

FAVORABLE
HB - 1309
Criminal Procedure - Law Enforcement Procedures - Use of Force
Hearing: March 3, 2020 @ 1pm – Judiciary
Jo Saint-George, Esq.

Chair, Vice Chair and the Committee,

Thank you for the opportunity to provide support for HB-1309 the Law Enforcement Procedures for Use of Force. As a community social justice and criminal justice reform advocate, I submit this letter of support for HB-1309.

Maryland is one of nine states with no codified state law on police use of force. The state defers to federal law and the guidelines set by individual police departments. After a careful review of the Use of Force policies published by the police departments in Maryland's 24 counties, I have determined that approximately 18 of the 24 Maryland county law enforcement agencies have use of force policies that follow generally the broad terminology of the U.S. Supreme Court's Graham decision, and some are similar to California recently passed Use of Force law [AB 392](#). (See the attached county by county Use of Force Comparison Table attached as Exhibit A) While California's law is a step in the right direction in an attempt to curtail what appears to be the indiscriminate use of deadly force by officers, that law does not go far enough to address the serious problems Maryland police have with the inappropriate use of deadly force that has resulted in many deaths and serious bodily injuries by Maryland residents. Consequently, I support HB-1309 because it models Baltimore City's new Use of Force Policy published in November 2019 (the "BCPD Policy"). Baltimore City's new police is the best model to follow for the following reasons.

Why Baltimore Use of Force Policy Should Become Law

1. The Baltimore City Police Department (BCPD) size, city demographics and resources are more consistent with the police departments around the state;
2. The BCPD Policy is not written in the affirmative, but rather the Policy clearly and with great detail provides instruction on the levels of "force" police officers "cannot use". Because it is understood based on state common law and federal statutory law that all police officers have the authority to use deadly force, a new state law does not need to codify what is already the law. Rather the new law must set a standard that "restricts" what is presumptively authorized by law;
3. The BCPD Policy focuses on de-escalation, protecting citizens from use of force tactics that the courts have determined to be excessive force and therefore unconstitutional, and it provides 21st Century policing tactics that encourages officers to use deadly force as a last resort; and
4. The BCPD Policy also meets the guidelines the Department of Justice put in place pursuant to the DOJ consent decree in 2017 that resulted from the DOJ's investigation into

Baltimore's policing practices that revealed officers routinely violated the civil rights of residents and especially people of color.

5. The BCPD Policy was developed in collaboration with the Department of Justice and a monitoring team with input from officers and the public, which includes Maryland residents.
6. A policy codified into law sets a standard by which all police officers can be held accountable.

It is important to note that in a special report by Amnesty International in 2016 regarding Maryland's lack of a "use of force" law, it was pointed by Justin Mazzola, Deputy Director of Research, (after his review of the various Maryland County police use of force policies), that "the department-level policies for use of force standards in Maryland are insufficient to bring about change" and limits police accountability because a violation of a department policy is just an "administrative infraction." Furthermore, law professor, David A. Harris at the University of Pittsburgh, who has studied police misconduct for years commented in a [Baltimore Sun 2016 article](#) on police use of force that "states can pass laws that are more restrictive" than the use of force standard set forth by the U.S. Supreme Court in 1989 in the [Graham v. Conner](#) case, which Professor Harris described as a "pretty open-ended" standard.

Courts Should No Longer Legislate "Use of Force" From the Bench

It was in *Graham* that the Supreme Court held that the "reasonableness" of a particular use of force by an officer must be judged from the perspective of a "reasonable officer" on the scene, rather than with the 20/20 vision of hindsight.

This *Graham* standard, however, has resulted in courts around the country giving police officers a "presumption" of innocence, wherein whatever an officer says were the facts at the time of an incident based on the officers "perspective" is treated by the courts as "true" and uncontroverted by any other forensic and empirical evidence. This "presumption" has resulted in a serious lack of accountability of officer to civilians because officers are treated as if they can do "no wrong" or that everything they do is right.

Moreover, the lack of state law that restricts an officer use of deadly force has also led to the courts determining when deadly force can or cannot be used, rather than the state legislator which has the duty to create binding law that is applicable to all and is not a moving target standard. For decades, courts have determined what is the "reasonable amount of force that an officer can use", which is determined on a "case by case" basis. This case by case approach judicial law making has resulted in inconsistent rulings by the courts, which have failed to provide a framework that provides police officers with any solid direction as to when deadly force should not be used.

A prime example is the April 25, 2019 opinion of Baltimore Circuit Court Judge, Fader, C.J., Berger, Friedman, JJ. who reversed the decision by the competent pool of jurors in the [Austin v. Blair](#) civil lawsuit wherein jurors found that Officer Austin had used excessive force. Rather than allowing the decision of the factfinding jury to stand, Judge Friedman reversed the jury's decision and outlined the following:

“Under this standard [the US Supreme Court standard in *Graham*], a police officer's actions are measured against "how a reasonably prudent officer would respond faced with the same difficult emergency situation." *Richardson*, [361 Md. at 452](#) (citing *Boyer v. State*, [323 Md. 558, 589](#) (1991)). Because what constitutes "reasonable" conduct is not easily defined, application is not mechanical and courts must pay "careful attention to the facts and circumstances of each particular case." *Richardson*, [361 Md. at 452](#) (citing *Graham*, [490 U.S. at 396](#)). Importantly, the standard is whether the officer's actions were *reasonable*, not whether they were the most prudent or whether there were better, possibly less intrusive, means available. *Richardson*, [361 Md. at 455](#) (citing *Schulz v. Long*, [44 F.3d 643](#) (8th Cir. 1995))....Depending on the situation, even an unarmed assailant can put an officer at risk of a violent physical altercation. *Mitchell v. Schlabbach*, [864 F.3d 416, 422-23](#) (6th Cir. 2017)....To warrant submission to a jury, the officer's actions must be so flagrant that they raise the question of whether any reasonable officer under the same circumstances would have made the same choice. *Roy v. Inhabitants of City of Lewiston*, [42 F.3d 691, 696](#) (1st Cir. 1994) ("[W]e are concerned here not with proof of raw facts but whether, on known or assumed facts, police behavior can be deemed egregious enough to submit the matter to a jury.")”

While the Supreme Court held in *Graham* that the reasonableness of an officers use of force must be based on the objective perspective of the officer, Judge Friedman has gone way further than the Supreme Court’s standard and has set a new standard based on whether an officers conduct is “egregious”, irrespective of what the “proof of raw facts” may present. Although Judge Friedman’s opinion has been declared an “unpublished opinion”, which means it should not be “relied” upon as law, the opinion which is in the public domain, nevertheless can and will influence other judges and law makers. This type of legislation from the bench leaves communities hardest hit by the so called “egregious” behavior of police without any recourse and redress for the violation of their rights. The courts keep setting new standards that are moving targets based on whatever outcome a court deems necessary and expedient at the time. This type of judicial law-making is no longer tolerable by communities over policed and subjected to the most extreme acts of police misconduct.

Yet, Maryland legislators, who have the authority to create law and to define legal terms to effectuate the goal and mission of a law that is most consistent with the needs of Maryland residents and new narratives around policing, have not legislated to codify into law a set restrictions of the “Use of Force”. Consequently, it is time for the Maryland General Assembly to act and set a standard vetted by experts with community input that models the Baltimore policies.

While those in opposition may argue that the BCPD Policy should not govern other parts of the state because other counties do not have the issues identified in the DOJ 2017 Investigative Report. However, the many incidents of the inappropriate use of deadly force by police officers around the state over the last several years prove that Baltimore’s Policy should be the standard for Maryland’s new Use of Force law.

For example, in Ocean City in 2013, a police officer used excessive force to take down and handcuff a pregnant African-American woman that resulted in the loss of the baby¹; in September 2018, a Caroline County officer used force that resulted in the death of an unarmed African-American - 19 year old male Anton Black - who was reported to have been suffering from mental illness²; and in June 2018 in Montgomery County Police Officer shot and killed an unarmed African-American male, Robert White, who also suffered from mental illness while simply walking down a street in Silver Spring, Maryland³, and most recently in July 2019, Montgomery County Officer was charged with two counts of second-degree assault for slamming a man's head into the pavement after subduing and handcuffing the gentleman.⁴ These acts of officers around the state reveal that it is time for restrictive legislation to be implemented.

Police Misconduct Is Not A Reflection Of Just a "Few Bad Apples" in the Pot

Since the Rodney King beating by Los Angeles Police Department in the 1990s, police departments across the nation, including in Maryland, have declared over and over that the "bad" acts of officers is only performed by a "few bad apples" in the department. However, based on a recent USA Today report that revealed the results of a national year-long investigation into police misconduct, one can conclude that the "few" bad actors claim, is just not true.

In the *US Today* [report released on October 14, 2019⁵](#) it revealed that at least 85,000 law enforcement officers across the USA have been investigated or disciplined for misconduct over the past decade. In 44 states, including Maryland, at least 30,000 law enforcement officers have lost their certification. The *U.S. Today* investigation further reveals that most misconduct involves routine infractions, but the records collected by the publication also revealed tens of thousands of cases of serious misconduct and abuse. Specifically, the report includes:

- 22,924 investigations of officers using excessive force;
- 3,145 allegations of rape, child molestation and other sexual misconduct; and
- 2,307 cases of domestic violence by officers.

The report noted that dishonesty is a frequent problem. The records also document:

- at least 2,227 instances of perjury, tampering with evidence or witnesses or falsifying reports; and
- 418 reports of officers obstructing investigations, most often when they or someone they knew were targets.

¹ See WBAL story, July 25, 2013, "[Pregnant Woman Struggles with Police on Ocean City Beach.](#)"

² See story in Baltimore Sun, Jan. 18, 2019 "[Another young black man died in an encounter with police. Four months later, why are we still waiting for answers?](#)"

³ See WTOP story "[Silver Spring residents demand action after investigation clears officer in death of Robert White](#)"

⁴ See NBC Washington Story by "[Officer Facing 2 Charges After Video Shows Him Slam Knee Into Suspect's Head by Carissa](#)"

⁵ See <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/>

Despite these findings, it was discovered that less than 10% of officers in most police forces get investigated for misconduct. Yet some officers are consistently under investigation. Nearly 2,500 have been investigated on 10 or more charges. Twenty faced 100 or more allegations, yet they kept their badge for years.

The USA Today report makes it painfully clear that Maryland must legislate a standard by which officers are held to account. The law must spell out exactly the “unacceptable” uses of force by officers so that there are clear standards that are applied systematically to all officers.

Therefore, I request a favorable report for HB-1309.

Jo Saint-George, Esq.