factors Used To Determine Reasonableness. The Department examines reasonableness using *Graham* and from the articulated facts from the perspective of a Los Angeles Police Officer with similar training and experience placed in generally the same set of circumstances. In determining the appropriate level of force, officers shall evaluate each situation in light of facts and circumstances of each particular case. Those factors may include but are not limited to:

- The seriousness of the crime or suspected offense;
- The level of threat or resistance presented by the subject;
- Whether the subject was posing an immediate threat to officers or a danger to the community;
- The potential for injury to citizens, officers or subjects;

²¹ Memorandum from Shanetta Y. Cutlar, Chief – Special Litigation Section, United States Department of Justice, to the Honorable Roosevelt F. Dorn, Mayor, City of Inglewood, California, at 5 (December 28, 2009) available at http://www.justice.gov/crt/about/spl/documents/inglewood_pd_Jail_findlet_12-28-09.pdf.

²² The Portland Police Bureau implements a similar list of factors. See Portland Police Bureau, *Manual of Policy and Procedure*, Policy No. 1010.20 (2010).

- The risk or apparent attempt by the subject to escape;
- The conduct of the subject being confronted (as reasonably perceived by the officer at the time);
- The time available to an officer to make a decision;
- The availability of other resources;
- The training and experience of the officer;
- The proximity or access of weapons to the subject;
- Officer versus subject factors such as age, size, relative strength, skill level, injury/exhaustion and number officers versus subjects; and,
- The environmental factors and/or other exigent circumstances.²³

Moreover, many police departments go further and explicitly phrase their explanations of “reasonable force” in a restrictive context. For example, the Denver Police Department (“Denver PD”) instructs its officers that:

Each situation is unique. Sound judgment and the circumstances of each situation will dictate the force option the officer deems necessary. Depending on the circumstances, officers may find it necessary to escalate or de-escalate the use of force . . .²⁴

The Portland Police Bureau (“Portland PB”) employs the following directive:

It is the policy of the Bureau that members use only the force reasonably necessary under the totality of circumstances to perform their duties and resolve confrontations effectively and safely. The Bureau expects members to develop and display, over the course of their practice of law enforcement, the skills and abilities that allow them to regularly resolve

²³ Los Angeles Police Department, Department Manual, 556.10 Policy on the Use of Force available at http://www.lapdonline.org/lapd_manual/.

²⁴ Denver Police Department Use of Force Policy 105.01(4)(C) (2010).



confrontations without resorting to the higher levels of allowable force.²⁵

The DOJ also adheres to a restrictive definition of “reasonable force,” specifically:

[F]orce should be used only when it is a *necessity*. [A police department] should revise its policy on the use of force to permit force only when the force used is objectively reasonable because it is necessary to overcome resistance offered in a lawful police action to compel an unwilling subject's compliance with an officer's lawful exercise of police authority.²⁶

LVMPD needs to provide its officers with greater direction and clarity in assessing circumstances where an officer may need to use force. In accordance with national police standards, **the ACLU recommends that the LVMPD provide its officers with a restrictive definition of “reasonable force.” The Policy’s definition and explanation of “reasonable force” must be thorough and include specific non-exhaustive factors that an officer should consider when faced with a use of force situation. The ACLU recommends that the LVMPD include the following directive in the Policy’s “Statement of Authority” section:**

Force should be used only when it is a necessity. The community expects and the Las Vegas Metropolitan Police Department requires that members use only reasonable force—the level of force objectively reasonable to perform their duties. The level of force

²⁵ Portland Police Bureau, *Manual of Policy and Procedure*, Policy No. 1010.20 (2010).

²⁶ Memorandum from Shanetta Y. Cutlar, Chief – Special Litigation Section, United States Department of Justice, to the Honorable Roosevelt F. Dorn, Mayor, City of Inglewood, California, at 8 (December 28, 2009) available at http://www.justice.gov/crt/about/spl/documents/inglewood_pd_Jail_findlet_12-28-09.pdf.

applied must reflect the totality of circumstances surrounding the immediate situation, including but not limited to the following factors:

- **The seriousness of the crime or suspected offense;**
- **The level of threat or resistance presented by the subject;**
- **Whether the subject was posing an immediate threat to officers or a danger to the community;**
- **The potential for injury to citizens, officers or subjects;**
- **The risk or apparent attempt by the subject to escape;**
- **The conduct of the subject being confronted (as reasonably perceived by the officer at the time);**
- **The time available to an officer to make a decision;**
- **The availability of other resources to de-escalate the situation;**
- **The training and experience of the officer;**
- **The proximity or access of weapons to the subject;**
- **Officer versus subject factors such as age, size, relative strength, skill level, injury/exhaustion and number officers versus subjects; and,**
- **The environmental factors and/or other exigent circumstances.**

The officer need only select a level of force that is necessary and within the range of "objectively reasonable" options. Officers must rely on training, experience and assessment of the situation to decide an appropriate level of force to be applied. Reasonable and sound judgment will dictate the force option to be employed. Therefore, the Department examines all uses of force from an objective standard rather than a subjective standard.²⁷

²⁷ Derived in part from Merrick Bobb, Bernard K. Melekian, Oren Root, Matthew Barge, Camelia Naguib, *The Denver Report on Use of Deadly Force*, Police Assessment Resource Center (June 2008); Los Angeles Police Department, Department Manual, 556.10 Policy on the Use of Force available at http://www.lapdonline.org/lapd_manual/.

2. **“Deadly Force”**

LVMPD’s current definition of “Deadly Force” is:

Any force which in the manner used creates a substantial risk of serious bodily injury or death. The elements that must be present for use of deadly force are: Ability, Opportunity, Imminent Jeopardy, and Preclusion.

- Ability – The subject has the ability to either kill or seriously injure the officer(s) or a third party.
- Opportunity – the subject has the opportunity to either kill or seriously injure the officer(s) or a third party.
- Imminent Jeopardy – The officer(s) is in fear of either his own life or the life of a third party and must act immediately or face either death or serious bodily injury.
- Preclusion – All other options have been reasonably exhausted prior to the use of deadly force. Deadly force must be reasonable in response to the subject’s actions.²⁸

The Policy rightfully implements a broad definition of deadly force. However, the ACLU believes that the LVMPD’s definition of “Imminent Jeopardy” is incorrect. Specifically, the correct standard for determining the appropriate level of force “is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”²⁹ The LVMPD’s definition of “Imminent Jeopardy” is based on a subjective standard: whether an officer “is in fear of either his own life or the life of a third party

²⁸ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force (current as of March 8, 2012).

²⁹ *Graham*, 490 U.S. at 397.



and must act immediately.”³⁰ **Therefore, the ACLU recommends that the LVMPD use the proper objective reasonableness standard in its definition of “Deadly Force.” Specifically, the LVMPD should adopt the following explanation of “Imminent Jeopardy”:**

Imminent Jeopardy: Based on all facts and circumstances confronting the officer and without regard to officer’s underlying intent or motivation, the officer reasonably believes that the subject poses an immediate threat to the life of the officer(s) or other third parties and the officer must act immediately to prevent death or serious bodily injury.

Another issue with the LVMPD’s definition of “Deadly Force” is that it fails to instruct officers that other less lethal force tools may rise to the level of deadly force if used inappropriately. LVMPD should expand its definition of “Deadly Force” and instruct officers that certain uses of force other than the use of a firearm may constitute deadly force. Specifically, LVMPD should instruct officers that the use of less lethal force, such as but not limited to the use of impact weapons (i.e. baton strikes to the head or other vital areas), carotid holds, low lethality shotguns, or use of electronic control devices, may rise to the level of deadly force if used inappropriately. **The ACLU recommends that the following sentences be added to LVMPD’s current definition of “Deadly Force”:**

Deadly force is that degree of force, the intended, natural, and expected consequence of which, or the misapplication of which, is likely to produce death or

³⁰ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force (current as of March 8, 2012).

serious bodily injury.³¹ Deadly force is not limited to the use of firearms. Other forms of force that may rise to the level of deadly force include but are not limited to: strikes to the head or other vital areas with impact weapons, carotid holds, low lethality shotguns or impact munitions, or the use of electronic control devices.

C. Response to Resistance and De-escalation

Police departments often provide specific guidelines and directives regarding an officer's objectively reasonable response to "resistance."³² In determining an officer's objectively reasonable response to a resisting person, the officer must have a "sufficiently strong governmental interest to justify a given use of force" based on the totality of the circumstances, and the officer "must consider the severity of the crime at issue."³³ An officer who encounters a resisting person may have a sufficient governmental interest to exercise objectively reasonable force (i.e. circumstances where the resisting person poses a significant threat to themselves and others).³⁴ However, if a person stops resisting an officer must de-escalate and limit their use of force accordingly.³⁵

Police departments often require officers to modify their response to a resisting person based on the person's level of resistance.³⁶ Some police departments go further, and explicitly require officers to de-escalate the situation if the person stops resisting.³⁷

³¹ Derived in part from Washington DC Metropolitan Police Department General Order 901.07 at 2 (2002).

³² See, e.g., Denver Police Department Use of Force Policy 105.01(1)(a) (2010).

³³ *Young v. County of Los Angeles*, 655 F.3d 1156, 1164 (9th Cir. 2011); *Liberal v. Estrada*, 632 F.3d 1064, 1079 (9th Cir. 2011).

³⁴ *Young*, 655 F.3d at 1164.

³⁵ *Id.*

³⁶ See, e.g., Denver Police Department Use of Force Policy 105.01(1)(a) (2010).

³⁷ See, e.g., Washington DC Metropolitan Police Department General Order 901.07, at 6 (2002).



For example, the Washington DC Metropolitan Police Department's ("DC Metro") use of force policy provides the following:

Members shall modify their level of force in relation to the amount of resistance offered by a subject. As the subject offers less resistance the member shall lower the amount or type of force used. Conversely, if resistance escalates, members are authorized to respond in an objectively reasonable manner.³⁸

The Portland PB's use of force policy emphasizes the need for de-escalation, specifically: "[t]he Bureau is dedicated to providing the training, resources and management that help members safely and effectively resolve confrontations through the application of de-escalation tools and lower levels of force."³⁹

In addition to de-escalation, many police departments provide specific use of force guidelines for circumstances where an officer encounters a person suffering from: a physical or mental condition, drugs or alcohol, or a language barrier. Persons with a physical or mental condition, under the influence of drugs or alcohol, or suffering from a language barrier are especially vulnerable to excessive force because these persons appear resistant to an officer's commands.⁴⁰ For example, the Denver PD's use of force policy provides its officers with the following directive pertaining to persons suffering from "a medical condition, mental impairment, developmental disability, physical limitation, language, drug interaction, or emotional crisis":

³⁸ *Id.*

³⁹ Portland Police Bureau, *Manual of Policy and Procedure*, Policy No. 1010.20 (2010).

⁴⁰ See, e.g., Mike Blasky, *Video shows officers beating motorist in diabetic shock*, Las Vegas Review Journal, Feb. 7, 2012, available at <http://www.lvrj.com/news/video-shows-officers-beating-motorist-in-diabetic-shock-138901274.html>.

It is important for officers to bear in mind that there are many reasons a suspect may be resisting arrest or may be unresponsive. The person in question may not be capable of understanding the gravity of the situation. The person's reasoning ability may be dramatically affected by a number of factors, including but not limited to a medical condition, mental impairment, developmental disability, physical limitation, language, drug interaction, or emotional crisis. Therefore, it is possible that a person's mental state may prevent a proper understanding of an officer's commands or actions. In such circumstances, the person's lack of compliance may not be a deliberate attempt to resist the officer. An officer's awareness of these possibilities, when time and circumstances reasonably permit, should then be balanced against the facts of the incident facing the officer when deciding which tactical options are the most appropriate to bring the situation to a safe resolution.

Policing requires that at times an officer must exercise control of a violent, assaultive, or resisting individual to make an arrest, or to protect the officer, other officers, or members of the general public from risk of imminent harm. Officers may either escalate or de-escalate the use of force as the situation progresses or circumstances change. Officers should recognize that their conduct immediately connected to the use of force may be a factor which can influence the level of force necessary in a given situation. When reasonable under the totality of circumstances, officers should use advisements, warnings, verbal persuasion, and other tactics and recognize that an officer may withdraw to a position that is tactically more secure or allows an officer greater distance in order to consider or deploy a greater variety of force options. When a suspect is under control, either through the application of physical restraint or the suspect's compliance, the degree of force should be de-escalated accordingly.⁴¹

⁴¹ Denver Police Department Use of Force Policy 105.01(1)(a) (2010).



In a recent DOJ investigation of the Inglewood PD, the DOJ stressed the importance of policies that guide officers in circumstances where a person may appear resistant based on a physical or mental condition or drug or alcohol impairment:

[The Inglewood PD's use of force policy] lacks sufficient guidance or illustration for officers who are confronted with suspects that are mentally ill or under the influence of drugs or alcohol. Thus, IPD's current use of force policy potentially could allow for broad inconsistencies in the use of force by officers in similar circumstances. A clearly articulated use of force policy and matrix would bring clarity and confidence to officers.⁴²

Although the LVMPD includes a definition of “resistance” within the Policy⁴³, the Policy does not have specific directives on the proper officer response to resisting persons or persons who may be perceived as resisting because of a physical or mental condition. **The ACLU recommends that the LVMPD include specific directives that require officers to: (1) modify their use of force based on a person’s level of “resistance”; and (2) de-escalate the situation once the threat of resistance has dissipated. Furthermore, the LVMPD should include specific policies for officers who are confronted with persons who appear to be resisting arrest because of a physical or mental condition, drug or alcohol impairment, or a language barrier.**

⁴² Memorandum from Shanetta Y. Cutlar, Chief – Special Litigation Section, United States Department of Justice, to the Honorable Roosevelt F. Dorn, Mayor, City of Inglewood, California at 10 (December 28, 2009) available at http://www.justice.gov/crt/about/spl/documents/inglewood_pd_Jail_findlet_12-28-09.pdf.

⁴³ See Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force (current as of March 8, 2012) (Physical Resistance is defined as “[t]he resistance offered by a person in the form of active physical aggression towards a member or another person and can include the threat of or actual use of a weapon by a person against a member or third party.”).



Accordingly, the ACLU recommends that the LVMPD adopt the Denver PD's directives regarding the proper officer response to resisting persons.

D. Fleeing Felon Rule

In *Tennessee v. Garner*, the Supreme Court held that the Fourth Amendment of the United States Constitution allows for limited circumstances where an officer may use deadly force to stop a fleeing felon.⁴⁴ Specifically, the court concluded:

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.⁴⁵

Although *Garner* does not explicitly require a suspect to pose an immediate threat to the community if allowed to escape, some courts and police departments have found that a suspect must pose an immediate threat to the community in order for an officer to employ deadly force.⁴⁶ Consistent with the recent trend requiring a fleeing felon to create immediate threat to the community, the LVMPD Policy's directive on the fleeing felon rule states:

⁴⁴ 471 U.S. 1, 11-12 (1985).

⁴⁵ *Id.*

⁴⁶ See, e.g., *Brewer v. City of Napa*, 210 F.3d 1093, 1098 (9th Cir. 2000) (held that "the Fourth Amendment reasonableness of a use of force requires careful attention to the facts and circumstances of each particular case, whether the suspect *poses an immediate threat* to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight") (emphasis in the original).

A member may use deadly force upon another person only when it is objectively reasonable to . . . [p]revent the escape of a fleeing felon who the member has probable cause to believe is an imminent threat to human life if escape should occur. In this case, members will give some warning, if feasible, prior to the use of deadly force.⁴⁷

However, some police departments implement a more restrictive iteration of the fleeing felon rule that requires officers to exercise deadly force *only if all reasonable alternatives appear impracticable and the officer reasonably believes that the use of deadly force is necessary*.⁴⁸ For example DC Metro's fleeing felon rule states:

Members may use deadly force to apprehend a fleeing felon **ONLY** when every other reasonable means of effecting the arrest or preventing the escape has been exhausted **AND**,

- a. The suspect fleeing poses an *immediate* threat of death or serious bodily harm to the member or others; **OR**
- b. There is probable cause to believe the crime committed or attempted was a felony, which involved an actual or threatened attack which could result in death or serious bodily harm; **AND**
 - (1) There is probable cause to believe the person fleeing committed or attempted to commit the crime, **AND**
 - (2) Failure to *immediately* apprehend the person places a member or the public in *immediate* danger of death or serious bodily injury; **AND**
 - (3) The lives of innocent persons will not be endangered if deadly force is used.⁴⁹

⁴⁷ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force (current as of March 8, 2012).

⁴⁸ See, e.g., Los Angeles Police Department, Department Manual, 556.10 Policy on the Use of Force, available at http://www.lapdonline.org/lapd_manual/.

⁴⁹ Washington DC Metropolitan Police Department General Order 901.07 at 7 (2002).

The ACLU recommends that the LVMPD revise the Policy’s fleeing felon rule to require officers to use deadly force only if all reasonable alternatives appear impracticable and the officer reasonably believes that the use of deadly force is necessary. The LVMPD should adopt the DC Metro’s fleeing felon rule as discussed above.

E. Foot Pursuits

A consensus of renowned law enforcement organizations, including the International Association of Chiefs of Police (“IACP”) and the Police Assessment Resource Center (“PARC”), believe that an officer’s “pursuit of a suspect on foot carries a heightened risk of death or serious physical injury to the police officer and the suspect alike.”⁵⁰ The Federal Bureau of Investigation explains the dangers of foot pursuits in detail:

On a daily basis, law enforcement officers encounter many situations that potentially place them in grave personal jeopardy. While this depicts the nature of the profession, all too frequently, officers increase the likelihood of personal injury by their desire to apprehend offenders at all cost. Their keen sense of justice and their desire to keep their communities safe from social predators sometimes cloud their judgment, which can increase the possibility of harm to themselves. While engaged in such activities as foot chases and vehicle pursuits, officers often exhibit a tendency to rush into what can be described as "the killing zone," that is, within a 10-foot radius of the offender . . . [Officers] need to realize that they may be reacting too quickly, misreading behaviors or actions of offenders, or missing danger signs or signals that offenders may send unintentionally.

⁵⁰ *The Portland Police Bureau: Officer-Involved Shootings and In-Custody Deaths Third Follow-Up Report*, Police Assessment Resource Center, February 2009.

Officers continually need to remind themselves that, when entering the killing zone, they must become exceedingly aware of the increased possibility of injury to themselves.⁵¹

The LVMPD Policy does not provide clear directives on foot pursuits. The Policy's lack of direction explains why roughly "25 percent of [LVMPD] shootings" between 2001 to 2011 "followed a foot pursuit."⁵² Furthermore, since 1990, LVMPD officers have "chased" 77 people on foot "before shooting at them."⁵³ The ACLU believes that many officer-related shootings that were preceded by foot pursuits could have been avoided if LVMPD had adequate guidelines in place.

Given the serious and potentially deadly nature of these incidents, the ACLU recommends that LVMPD adopt the IACP's Model Policy on Foot Pursuits. The IACP's Model Policy is a leading national standard cited by many police departments because it provides officers with specific directives on terminating a foot pursuit.⁵⁴ The LVMPD should adopt the Model Policy in its entirety:

Guidelines and Restrictions

- 1. The pursuing officer shall terminate a pursuit if so instructed by a supervisor.**
- 2. Unless there are exigent circumstances such as an immediate threat to the safety of other officers or civilians, officers shall not engage in**

⁵¹ Anthony J. Pinizzotto, Edward F. Davis, and Charles E. Miller, *Escape from the Killing Zone*, FBI Law Enforcement Bulletin, Vol. 71, No. 3, at 3, March 2002.

⁵² Alan Maimon, Lawrence Mower and Brian Haynes, *Las Vegas police rank high in shootings*, Las Vegas Review Journal. Nov. 28, 2011. <http://www.lvrj.com/news/deadly-force/142-dead-and-rising/las-vegas-police-rank-high-in-shootings-134255763.html>.

⁵³ *Id.*

⁵⁴ *The Portland Police Bureau: Officer-Involved Shootings and In-Custody Deaths Third Follow-Up Report*, Police Assessment Resource Center, February 2009.

or continue a foot pursuit under the following conditions:

- a. If the officer believes the danger to pursuing officers or the public outweighs the necessity for immediate apprehension.
- b. If the officer becomes aware of any unanticipated circumstances substantially increases the risk to public safety inherent in the pursuit.
- c. While acting alone. If exigent circumstances warrant, the lone officer shall keep the suspect in sight from a safe distance and coordinating containment.
- d. Into buildings, structures, confined spaces, or into wooded or otherwise isolated areas without sufficient backup and containment of the area. The primary officer shall stand by, radio his or her location, and await the arrival of officers to establish a containment perimeter. At this point, incident shall be considered a barricaded or otherwise noncompliant suspect, and officers shall consider using specialized units such as SWAT, crisis response team, aerial support, or police canines.
- e. If the officer loses possession of his firearm.
- f. If the suspect's identity is established or other information exists that allows for the suspect's probable apprehension at a later time and there is no immediate threat to the public or police officers.
- g. If the suspect's location is no longer known.
- h. If primary officers lose communications with EOC or communication with backup officers is interrupted.
- i. If an officer or third party is injured during the pursuit who requires immediate assistance and there are no other police or medical personnel able to render assistance.
- j. If the officer loses visual contact with the suspect.

k. If the officer is unsure of his or her own location or direction of travel.⁵⁵

F. Firearms Policy

Since 1990, the LVMPD has been involved in 378 officer-related shootings—the third highest officer-related shooting total per capita among the nation’s 20 largest police departments.⁵⁶ The LVMPD Policy contains a “Firearm Use” section that shares part of the blame for LVMPD’s alarmingly high incidence of officer-related shootings. This section will discuss the deficiencies of the Policy’s “Firearm Use” section and provide recommendations in accordance with best practices from police departments and law enforcement agencies nationwide.

1. Drawing and Displaying a Firearm

The drawing and displaying of a firearm may substantially increase the likelihood of an officer using deadly force.⁵⁷ Drawing and displaying a firearm also increases the risks of, among other things: accidental discharges, an officer being disarmed, unreasonable escalation of the situation, and/or an officer unnecessarily reverting to the use of deadly force.⁵⁸ Because of these risks, police departments generally implement policies and directives regarding the limited circumstances where an officer may reasonably draw or display their firearm.⁵⁹

⁵⁵ *Model Policy Foot Pursuit*, International Association of Chiefs of Police, February 2003.

⁵⁶ Alan Maimon, Lawrence Mower and Brian Haynes, *Las Vegas police rank high in shootings*, Las Vegas Review Journal. Nov. 28, 2011. <http://www.lvrj.com/news/deadly-force/142-dead-and-rising/las-vegas-police-rank-high-in-shootings-134255763.html>.

⁵⁷ Merrick Bobb, Bernard K. Melekian, Oren Root, Matthew Barge, Camelia Naguib, *The Denver Report on Use of Deadly Force*, Police Assessment Resource Center (June 2008).

⁵⁸ *Id.*

⁵⁹ *See, e.g.*, Los Angeles Police Department, Department Manual, 556.10 Policy on the Use of Force, available at http://www.lapdonline.org/lapd_manual/.

The LVMPD Policy recognizes the risks involved with officers drawing and displaying a their firearm. Currently, the Policy correctly employs the following directive: “Department members are not authorized to draw or display their firearms, except for training at the firearms range, unless the circumstances create reasonable belief that it may be necessary to use the firearm in conformance with [the Policy].”⁶⁰

However, many police departments have taken additional steps to limit the risks associated with drawing and displaying a firearm.⁶¹ For example, the LAPD firearms use policy explicitly explains to officers why prematurely drawing a weapon is discouraged:

Unnecessarily or prematurely drawing or exhibiting a firearm limits an officer's alternatives in controlling a situation, creates unnecessary anxiety, and may result in an unwarranted or accidental discharge of the firearm. Officers shall not draw or exhibit a firearm unless the circumstances surrounding the incident create a reasonable belief that it may be necessary to use the firearm in conformance with this policy on the use of firearms.⁶²

DC Metro employs an added level of accountability by requiring its officers to complete a formal report “immediately following the drawing of and pointing a firearm at or in the direction of another person.”⁶³ Furthermore, DC Metro also requires its officers

⁶⁰ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force, “Firearms Use” (current as of March 8, 2012).

⁶¹ See, e.g., Washington DC Metropolitan Police Department General Order 901.07 at 4 (2002).

⁶² Los Angeles Police Department, Department Manual, 556.10 Policy on the Use of Force, available at http://www.lapdonline.org/lapd_manual/.

⁶³ Washington DC Metropolitan Police Department General Order 901.07 at 9 (2002).



to immediately “secure or holster the firearm” after the officer has determined that “the use of deadly force is not necessary.”⁶⁴

The ACLU recommends that LVMPD expand the Policy’s provisions regarding the drawing and displaying of firearms based on the LAPD and DC Metro policies cited above. Specifically, LVMPD should adopt the following or similar language:

Unnecessarily or prematurely drawing or exhibiting a firearm limits an officer's alternatives in controlling a situation, creates unnecessary anxiety on the part of citizens, and may result in an unwarranted or accidental discharge of the firearm. An officer's decision to draw or exhibit a firearm should be based on the tactical situation and the officer's reasonable belief there is a substantial risk that the situation will escalate to the point where deadly force may be justified. When an officer has determined that the use of deadly force is not necessary, the officer shall, as soon as practicable, secure or holster the firearm. An officer shall notify their supervisor and complete a use of force incident report immediately following the drawing of and pointing a firearm at or in the direction of another person.⁶⁵

⁶⁴ *Id.*

⁶⁵ Derived in part from Merrick Bobb, Bernard K. Melekian, Oren Root, Matthew Barge, Camelia Naguib, *The Denver Report on Use of Deadly Force*, Police Assessment Resource Center (June 2008); Los Angeles Police Department, Department Manual, 556.10 Policy on the Use of Force available at http://www.lapdonline.org/lapd_manual/; and Washington DC Metropolitan Police Department General Order 901.07 at 9 (2002).

2. Limitations on the Use of a Firearm and Ammunition

Police departments often have strict guidelines regarding firearms and ammunition.⁶⁶ The Policy's "Firearms Use" section prohibits officers from discharging their firearm in three specific circumstances:

Department members are not authorized to discharge their firearm:

- 1) As warning shots
- 2) If it appears likely that an innocent person may be injured;
- 3) Either at or from a moving vehicle, unless it is absolutely necessary to do so to protect against imminent threat to life of the member or others. The imminent threat must be by means other than the vehicle itself.
 - a) Members will attempt to move out of the path of an oncoming vehicle, if possible, rather than discharge their firearms.
 - b) Members will not intentionally place themselves in the path of an oncoming vehicle and attempt to disable the vehicle by discharging their firearms.
 - c) Members will not discharge their firearms at a fleeing vehicle (a member moving away from the member) or its driver.⁶⁷

Although the "Firearms Use" section includes valid directives, the ACLU recommends that the LVMPD include additional directives to prevent the use of excessive force and improve officer accountability. First, other police departments often

⁶⁶ See, e.g., Denver Police Department Use of Force Policy 105.07 (2010).

⁶⁷ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force, "Firearms Use" (current as of March 8, 2012).



have more extensive prohibitions regarding the discharge of a firearm.⁶⁸ For example,

DC Metro's policy requires the following:

No member of the Metropolitan Police Department shall discharge his/her firearm under the following circumstances:

1. As a warning.
2. Into a crowd.
3. At or from a moving vehicle unless deadly force is being used against the officer or another person . . . Members shall as a rule, avoid tactics that could place them in a position where a vehicle could be used against them.
4. *In a felony case which does not involve an actual attack, but involves a threatened attack, unless the member has reasonable cause to believe the threatened attack is imminent and could result in death or serious bodily injury.*
5. *In any misdemeanor offense, unless under exceptional circumstances.*
6. *Solely to protect property interests.*
7. *To stop an individual on mere suspicion of a crime simply because the individual runs away.*

. . .

*When feasible, members shall identify themselves as a police officer and issue a warning before discharging a firearm.*⁶⁹

The DC Metro policy provides greater specificity and guidance than the prohibitions in the current LVMPD Policy. The ACLU intentionally italicized certain portions of the DC Metro policy to emphasize the distinctions between the DC Metro policy and the LVMPD Policy.

⁶⁸ See, e.g., Denver Police Department Use of Force Policy 105.07 (2010).

⁶⁹ Washington DC Metropolitan Police Department General Order 901.07 at 4 (2002) (emphasis added).



Second, police departments often limit the authorized weapons and ammunition options for its officers in order to “simplify [officer] accountability and training.”⁷⁰ The DOJ has found that “[a]llowing so many weapon and ammunition options for officers creates potential problems for officer-involved shootings and/or processing crime scenes where weapons have been discharged.”⁷¹ Consistent with the DOJ’s view on limiting the number of authorized weapons and ammunition, DC Metro explicitly prohibits officers from using unauthorized weapons or ammunition, specifically:

No member of the Metropolitan Police Department, in the normal exercise his or her responsibilities, shall carry, use or discharge any firearm or other weapon, except those issued or approved for use by the Metropolitan Police Department under direction of the Chief of Police.

No member of the Metropolitan Police Department shall carry, use, or discharge any unauthorized ammunition in their issued service weapons. Members are prohibited from obtaining service ammunition from any source except through official departmental channels. Members are further required to carry only the requisite amount of service ammunition as applicable to the authorized service weapon they are utilizing.⁷²

LVMPD should explicitly limit its officers’ authorized weapons and ammunition options in order to improve officer accountability.

⁷⁰ Memorandum from Shanetta Y. Cutlar, Chief – Special Litigation Section, United States Department of Justice, to the Honorable Roosevelt F. Dorn, Mayor, City of Inglewood, California (December 28, 2009) available at http://www.justice.gov/crt/about/spl/documents/inglewood_pd_Jail_findlet_12-28-09.pdf.

⁷¹ *Id.*

⁷² Washington DC Metropolitan Police Department General Order 901.07 at 4 (2002).



Third, police departments often require officers to immediately report any situation where an officer discharges his/her weapon.⁷³ For example, the Denver PD requires officers to comply with the following directive:

When any law enforcement officer, regardless of agency or department, discharges a firearm as a result of contact with a person, whether or not a death or wounding occurs, officers shall immediately notify the Denver 911 dispatcher. Officers may request I-Call communication if officers wish to reduce the number of persons who may receive the broadcast information. The landline telephone is the only way an officer can communicate with the dispatcher in confidence. Denver 911 records all radio and telephone conversations and provides them for use in an investigation upon request. This procedure also applies when investigating the death or wounding of law enforcement officers.⁷⁴

The ACLU recommends that the LVMPD include additional guidelines and directives in the Policy that limit the use of firearms and ammunition. The ACLU believes that in order to lower the number of officer-related shootings in Las Vegas, LVMPD officers need to: (1) have specific guidelines to rely upon; and (2) be held accountable for their actions. **Thus, in addition to the Policy's current prohibitions on the discharge of firearms, the ACLU recommends that the LVMPD add the following prohibitions:**

- **Discharging a firearm into a crowd.**
- **Discharging a firearm in a felony case that does not involve an actual attack, but involves a threatened attack, unless the member has an**

⁷³ See, e.g., Denver Police Department Use of Force Policy 105.07 (2010).

⁷⁴ *Id.*

objectively reasonable cause to believe the threatened attack is imminent and could result in death or serious bodily injury.

- **Discharging a firearm in any misdemeanor offense, unless under exceptional circumstances.**
- **Discharging a firearm solely to protect property interests.**
- **Discharging a firearm to stop an individual on mere suspicion of a crime simply because the individual runs away.**

Furthermore, the LVMPD policy should explicitly limit the number of authorized firearms and ammunition options available to LVMPD officers. The ACLU recommends that LVMPD adopt a similar policy as DC Metro:

No member of the Las Vegas Metropolitan Police Department, in the normal exercise his or her responsibilities, shall carry, use or discharge any firearm or other weapon, except those issued or approved for use by the Department.

No member of the Las Vegas Metropolitan Police Department shall carry, use, or discharge any unauthorized ammunition in their issued service weapons. Members are prohibited from obtaining service ammunition from any source except through official departmental channels. Members are further required to carry only the requisite amount of service ammunition as applicable to the authorized service weapon they are utilizing.⁷⁵

The LVMPD Policy should also include an immediate reporting requirement for any discharge of a firearm analogous to the Denver PD's policy.

⁷⁵ Derived from Washington DC Metropolitan Police Department General Order 901.07 at 4 (2002).

Specifically, the Policy should instruct officers to immediately report any discharge of a firearm regardless of whether or not a death or wounding occurs or whether the officer intentionally or accidentally discharged his/her weapon. The LVMPD's reporting system should ensure that an officer's report is recorded (i.e. by requiring officers to call Las Vegas 911) in order to improve a later coming investigation of the incident.

G. **“Authorized Non-Deadly Force Tools/Restraints” Versus “Authorized and Required Tools, Restraints, Techniques and Procedures”**

The LVMPD Policy includes a section on “Authorized Non-Deadly Force Tools/Restraints,” as well as, a section on “Authorized and Required Tools, Restraints, Techniques and Procedures.”⁷⁶ The “Authorized Non-Deadly Force Tools/Restraints” section lists “authorized non-deadly force tools/restraints and techniques which may be used when objectively reasonable and otherwise permitted under this policy.”⁷⁷

The “Authorized and Required Tools, Restraints, Techniques and Procedures” section provides the following directive:

When reasonably possible, only department approved weapons and training techniques should be used. Uniformed members will carry all tools and equipment required by the policies of this Agency. Non-uniformed commissioned personnel below the rank of captain are required to carry at least one less-lethal force option — baton, OC spray, or ECD — when on-duty unless the

⁷⁶ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force (current as of March 8, 2012).

⁷⁷ *Id.*

requirement is waived, via completion of LVMPD Form 483, by their Division Commander.⁷⁸

The problem with having two distinct sections—one on “Authorized Non-Deadly Force Tools/Restraints” and the other on “Authorized Required Tools, Restraints, Techniques and Procedures”—is it creates confusion. Specifically, the Policy’s “Authorized Non-Deadly Force Tools/Restraints” contains force options that may rise to the level of deadly force if used improperly. However, officers may interpret all force tools/restraints under the “Authorized Non-Deadly Force Tools/Restraints” umbrella as strictly non-deadly force tools/restraints.

For example, the Policy’s list of “Authorized Non-Deadly Force Tools/Restraints” includes the following intermediate force tools:

- “Empty Hand Tactics”;
- “Baton[s]”;
- “Low Lethality Shotguns”;
- “Electronic Control Device[s] (ECD)”;
- “Other Impact Weapons.”

However, if used improperly, the use of empty hand tactics, batons, low lethality shotguns, ECD, and other impact weapons could rise to the level of deadly force. The DOJ recently recommended that the Inglewood PD give “specific guidance and restrictions on all intermediate force weapons used . . . the circumstances under which the intermediate weapons should be used and instructions on how to properly use them.”⁷⁹

⁷⁸ *Id.*

⁷⁹ Memorandum from Shanetta Y. Cutlar, Chief – Special Litigation Section, United States Department of Justice, to the Honorable Roosevelt F. Dorn, Mayor, City of Inglewood, California

As it is currently structured, the Policy creates unnecessary confusion by categorizing many intermediate force tools under a section for “Authorized Non-Deadly Force Tools/Restraints.” **The ACLU recommends that the LVMPD consolidate the “Authorized Non-Deadly Force Tools/Restraints” and “Authorized and Required Tools, Restraints, Techniques and Procedures” sections. Specifically, LVMPD should delete the Policy’s “Authorized Non-Deadly Force Tools/Restraints” distinction, and instead, list all intermediate force tools under the Policy’s “Authorized and Required Tools, Restraints, Techniques and Procedures” section.**

H. Use of Force Tools

Police departments generally have an array of authorized force tools at its disposal, including but not limited to, empty hand tactics, Oleoresin Capsicum (“OC”) spray or chemical agents, batons or other impact weapons, handcuffs, electric control devices (“ECD”), canines, and other specialized devices/techniques. An officer’s force tools can vary in its severity from non-lethal force tools to deadly force tools depending on how the tool is used. For example, the use of a department-authorized baton can be non-lethal if used appropriately and with proper training. However, the use of an authorized baton may rise to the level of deadly force if used inappropriately (i.e. a baton strike to the head or other vital area).

In order to avoid inappropriate or excessive use of force, a police department must provide specific guidelines regarding an officer’s force tools. The DOJ in its 2011

(December 28, 2009) available at http://www.justice.gov/crt/about/spl/documents/inglewood_pd_Jail_findlet_12-28-09.pdf.



investigation of the Seattle Police Department (“SPD”), emphasized the importance of specific directives regarding the proper use of weapons and force tools:

To adequately convey Department expectations regarding other uses of force, we recommend that SPD create individualized policies specific to each weapon. In particular, the policies should create clear directives about the appropriate application of these weapons, including when it is appropriate to use the weapon, how often, and the amount of force used per weapon (*i.e.*, number of bursts of OC spray, number of cycles of an ECW, etc.). Additionally, the policy should clearly direct the preservation of evidence when these weapons are used.⁸⁰

Furthermore, the DOJ also emphasized in its investigation of the Inglewood PD that a police department should have a consistent “diagram, guide, or chart” delineating “all situations requiring [a] use of force [tool].”⁸¹ The “diagram, guide, or chart . . . should include an illustration of a progression of various descriptions of use of force and the corresponding appropriate responses by the officer.”⁸²

LVMPD explains in detail several authorized force tools and provides guidelines on the permissible use of these tools; however, the ACLU also observed that the Policy’s directives regarding the use of certain weapons and tools are inconsistent with prevailing national standards. These inconsistencies may confuse an officer and inadvertently result

⁸⁰ Memorandum from Jonathan M. Smith, Chief – Special Litigation Section, United States Department of Justice, to the Honorable Michael McGinn, Mayor, City of Seattle, Washington at 17 (Dec. 16, 2011) (on file with the ACLU).

⁸¹ Memorandum from Shanetta Y. Cutlar, Chief – Special Litigation Section, United States Department of Justice, to the Honorable Roosevelt F. Dorn, Mayor, City of Inglewood, California (December 28, 2009) available at http://www.justice.gov/crt/about/spl/documents/inglewood_pd_Jail_findlet_12-28-09.pdf.

⁸² *Id.*

in an officer inappropriately using a force tool. The purpose of this section is to discuss in detail the flaws in the Policy's directives regarding: (1) batons and impact weapons; (2) canines; and (3) low lethality shotguns.

1. **Baton and Impact Weapons**

The use of batons and impact weapons may be objectively reasonable "as a response to aggressive or combative acts."⁸³ However, a police department must instruct its officers that "a baton [or other impact weapon] is a deadly weapon."⁸⁴ Specifically, if used inappropriately, a baton "can cause deep bruising as well as blood clots capable of precipitating deadly strokes."⁸⁵ Furthermore, "[h]ead, neck, throat or clavicle injuries caused by an impact weapon of any sort can lead to death or serious physical injury."⁸⁶ Because of a baton or impact weapon's potential for serious injury or death, a police department may "engage in a pattern or practice of excessive use of force when [officers] too quickly resort to employing impact weapons . . . in non- exigent circumstances (*i.e.*, not merely as weapons of necessity)."⁸⁷

In order to prevent officers from using excessive force, the Denver PD has an extensive directive on the use of batons and impact weapons:

IMPACT TOOLS/DEVICES: Include the Department approved police batons . . . when used as an impact device.

⁸³ *Young*, 655 F.3d at 1162.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Louisville Metro Police Department, Standard Operating Procedure (February 2008).

⁸⁷ Memorandum from Jonathan M. Smith, Chief – Special Litigation Section, United States Department of Justice, to the Honorable Michael McGinn, Mayor, City of Seattle, Washington at 17 (Dec. 16, 2011) (on file with the ACLU).

- a. Impact tools/devices authorized.
 - 1. Police Batons:
 - a. Standard issue twenty-nine (29) inch baton.
 - b. Standard issue thirty-six (36) inch riot baton.
 - c. Commercially manufactured or custom made batons that closely resemble the length, diameter, composition and appearance of the standard issue baton.
 - d. An approved expandable baton upon successful completion of specialized training. The Training Bureau will maintain a list of approved expandable batons.
 - 2. **Items prohibited for carry:** All other devices including but not limited to saps, sap gloves, brass knuckles, billy clubs, batons with ornate carvings or a metal ball attached to either end, yawara sticks, iron claws, shirkins, ropes, and non-department issued leg restraint devices, including rope or cord hobbles are not authorized for carry. See OMS 111.03.
 - 3. Officers must be able to articulate a compelling need to use any other device or object as an impact weapon.
 - 4. Officers are discouraged from using a duty handgun as an impact weapon for the following reasons:
 - a. The inherent danger of an accidental discharge endangering the officer and other bystanders.
 - b. The firearm is generally an ineffective impact weapon due to its construction and weight.
- b. Impact Tool/Device - General Guidelines:
 - 1. If a person resists non-violently (Defensive Resistance), the impact tool/device may be used only to apply come-along/escort-compliance holds. A person, who remains non-violent, will not intentionally be struck with the impact tool.
 - 2. If a person forcefully resists and/or attacks an officer or other person, an officer is permitted to strike the person with an impact tool/device, provided the officer uses reasonable care to confine such strikes and power levels, to areas of the body which, if struck, are not intended or likely to cause serious bodily injury.

3. The head and neck shall not be intentionally struck with the impact tool/device, unless the officer is justified in using deadly force.
4. Impact tools/devices shall be maintained in serviceable condition and shall not be modified, altered or fitted with any unauthorized add-on device in any way that is not approved in writing by the Department. They may be marked with the officer's serial number but shall not be marked or adorned in any other fashion.
5. Defective, broken, or altered impact tools shall not be carried.
 - a. An officer who discovers an impact tool/device that is unserviceable must immediately cease carrying the item and, if issued by the Department, promptly submit a written request for replacement through the chain of command.
 - b. All officers shall receive the designated training on each impact tool or device that they intend to carry before carrying the tool or device on or off duty. The mandatory training will be recorded in the officer's permanent training record. Bureau and District Commanders will insure that the appropriate training is current and documented for all officers under their commands.
- c. Use of Impact Tools or Devices to Apply Deadly Force:
 1. An impact tool or device is generally used as a "compliance tool" to overcome non-deadly force exercised by a person resisting the officer's authority. However, in certain circumstances the impact tool or device can be properly used to apply greater force up to and including deadly physical force. Refer to CRS §18-1-707(2) for the circumstances under which deadly physical force can be used.
 2. Examples of reasonable deadly force applications of impact tool or devices include:
 - a. Controlling a suspect who has disarmed an officer and the officer reasonably believes that the suspect is about to use the firearm against the officer or another.
 - b. Controlling a suspect who is armed with a knife or other deadly weapon and due to the

suspect's close proximity, the officer reasonably believes that the suspect is threatening the officer with imminent death or serious bodily injury.⁸⁸

Contrary to Denver PD's use of force policy, the LVMPD Policy's current directives fail to provide officers with adequate guidance on the use of "batons" and "impact weapons." The LVMPD Policy currently states:

Baton (Restraint, Arrest/Control, Self Defense, and Deadly Force): a baton is a department authorized Expandable Straight Baton, Side Handle Baton or a rigid rattan baton. Batons are designed for blocking, jabbing, striking, or to apply control holds. They will be used only in accordance with department training.

. . .

Other Impact Weapons: The use of instruments as a weapon for the purpose of striking, jabbing, or cutting (i.e., flashlights, knives, radio, etc.) other than department authorized batons, is strongly discouraged and acceptable only when other authorized force responses are unavailable or ineffective.

The LVMPD Policy is inadequate because it fails to direct officers on, among other things: the circumstances under which a baton or impact weapon may be used; the proper use of batons or impact weapons; an officer's objectively reasonable response to resistance (both active resistance and passive resistance); prohibition on the use of certain impact weapons; discouraging the use of firearms as impact weapons; proper reporting procedures; and most importantly, adequate prohibitions against officers using batons to strike at vital areas (i.e. head, neck, kidneys, etc.).

⁸⁸ Denver Police Department Use of Force Policy 105.01(5) (2010).



Making matters worse, the Policy’s directives on the use of a “Baton” and “Other Impact Weapons” falls under the Policy’s section on “Authorized Non-Deadly Force Tools/Restraints” creating a presumption that the use a baton or impact weapon is non-deadly. However, the use of batons and impact weapons clearly rise to the level of deadly force if improperly applied.

The ACLU recommends that LVMPD consolidate its “Baton” and “Other Impact Weapon” directives into one directive entitled “Impact Tools and Devices.” The LVMPD’s new directives on “Impact Tools and Devices” should mirror Denver PD’s policy on impact tools/devices. In fact, the ACLU recommends that LVMPD adopt Denver’s baton and impact weapon policy verbatim. Furthermore, the LVMPD should explicitly require officers to immediately report any use of a baton or other impact weapon.

2. Canine Policy

The use of police canines may rise to the level of excessive force if the canine is managed or deployed inappropriately.⁸⁹ Canines can cause serious injuries and to a suspect or other third parties.⁹⁰ As a best practice, many police departments include specific directives on the proper use of canines within its use of force policy notwithstanding a department’s separate canine policy. For example, the Denver PD’s

⁸⁹ *Watkins v. City of Oakland, Cal.*, 145 F.3d 1087, 1093 (9th Cir. 1998) (held that “excessive duration of [a dog] bite and improper encouragement of a continuation of [a dog] attack by officers could constitute excessive force that would be a constitutional violation”).

⁹⁰ *See, e.g., Id.* at 1090 (Canine attack resulted in “multiple lacerations and punctures to [plaintiff’s] left foot . . . a jagged tearing of the skin and a puncture deep enough to [expose] tendons.” Plaintiff suffered long-term “mobility” problems and consistent “pain” from the canine bites.).

use of force policy provides officers with extensive guidelines on the use of police canines. The policies range from deployment of canines to proper procedures in the event of injury. Specifically, the Denver PD's "Police Service Dogs" section within its use of force policy states the following:

Policy

The mission of the Denver Police Department is to deliver high quality public safety services so all people may share a safe and healthy environment. The Department, in partnership with the community, will endeavor to achieve our mission by utilizing the most modern and effective practices and methods. One of those effective practices is the utilization of a well trained professional Police Canine Unit. The police canine provides many valuable services including criminal apprehension, evidence and contraband detection, locating missing persons, and public relations activities.

1. Canines assigned to the METRO/SWAT Bureau will be available to assist in searches, crowd control, tracking, explosive and narcotic detection, security at scenes of major crimes or disasters, in addition to regular patrol duties and special assignments.
 - a. If an officer needs a canine and none are on duty, the dispatcher shall be notified. The canine supervisor will be contacted and will make the determination of which canine officer to send.
 - b. Canine handlers will be in complete charge and responsible for their dogs' deployment, regardless of the ranking officer on the scene. Canine handlers will determine the appropriate utilization of their dogs.
 - c. When it is believed a suspect may be armed with a weapon likely to cause injury or death to the police service dog, the handler may

- exercise his/her discretion before deploying the dog.
- d. Any conflicts in utilization shall be reported in writing, via the chain of command, to the commanders of the officers involved, as soon as possible.
2. A police service dog may be used to perform a search or apprehension in a reasonable manner as determined by the handler and in compliance with all applicable laws and statutes regarding police use of force, the Denver Police Department Use of Force Policy, and the Canine Unit Policies and Procedures when the following conditions exist:
 - a. When there is probable cause to believe the suspect has committed a crime or is a danger to themselves or others, and
 - b. When the suspect is actively evading efforts to take them into custody and the use of a canine would reduce risk to officers or the public.
 3. Risk to Third Parties: In using police service dogs, the canine handler shall exercise reasonable care to avoid unnecessary risk of injury to persons who are not the subject of a search or apprehension.
 4. Should a police service dog injure any person:
 - a. The arrest scene and any criminal suspects will be immediately secured.
 - b. The canine officer/handler will immediately request medical assistance.
 - c. The injury will be reported on a Report of Use of Force, DPD 12, and in accordance with the requirements of OMS 105.01, Use of Force Procedures.
 - d. Injuries caused by the police service dog to persons who were not the subject of the search will be reported on a Use of Force Report.

In contrast, the LVMPD Policy does not have a section on the proper use of police canines. **Therefore, in order to comply with national standards on the use of police force, the ACLU recommends that LVMPD include a section on “Police Canines/K-9” in the Policy. Pursuant to national standards, the new “Police**

Canines/K-9” section should be derived from, or be substantially consistent with, the Denver PD’s “Police Service Dogs” section.

3. Low Lethality Shotguns or Impact Munitions

Low lethality shotguns that use beanbag rounds or other non-lethal impact munitions (i.e. rubber rounds) allow police officers to “subdue suspects in circumstances where police officers otherwise might have had to shoot the suspect.”⁹¹ However, because low lethality shotguns and impact munitions “have the potential to cause serious bodily injury or death, the use of impact munitions . . . needs to be consistent with the use of deadly force.”⁹²

The LVMPD currently has a set of policies for the use of “Low Lethality Shotguns,” which states:

Low Lethality Shotguns: (distance greater than five yards – Self Defense; distance less than five yards – Deadly Force) The low lethality shotgun may be used against persons who are armed with a weapon that could cause serious injury or death to themselves or others or when a subject poses a significant threat to the safety of the member or other persons. This includes, but is not limited to: an edged weapon, club, pipe, bottle, brick, etc. However, the low lethality shotgun should not be used against persons who are holding a firearm unless there are compelling reasons to do so which can be clearly articulated. Members must re-qualify annually with the low lethality shotgun.

1. The low lethality shotgun is a Force Option in both the Self Defense and Deadly Force categories. When

⁹¹ *The Portland Police Bureau: Officer-Involved Shootings and In-Custody Deaths Third Follow-Up Report*, Police Assessment Resource Center, February 2009.

⁹² Memorandum from Shanetta Y. Cutlar, Chief – Special Litigation Section, United States Department of Justice, to the Honorable Roosevelt F. Dorn, Mayor, City of Inglewood, California, at 14 (December 28, 2009) available at http://www.justice.gov/crt/about/spl/documents/inglewood_pd_Jail_findlet_12-28-09.pdf.

fired at a subject in the center body mass/head area from closer than five (5) yards. Two members must be present if a low lethality shotgun is deployed. It may be used as an option to deadly force only when circumstances allow the members involved to bring an incident to a safe conclusion without unnecessary risk to members.

2. Prior to its use, the officer will communicate to other officers and the subject that discharge of the low lethality shotgun is imminent, and clearly and audibly announce the same to all personnel in the immediate area unless exigent circumstances prevent this from occurring.
3. Low lethality munitions should not be used in a civil unrest situation unless authorized by a lieutenant or above in rank.
4. Officer must notify his supervisor and summon medical assistance for the subject. The officer will also provide for medical transport to UMC if the projectile causes injury or strikes the subject in center body mass or head area.
5. The supervisor will contact the Violent Crimes Section, a crime scene analyst, and the watch commander to respond when a subject has been struck with the low lethality shotgun projectile; and the supervisor will conduct a preliminary interview with the officer.⁹³

However, the ACLU's research has concluded that the Policy's directives provide officers with insufficient guidance on the proper use of low lethality shotguns. Specifically, the Policy does not include an extensive list of prohibited uses of a low lethality shotgun and tactical guidelines regarding the proper use of a low lethality shotgun. PARC recently recommended an extensive low lethality shotgun policy to the Portland PB that provides adequate guidance and directives on the proper use of low lethality shotguns. **The ACLU recommends that LVMPD adopt a revised version of PARC's low lethality shotgun policy listed below:**

⁹³ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force (current as of March 8, 2012).

Prohibitions and Cautions

- **Low lethality shotguns may only be used to subdue or incapacitate an individual engaged in active aggression to prevent imminent physical harm to the officer or another person, or to prevent individuals from threatening or committing suicide or otherwise injuring themselves or others.**
- **It is prohibited to use low lethality shotguns on persons as a form of coercion or punishment or for retaliation.**
- **Low lethality shotguns should not be used when the suspect is visibly pregnant, elderly, very young, visibly frail, or disabled unless deadly force is the only other option.**
- **Low lethality shotguns should not be used when the suspect is in an elevated position where a fall is likely to cause substantial injury or death.**
- **Low lethality shotguns should not be used when the suspect is in a location where the suspect could drown.**
- **Low lethality shotguns should not be used when the suspect is operating a motor vehicle and the engine is running or is on a bicycle or scooter in motion, absent overtly assaultive behavior that cannot be reasonably dealt with in any other safer fashion.**
- **Low lethality shotguns should not be used when an individual is handcuffed or otherwise restrained.**
- **It is prohibited to use low lethality shotguns against a crowd or a civil unrest situation unless authorized by a lieutenant or above in rank and can target a specific individual who poses an immediate threat to cause imminent physical harm; and reasonably assure that other individuals in the crowd who pose no threat of violence will not be struck by the weapon.**
- **Officers are cautioned that the target area for impact munitions substantially differs from a deadly force target area. Instead of aiming for the center mass of the body, beanbag shotguns are aimed at the abdomen, thighs or**

forearms. The head, neck, and groin should not be targeted.

- Officers are further cautioned that targeting the chest has on occasion proven lethal when a low lethality shotgun is fired at a close range of less than 21-30 feet.
- Officers are further cautioned that the accuracy of impact munitions decrease significantly after approximately 50 feet and their flight becomes erratic, striking objects to the right, left, or below the target, increasing the risk to innocent bystanders.

Tactical Considerations

- The optimal distance for a low lethality shotgun is between 21-50 feet. Accuracy drops off rapidly after 50 feet, and 80 feet appears to be a maximum functional range. A low lethality shotgun presents a risk of death or serious physical injury at less than 15 feet when fired at the chest, head, neck, and groin.
- Two members must be present if a low lethality shotgun is deployed.
- Officers should also be prepared to employ other means to control the individual — including, if necessary, other force options consistent with agency policy—if the individual does not respond sufficiently to the low lethality shotgun and cannot otherwise be subdued.

Verbal Warnings

- In cases in which the distance between the officer and the target makes it practical, and unless it would put an officer or any other person at risk of death or serious physical injury, a verbal announcement of the intended use of a low lethality shotgun shall precede the firing of the round in order to:
 - Provide the individual with a reasonable opportunity to voluntarily comply.
 - Provide other officers and individuals with a warning that impact munitions may be deployed.

Operations

All low lethality shotguns must be painted in a bright color clearly and instantly distinguishable from a shotgun firing live rounds. Members must re-qualify annually in order to use a low lethality shotgun.

Handling Suspects after Deployment

- **Officers should take advantage of the window of opportunity while the subject is under the effects of the impact munitions round to handcuff and take the subject into custody.**
- **Officers shall notify a supervisor that a low lethality shotgun has been deployed.**
- **Officers shall have medical personnel examine any suspect that has been stunned by an impact munitions round as soon as it can be done safely.**
- **Officers shall transport or arrange transport immediately to the emergency room of the nearest hospital if an individual who has been hit with an impact munitions round is unconscious, complaining of pain, demonstrating difficulty breathing, or exhibiting signs of severe stress, excited delirium, hyperventilation, high temperature, or is under the influence of controlled substances or alcohol.**

4. Electric Control Device

Electronic control devices or Tasers (collectively referred to as “ECD” or “ECW”) are force tools that “deliver a high-voltage, low amperage, electro-shock.”⁹⁴ ECDs are “meant to help control persons who are actively resisting authority or acting aggressively.”⁹⁵ However, the use of an ECD may lead to death or significant injury if

⁹⁴ *USA: Excessive and lethal force? Amnesty International's concerns about deaths and ill-treatment involving police use of Tasers*, Amnesty International (Nov. 29, 2004), available at <http://www.amnestyusa.org/node/55449?page=show>.

⁹⁵ *2011 Electronic Control Weapon Guidelines*, Police Executive Research Forum, at 8 (2011).

used inappropriately.⁹⁶ Because of the inherent risks associated with ECDs, police departments nationwide employ detailed directives and guidelines on: (a) the proper deployment and use of an ECD; (b) the prohibited uses of an ECD; (c) the proper response after deploying an ECD; and (d) the proper medical response to a person who has been exposed to an ECD. This section will discuss the LVMPD Policy on ECDs and recommendations to improve the Policy.

(a) LVMPD's Directives Regarding the Use of ECDs

The LVMPD Policy contains the following basic directives regarding the proper use of ECDs:

Electronic Control Device (ECD): Electronic Control Devices will be used only in accordance with department training and this policy. The ECD is one option available to officers. Like the baton, OC spray, or empty hand techniques, the ECD may not be effective in every situation. Officers must assess the effectiveness of each application and determine whether further applications are warranted or a different tactic should be employed.

1. The ECD may be used during custodial or arrest situations only . . . ECD usage is intended to quickly and safely take into custody a subject who exhibits combative, bizarre, or specific (see below) behavior(s) that an officer reasonably believes could cause injury to himself or others.
2. Department members are not authorized to draw or display the ECD except for training, unless the circumstances create reasonable belief that it may be necessary to use it. The ECD will be handled in the same manner as a firearm and will be secured prior to entering any detention facility.
3. . . .

⁹⁶ See, e.g., *Oliver v. Fiorino*, 586 F.3d 898, 904 (11th Cir. 2009) (suspect died after “being struck by a Taser” more than seven times).

4. Just as in any of the use of force options, the following will be considered prior to deploying the ECD:
 - a. The likelihood that the officer or suspect may be injured if another force option is used;
 - b. The severity of the crime committed by the suspect;
 - c. If the suspect poses an immediate threat to the officer(s) or others;
 - d. If the suspect is actually resisting arrest.⁹⁷

Although the Policy's basic directives on the use of an ECD are thorough, the ACLU believes that the policy could be improved by adding greater restrictions on the use of ECDs. For example, the Police Executive Research Forum's ("PERF") *2011 Electronic Control Weapon Guidelines* ("PERF ECD Model Policy") provides the following directive: "Personnel should always be able to articulate the justification for going outside of agency policy or training."⁹⁸ The purpose of this directive is to build greater officer "accountability" and to minimize "the opportunity for negative outcomes."⁹⁹ **The ACLU recommends that LVMPD include the following sentence in the Policy's opening paragraph regarding ECDs: "Members should always be able to articulate the justification for going outside of agency policy or training."**

PERF also recommends that a police department's "comprehensive use-of-force policy should recognize that ECWs—as "less-lethal" and not "nonlethal" weapons—have the potential to result in a fatal outcome even when used in accordance with policy and training."¹⁰⁰ **The ACLU recommends that LVMPD explicitly instruct officers that**

⁹⁷ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force (current as of March 8, 2012).

⁹⁸ *2011 Electronic Control Weapon Guidelines*, Police Executive Research Forum, at 17 (2011).

⁹⁹ *Id.* at 16.

¹⁰⁰ *Id.* at 12.

ECDs are less-lethal weapons that have potentially fatal consequences even when used in accordance with the Policy.

In addition to the Policy's basic directives, the Policy also gives specific guidelines on the proper deployment of an ECD:

ECD Deployment . . . When displaying an ECD, officers will:

1. Give a warning, when practical, to the subject and other officers before firing the ECD at the subject;
2. For a frontal shot, reasonable effort should be made to target lower center mass and avoid intentionally targeting the head, neck, groin and chest. It is recognized that the dynamics of each situation and officer safety may not permit the officer to limit the application of the ECD probes to a precise target area . . . [However,] [b]ack shots remain the preferred target area when practical.
3. When encountering subjects wearing heavy or loose clothing on the upper body, consider the legs as a target.
4. Assess the suspect's actions after each application of the ECD, only use the number of ECD exposures which are objectively reasonable to accomplish lawful objective(s);
5. Minimize Repeated, Continuous, and/or Simultaneous Exposures. Once a suspect becomes compliant, he should be handcuffed without a continuous cycle. Repeated, continuous, and/or simultaneous use of ECD devices should be used only when objectively reasonable given the totality of the circumstances and reasonable efforts should be made to continuously assess the circumstances to minimize the number of ECD exposures;
6. Control and Restrain Immediately. Begin control and restraint procedures, including cuffing under power, as soon as it is reasonably safe and practical to do so in order to minimize the total duration of ECD exposure(s) . . .

7. ...
8. Refrain from use of the Touch Stun except in situations where the Probe deployment is not possible or completed and the immediate application of the Touch Stun will likely bring a subject under control into custody. Touch Stun will be made below the neck area whenever possible (chest, legs, etc.). Multiple Touch Stuns are discouraged and should be applied by one officer at a time, and must be reported and justified on the Use of Force form. If initial application is ineffective, officer will reassess situation and consider other available options. Touch stun (sic) may be used to effect a two-point immediate action, or to complete a three-point contact as described in training.¹⁰¹

The Policy provides officers with very specific guidelines; however, the LVMPD needs to provide officers with additional guidelines to ensure that officers are not subjecting persons to repeated, continuous, and/or simultaneous exposures to ECDs. Currently, the Policy correctly directs officers to “minimize repeated, continuous, and/or simultaneous exposures [to ECDs].”¹⁰² However, some police departments provide greater specificity regarding minimizing repeated, continuous, and/or simultaneous exposures.¹⁰³ PERF, for example, published the following model policies on repeated, continuous, and/or simultaneous exposures:

Personnel should use an ECW for one standard cycle (five seconds) and then evaluate the situation to determine if subsequent cycles are necessary. Personnel should consider that exposure to the ECW for longer than 15 seconds (whether due to multiple applications or continuous cycling) may increase the risk of death or serious injury. Any subsequent applications should be

¹⁰¹ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force (current as of March 8, 2012).

¹⁰² *Id.*

¹⁰³ *See, e.g.*, Louisville Metro Police Department, Standard Operating Procedure (February 2008).

independently justifiable, and the risks should be weighed against other force options.

...

Personnel should not intentionally activate more than one ECW at a time against a subject.¹⁰⁴

The ACLU recommends that the LVMPD adopt the PERF model policy regarding repeated, continuous, and/or simultaneous exposure to ECDs in its entirety.

(b) The LVMPD Policy's Prohibited Uses of an ECD

The Policy provides officers with the following prohibited uses of an ECD:

The ECD will not be used:

- [1.] When the officer knows a subject has come in contact with flammable liquids or is in a flammable atmosphere;
- [2.] When the subject is in a position where a fall may cause substantial injury or death;
- [3.] Punitively for purposes of coercion, or in an unjustified manner;
- [4.] To escort or jab individuals;
- [5.] To awaken unconscious or intoxicated individuals;
- [6.] When the subject is visibly pregnant, unless deadly force is the only other option.
- [7.] When the subject is in handcuffs/waist restraints;
- [8.] When a subject displays solely passive resistance/simple disobedience (i.e. peaceful protest, refusal to stand, non-aggressive verbal resistance, etc.);
- [9.] When a subject is fleeing as the sole justification for use of the ECD.

The ECD should not be used in the following circumstances unless there are compelling reasons to do so which can be clearly articulated:

- [1.] When the subject is operating a motor vehicle;
- [2.] When the subject is holding a firearm;

¹⁰⁴ 2011 *Electronic Control Weapon Guidelines*, Police Executive Research Forum, at 20 (2011).

- [3.] When the subject is at the extremes of age or physically disabled;
- [4.] In a situation where deadly force is clearly justifiable unless another officer is present and capable of providing deadly force to protect the officers and/or civilians as necessary.

The Policy provides an extensive list of prohibited ECD uses; however, the ACLU believes that the LVMPD must include additional prohibited uses to prevent the inappropriate use of ECDs. First, the deployment of multiple ECDs by several officers may be problematic because a person may be subjected to repeated, continuous, and/or simultaneous exposures to an ECD.¹⁰⁵ Currently, the Policy does not explicitly prohibit the deployment of multiple ECDs by multiple officers. **Given the substantial risk of death or serious injury associated with the deployment multiple ECDs, the ACLU recommends that the LVMPD adopt the following directive: “Personnel should not intentionally activate more than one ECW at a time against a subject.”¹⁰⁶**

Second, the Policy does not explicitly prohibit officers from intentionally targeting sensitive areas (i.e. neck, head, groin, etc.). Instead, in the Policy’s deployment guidelines, the Policy directs officers to “avoid intentionally targeting the head, neck, groin and chest.”¹⁰⁷ **The ACLU recommends that the LVMPD explicitly prohibit police officers from intentionally targeting sensitive areas. The LVMPD should adopt the following language and include it throughout its directives on ECDs:**

¹⁰⁵ See Brian Haynes and Lynnette Curtis, *Family still questions man's Taser death*, Las Vegas Review Journal, Jan. 22, 2012, available at <http://www.lvrj.com/news/family-still-questions-man-s-taser-death-137844428.html> (Two Nevada Highway Patrol officers tasered a suspect “19 times” leading to his death).

¹⁰⁶ Derived from *2011 Electronic Control Weapon Guidelines*, Police Executive Research Forum, at 20 (2011).

¹⁰⁷ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force (current as of March 8, 2012).

“Members should not intentionally target sensitive areas (e.g., head, neck, groin, or chest area).”¹⁰⁸

(c) The LVMPD Policy’s Post-ECD-Deployment Procedures

The LVMPD implements the following response procedures after the deployment of an ECD:

ECD Deployment:

- a. [O]fficers will:
 - [1.] Notify immediate supervisors that an ECD has been used as soon as reasonably possible after deployment.
 - [2.] Notify detention personnel, at the time of booking, that the subject has been struck with ECD probes or received a touch scan.
- b. The police supervisor will:
 - 1) Respond to the scene when a (sic) ECD has been used and notify the area lieutenant and/or watch commander that an ECD has been used;
 - 2) Conduct an investigation of the ECD usage to determine justification and adherence to procedure, as well as to correct any identifiable training deficiencies (NOTE: Acting supervisors are not authorized to complete this investigation);
 - 3) Assist with the completion of the Use of Force Report in Blue Team as necessary;
 - 4) Supervisor will complete a review of the ECD camera and/or firing log and upload the ECD information into the OnBase system through the ECD kiosk(s), or attach to upload to the Blue Team report if the kiosk fails to record the data;
 - 5) Ensure photographs are taken of the site of the puncture/probe impacts and any related injuries and attached to the Use of Force Report in Blue Team.
- c. The Police Area Lieutenant/Watch Commander will respond to the scene (if serious bodily injury

¹⁰⁸ Derived from *2011 Electronic Control Weapon Guidelines*, Police Executive Research Forum, at 20 (2011).

resulted from the use of the ECD, or as otherwise advisable).

Following an ECD deployment

- a. The officer will:
 - 1) Handle the probes the same as contaminated needles and sharps in accordance with department bio-hazard disposal procedures . . . and impounds all probes, wires and cartridges as evidence. In cases of deadly force or in-custody death CSI will impound the probes.
 - 2) Complete automated Use of Force Report in Blue Team (including probe impact locations) and attaches any photos.
 - 3) Present ECD used to his supervisor for data upload prior to end of shift if a reportable use of force incident occurs.
 - 4) Forward a copy of the Use of Force Report, via Blue Team, to the supervisor.
- b. The officer's supervisor will:
 - 1) Ensure the officers complete reports and that required photographs are included;
 - 2) Verify the probes, wires and cartridges are properly impounded and arrange for replacement cartridges;
 - a) Supervisor will impound probes, wires and cartridges as evidence if the officer cannot (i.e. due to injury, etc.);
 - b) Accidental discharges will not require impounding of the probes, wires and cartridges unless there has been an injury.
 - 3) Upload the data record of the ECD prior to the end of shift in which a reportable use of force incident occurs into a kiosk, or attach it to the Use of Force Report in Blue Team if the kiosk fails to record the data (X26 uploads must be attached in either a .pdf or .rtf format).
- c. The Bureau/Area Command Supervisor ensures that:
 - 1) Data from the ECD has been uploaded;
 - 2) If the ECD has video, the bureau/area commander has viewed the video prior to completing the blue (sic) Team administrative review;
 - 3) The Use of Force report is complete accurate and forwards the report to the Internal Affairs Section via Blue Team;

- 4) A control log is maintained for ECD/cartridge check-out and check-in, and repairs.¹⁰⁹

Although the LVMPD Policy provides specific directives following the deployment of an ECD, the Policy could be improved by implementing certain guidelines from the PERF ECD Model Policy. Specifically, **the PERF ECD Model Policy provides the following policies:**

- **ECWs [are] regulated while personnel are off duty under rules similar to those for service firearms (including storage, transportation, use, etc.).**
- **A supervisor should respond to all incident scenes where an ECW was activated, including but not limited to accidental discharges.**
- **When possible, supervisors should anticipate on-scene officers' use of ECWs and should respond to calls for service that have a high propensity for the use of an ECW.**
- **A supervisor should conduct an initial review of each ECW activation, and every instance of ECW use, including unintentional activation, should be documented.**
- **When reviewing downloaded ECW data, supervisors and investigators should be aware that the total time of activation registered on an ECW may not reflect the actual duration of ECW application on a subject.**
- **[The Department] periodically conduct[s] random audits of ECW data downloads and reconcile use-of-force reports with recorded activations . . . [and] take[s] necessary action as appropriate when inconsistencies are detected.**

¹⁰⁹ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force (current as of March 8, 2012).



- [The Department] verify[ies] that all personnel who carry ECWs have attended initial and recertification training.¹¹⁰

The ACLU recommends that LVMPD include the PERF ECD Model Policies listed above.

The Policy also requires officers to report “three types of ECD applications,” specifically:

- a. Spark Display – a non-contact demonstration of the ECD's ability to discharge electricity. This is conducted only when the cartridge has been removed. The purpose of this display is to convince the subject to comply with a lawful order and avoid the ECD being deployed in the Touch Stun or Probe mode;
- b. Touch Stun - contact is made by pressing the front of the ECD (cartridge removed) into the body of a subject resisting lawful orders, and activating the ECD. The Touch Stun causes significant localized pain in the area touched by the ECD but does not have a significant effect on the central nervous system. The Touch Stun does not incapacitate a subject but may assist in taking a subject into custody.
- c. Probe - The ECD is most effective when the cartridge is fired and the probes make direct contact with the subject. Proper application will result in temporary immobilization of the subject and provide the officer a "window of opportunity" in which to take the subject safely into custody. Optimum range for probe deployment is seven to 15 feet, with a 21 foot maximum distance.¹¹¹

¹¹⁰ 2011 *Electronic Control Weapon Guidelines*, Police Executive Research Forum, at 22-23 (2011).

¹¹¹ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force (current as of March 8, 2012).

Some police departments require its officers to report any ECD deployment, including accidental discharges.¹¹² For example, the Eugene Police Department implements the following policy: “All Taser discharges shall be documented in the related arrest/crime report and on the Taser report form. Accidental discharges of a Taser cartridge will also be documented on the Taser report form.”¹¹³ **The ACLU recommends that the LVMPD include the following language in the Policy’s current directives regarding the reportable use of ECDs:**

Officers are required to report all ECD discharges, including but not limited to:

- a. Accidental Discharge – any situation where an ECD is accidentally or inadvertently deployed, even if the accidental/inadvertent deployment did not result in injury;**
- b. Spark Display [retain current language];**
- c. Touch Stun [retain current language]; or**
- d. Probe [retain current language].**

(d) The Policy’s Medical Response Procedures

The LVMPD Policy provides insufficient directives regarding the appropriate medical response procedures after a person has been exposed to an ECD. Currently, the Policy does not have an independent section delineating an officer’s actions to aid a person who has been exposed to an ECD. Specifically, the Policy provides the following directives:

¹¹² See, e.g., Eugene Police Department, Policy 309 Taser Guidelines (2007).

¹¹³ *Id.*

All subjects on which an ECD is used will be screened for injuries. If the result of the screening indicates an injury exists, the appropriate medical response will be provided . . .

. . .

If one or more probes strike the head, neck, or groin, officers shall take prompt and ongoing care to monitor the condition of the subject and ensure probes penetrating these areas are removed by medical personnel . . .

Ensure the probes are removed from the subject's skin by an ECD certified officer . . .

. . .

Handle the probes the same as contaminated needles and sharps in accordance with department bio-hazard disposal procedures . . .¹¹⁴

The Policy's current directives regarding an officer's appropriate medical response post-ECD-deployment are inadequate because it fails to give officers specific guidelines on the medical risks associated with ECD exposure. **Specifically, ECDs "have been cited by medical authorities as a cause of, or contributing factor in, some [police-related] deaths."**¹¹⁵ The ACLU believes that the Policy should be revised to include specific directives regarding medical risks and considerations after an officer uses an ECD. The ACLU recommends that LVMPD adopt the following policies regarding proper medical action:

Medical Considerations

Personnel should be aware that there is a higher risk of sudden death in subjects under the influence of

¹¹⁴ Las Vegas Metropolitan Police Department, Department Manual, 6/002.00 Use of Force (current as of March 8, 2012).

¹¹⁵ *2011 Electronic Control Weapon Guidelines*, Police Executive Research Forum, at 13 (2011).

drugs and/or exhibiting symptoms associated with excited delirium. In addition, positional asphyxia—a death that occurs when a subject’s body position interferes with breathing, either when the chest is restricted from expanding properly or when the position of the subject’s head obstructs the airway—may exacerbate the condition of any individual who has received an ECW application.

When possible, emergency medical personnel should be notified when officers respond to calls for service in which they anticipate an ECW application may be used against a subject.

All subjects who have been exposed to ECW application should receive a medical evaluation by emergency medical responders in the field or at a medical facility. Subjects who have been exposed to prolonged application (i.e., more than 15 seconds) should be transported to an emergency department for evaluation. Personnel conducting the medical evaluation should be made aware that the suspect has experienced ECW activation, so they can better evaluate the need for further medical treatment.

All subjects who have received an ECW application should be monitored regularly while in police custody even if they received medical care. Documentation of the ECW exposure should accompany the subject when transferred to jail personnel or until the subject is released from police custody.

ECW probes should be treated as a biohazard. Personnel should not remove ECW probes from a subject that have penetrated the skin unless they have been trained to do so. Only medical personnel should remove probes that have penetrated a subject’s sensitive areas or are difficult to remove.¹¹⁶

¹¹⁶ Derived from *2011 Electronic Control Weapon Guidelines*, Police Executive Research Forum, at 14 and 21 (2011).