

Report on November 9, 2011

Committee of U.C. Berkeley Police Review Board

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Submitted to Chancellor Birgeneau on May 29, 2012*

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Commonly Used Abbreviations

CMT = Crisis Management Team

PRB = Police Review Board

PRT = Protest Response Team

UCPD = U.C. Berkeley Police Department

I. Charge to the Police Review Board

On the morning of November 9, 2011, thousands of students, faculty, staff, and community members gathered for a noontime rally in Sproul Plaza. Protestors voiced their opposition to a variety of issues including recent tuition increases and state cuts to public education, and their support for the Occupy movement, which began in New York City a few months prior. In the early afternoon, hundreds of protestors convened a “General Assembly,” in which they voted to set up tents near Sproul Hall. The first tents to be erected in the grassy area near Sproul Hall were quickly removed by campus police without incident.

Two later incidents in this same area, however, one in the mid-afternoon and one at night, involved the use of force by police against large numbers of protesters. Around 3 p.m., another set of tents was erected. In an effort to remove the tents, the police used batons and other means of force to move protestors that were locking arms and blocking access to the tents. After tense interaction with protesters, the police removed this second set of tents and withdrew to their command post in the basement of Sproul Hall. During this period, six individuals were arrested and more were injured and in some instances handled roughly.

Later, another set of tents was erected in the same area. Around 9:30 p.m. the police again used batons and other means of force against protesters to obtain access to and remove the tents. During this period, thirty-two individuals were arrested and more were injured or handled roughly. After removing this third set of tents, the police set up a perimeter around the grassy area to prevent further tents from being erected at that site, although a number of protestors stayed on Sproul Plaza throughout the night.

A few days after these incidents, Chancellor Birgeneau asked the Police Review Board (PRB) to review the events of that day, to the best of their ability determine what happened, and to assess whether the conduct of the police was consistent with the norms of the Berkeley campus and established campus policies. While a review of this breadth is not the regular business of the PRB, complying with the Chancellor’s request is within the stated mission of the Board. Given limitations of time and resources, the PRB limited its review of November 9’s events to the two primary confrontations regarding tent encampments summarized above, as well as the communications and actions by protesters, UCPD, and the campus leadership directly associated with those confrontations.

It must be emphasized that the PRB is not a legal tribunal, and nothing in this report should be considered fact or judgment for legal purposes. Further, this report required the assistance of many individuals currently involved in civil and criminal proceedings, including students, faculty, administrators, and police. Their participation and cooperation would have been further constricted had legal standards been applied. The report does not focus on the actions of individual police officers, but rather on the police conduct during this protest in general, and on the campus leadership’s management of that conduct.

A number of broad prospective recommendations regarding responses to student protests at UC Berkeley were made in the “[Brazil Report](#)” following the 2009 events at Wheeler Hall and the “Bundy Report” on the use of force by police in 1998. While this report does offer additional recommendations, it seeks mainly to assess the events of November 9 against the norms of the Berkeley campus, as they are both written and understood. An additional reason for avoiding broad policy recommendations in this report is that the task has been delegated by UC President Mark Yudof to a University-wide committee with a larger support system than the PRB that is composed of members more expert in matters of police tactics and strategy. That committee is co-chaired by UC Berkeley Law Dean Christopher Edley and UC General Counsel Charles Robinson; its report, entitled “Response to Protest on UC Campuses,” was circulated for comment on May 4, 2012.¹

A number of fact-finding endeavors were undertaken to prepare this report. On February 13 and 15, 2012, the PRB committee arranged two public forums to receive input from students, faculty, and other community members regarding the events of November 9. The PRB committee heard over six hours of testimony at these events. On March 5 and 6, 2012, the committee took further statements from a group of faculty members and from the UCPD, represented by legal counsel. Both groups presented a selection of videos from the day, most of which can be found online. On March 16 and April 6, 2012, the PRB committee met with members of the UC Berkeley Crisis Management Team (CMT) to discuss their roles in the events on November 9.

Finally, members of the committee independently collected facts and reviewed dozens of hours of relevant videos and other materials online as well as materials from the UCPD, the campus leadership, and protestors. This report reflects the PRB committee’s understanding and interpretation of the November 9 events. The committee met and discussed relevant evidence and testimony over the course of a number of scheduled meetings since accepting the assignment.

¹ Available at <http://campusprotestreport.universityofcalifornia.edu/documents/Robinson-Edley-Report-043012.pdf>.

II. Rules: Standards for Assessing the Use of Force

In addition to recounting the events of November 9, the Chancellor asked the PRB committee to review the actions of the police. However, there is no obvious standard against which to judge these actions. Further, the Board is not a legal tribunal imbued with authority to judge the lawfulness of the police's conduct. Nevertheless, it is generally agreed that UC Berkeley holds itself to higher than legal standards regarding the use of force. As the birthplace of the Free Speech Movement, and as a locus for student protest throughout the past half century, the Berkeley campus is especially tolerant of students' right to assemble and protest. To concentrate solely on legal definitions of excessive force would thus underestimate the campus's customs regarding free speech and assembly.

Instead, the committee must judge the events of November 9 based upon an understanding of campus norms applying at that time, which is garnered from four sources: written policies and procedures, which are the campus leadership's textual guides for campus protest; legal standards as an alternative (and not dissimilar) baseline; prior reports of the PRB; and perhaps most importantly, each committee member's own understanding and interpretation of the details and ideas presented them over the course of this investigation. After November 9, the campus leadership formed a Protest Response Team (PRT) in response to events of that day, which is relevant inasmuch as its creation is indicative of the campus leadership's own idea of whether the police actions and campus leadership's response were consistent with campus norms that day, and how those norms should be safeguarded in the future.

A. Written Policies and Procedures

The First Amendment of the Constitution authorizes government entities such as UC Berkeley to place reasonable restrictions on the time, place, and manner of speech. Such restrictions are embodied in §§ 300-369 of the Berkeley Campus Regulations Implementing University Policies. Those regulations allow for "the constitutionally protected rights of free expression, speech and assembly" as long as these activities do not "interfere with the right of the University to conduct its affairs in an orderly manner and to maintain its property, nor may they interfere with the University's obligation to protect the rights of all to teach, study, and freely exchange ideas."² More specifically, the regulations prohibit "participat[ion] in a disturbance of the peace or unlawful assembly," "fail[ure] to comply with the directions of a University official . . . or resisting or obstructing such . . . officials in the performance of or the attempt to perform their

² Berkeley Campus Regulations Implementing University Policies, at § 311.

duties.”³ In addition, the regulations prohibit “camp[ing] or lodg[ing] on University property.”⁴ Similar rules are found in the Code of Student Conduct.⁵ Finally, the State of California Code of Regulations contains certain provisions prohibiting “non-affiliates”⁶ from bringing “any tent or other housing structure on University property” without prior authorization.⁷ These were the written regulations and texts on which the campus leadership based its no-encampment policy.

Police conduct is also governed by several written authorities. California Penal Code § 835a states that officers “may use reasonable force to effect [an] arrest, to prevent escape or to overcome resistance.” That section also states that an officer “need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested.” The UC Berkeley Police Department’s (UCPD) own regulations provide greater specificity and are in some ways stricter than state law. These regulations define reasonable force as that which “a reasonable and prudent officer/employee would have used, given the same facts/information at the time force was employed, coupled with the officer/employee’s same level of skill, experience, and knowledge.”⁸ Excessive force is defined simply as that which is not reasonable.⁹ These regulations allow the use of reasonable force in the same situations enumerated under the California Penal Code, but they include “crowd control situations” as an example of “overcoming resistance.”¹⁰ More specifically, officers must base their decision to use force on several factors, including “differences between the officer/employee and subject,” the “proximity of weapons,” the “availability of other options,” the “seriousness of the offense in question,” the “risk of injury to other[s],” and “other relevant and/or exigent circumstances.”¹¹

Regulations governing arrests ensure proper treatment of detainees. They provide that officers “should not use inappropriate force or more force than necessary in making an arrest or in carrying out of assigned duties.”¹² Moreover, they state that “[a]rrestees and suspects shall be treated in a humane manner as provided by law. They shall not be subject to physical force except

³ Berkeley Campus Regulations Implementing University Policies, at § 321 (g), (m).

⁴ Berkeley Campus Regulations Implementing University Policies, at § 321 (n).

⁵ Code of Student Conduct (last modified Feb 2010), at § 102.13, .16, .24, .25, available at <http://students.berkeley.edu/uga/conduct.pdf>.

⁶ “‘Non-affiliate’ means any person who is not any of the following: a student, officer, official volunteer, employee, Regent, or emeritus of the University of California or a member of a household authorized to reside in University Property.” § 100001(A) of the Regents Code.

⁷ California Code of Regulations, Title V, Division 10, § 100005(B).

⁸ UC Berkeley Police Department, General Order F-1: Use of Less Lethal Force, at § 7(a).

⁹ *Id.* at § 7(b).

¹⁰ *Id.* at § 10(c).

¹¹ *Id.* at § 11.

¹² UC Berkeley Police Department Regulations, § DR 200.

as required to subdue violence or ensure detention. No officer shall strike an arrestee or suspect except in self-defense, to prevent an escape, or to prevent injury to another person.”¹³

A number of UCPD regulations also govern the specific use of batons. As a threshold matter, “[o]nly impact weapons issued or authorized by the Department may be carried,”¹⁴ and published departmental regulations do not authorize the use of 36-inch straight batons, but designate the 26-inch baton as the appropriate “crowd control impact weapon.”¹⁵ In fact, UCPD changed from the 26-inch baton to the 36-inch baton in 2011. UCPD officers were trained for the change in early June 2011. General Order F-6 has not yet been updated to reflect this.

It is UCPD policy to use impact weapons only “when other means of lawful force have failed, are not available, or are not suitable.”¹⁶ In crowd control situations specifically, police regulations state that “an impact weapon may be used to move, separate, or disperse people, or to deny them access to an area or structure.”¹⁷ They further counsel that “[t]he need to immediately incapacitate the suspect must be weighed against the risk of causing serious injury.”¹⁸ For this reason, certain areas like the “head, neck, throat, spine, heart, kidneys and groin should not be intentionally targeted except when the officer reasonably believes the suspect may cause serious bodily injury or death to the officer or others.”¹⁹ These policies and procedures are integrated into the training that officers are given regarding baton use.

B. Legal Standards

Beyond the written laws and regulations governing confrontations between police and protestors, judicial standards are also helpful, as they illuminate the factors that courts normally consider when assessing the use of police force. In determining whether a given use of force is reasonable or excessive, courts balance the “nature and quality” of the force used against the “countervailing governmental interests at stake.”²⁰ The U.S. Supreme Court has warned that judgment should proceed “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” and must allow “for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly

¹³ Universitywide Police Policies and Administrative Procedures, at § 902(3); *see also* UC Berkeley Police Department, General Order F-1: Use of Less Lethal Force, at § 15.

¹⁴ UC Berkeley Police Department, General Order F-6: Use of Impact Weapons, at § 5.

¹⁵ *Id.* at §§ 3, 8.

¹⁶ *Id.* at § 6.

¹⁷ *Id.* at § 10.

¹⁸ Universitywide Police Policies and Administrative Procedures, at § 813.2.

¹⁹ *Id.*

²⁰ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

evolving – about the amount of force that is necessary in a particular situation.”²¹ In weighing the government interest, courts look to at least three factors: “[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight.”²² However, because the circumstances of each case differ, other “relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed.”²³ The federal law applicable in California is that the most important factor to consider is whether the suspect “posed an ‘immediate threat to the safety of the officers or others.’”²⁴

Recent decisions of the U.S. Court of Appeals for the Ninth Circuit further elucidate how courts treat the use of batons. A baton is “a significant use of force that is capable of causing pain and bodily injury” and is “considered a form of ‘intermediate force’” on par with pepper spray, K-9s, and beanbag guns.²⁵ One case noted that “California law enforcement officers are taught that a baton is a deadly weapon that can cause deep bruising as well as blood clots capable of precipitating deadly strokes, and that batons should therefore be used ‘only as a response to aggressive or combative acts.’”²⁶ Another case, involving a police officer who used his baton to clear a noncompliant individual from a public square, held that conduct to be reasonable because the officer “did not raise his baton to strike [the civilian] nor did he swing his baton at [the civilian’s] body. Rather, [the officer] used his baton, positioned across his chest, to push [the civilian] away from the officers and towards the departing crowd.”²⁷ Though no court has addressed a case with facts closely similar to the confrontations on November 9, these cases may be useful reference points for guidance.

C. Lessons from Prior Reports of the Police Review Board

Berkeley’s campus is well-known as the birthplace of the Free Speech Movement in the mid-1960s. From the controversy over People’s Park to the recent tree-sitters in Oak Grove, that legacy has carried through, for better or worse, to the current day.

For the purposes of this report, Berkeley’s history yields two important facts. First, it is reasonably indisputable that the campus has heightened norms respecting free expression when

²¹ *Id.* at 396–97.

²² *Id.*

²³ *Glenn v. Washington County*, 10-35636, 2011 WL 6760348, *6 (9th Cir. Dec. 27, 2011).

²⁴ *Id.*

²⁵ *Young v. County of Los Angeles*, 655 F.3d 1156, 1162 (9th Cir. 2011); see also *United States v. Mohr*, 318 F.3d 613, 623 (4th Cir. 2003) (comparing batons to K-9 dogs and other “less lethal force”).

²⁶ *Young*, 655 F.3d at 1162.

²⁷ *Zavala v. Parks*, 124 F. App’x 527, 528 (9th Cir. 2005).

compared to other campuses within the University of California system. Some are proud of this reputation, others are unhappy, and surely others deem it irrelevant. But when considering incidents like the November 9 protest, these heightened norms are germane.

Second, as an institutional matter, two events in the past fifteen years have produced reports similar to this one. The Brazil Report, concerning the student occupation of Wheeler Hall in November 2009, was written when the PRB was chaired by Berkeley Law Professor, and former Federal Magistrate Judge, Wayne Brazil.²⁸ The Bundy Report, which concerned an April 1997 occupation of Sproul Hall by students opposed to Proposition 209, was completed under the chairmanship of Berkeley Law Professor Stephen Bundy.²⁹

The recommendations made by the PRB in each report are instructive. Both involved the UCPD's use of batons, the main consideration of the present report. In 1997, the UCPD used batons, as well as hands and pepper spray, to repel a crowd of students trying to force their way through a police line in Sproul Hall. Out of a number of baton strikes, the report found that two officers used batons four times in a manner that was clearly unreasonable.³⁰ It also found unreasonable the UCPD's policy of allowing individual officers to choose between all possible uses of the baton, where some uses are much more forceful – and likely to injure – than others.³¹

The Brazil Report precisely recounts that the police used batons on at least six occasions – two of which were deemed to be unreasonable by the PRB – during the Wheeler occupation in 2009. The first use occurred within Wheeler Hall when a student charged a police officer.³² The second took place when protestors surrounded officers delivering barricades to the protest site. One officer had fallen to the ground and other officers used “open-hand pushes and baton strikes” to move the crowd and assist the surrounded officers.³³ The third use of batons arose when officers were placing a barricade at a line previously held with only police tape.³⁴ The police “used forceful forward thrusts of their batons, jabbing into the demonstrators abdominal areas, to try to move the crowd.”³⁵ When the line of protestors resisted being moved, the police continued to use batons, including “overhead baton strikes.” After placing the barricade, some officers “continued to thrust batons through its bars into the crowd, apparently believing that protestors were trying to

²⁸ POLICE REVIEW BOARD, U.C. BERKELEY, *November 20, 2009 Review, Reflection & Recommendations: A Report by the Police Review Board* (June 14, 2010), available at http://www.berkeley.edu/news2/2010/06/16_prb-report.pdf (last visited Mar. 25, 2012).

²⁹ See Henry K. Lee, *UC Report Critical of Own Police: But Overall Handling of '97 Campus Rally Called OK*, S.F. CHRON., July 1, 1998, at A13, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/1998/07/01/MN28488.DTL> (last visited Mar. 25, 2012).

³⁰ Bundy Report, at 42.

³¹ *Id.* at 41.

³² Brazil Report, at 42.

³³ *Id.* at 52.

³⁴ See, e.g., <http://www.youtube.com/watch?v=H1PuiY4Go8Y>; http://www.youtube.com/watch?v=rOI5I2_RghQ; <http://www.youtube.com/watch?v=MPW0214z2Vk>.

³⁵ *Id.* at 55.

push the barricade over or back into the officers.” The PRB deemed this third use of force unreasonable.³⁶ The fourth baton use occurred when a protestor, who reported that the blow broke two of her fingers, was ordered to remove her hand from the metal barricade and refused to comply.³⁷ The fifth baton use occurred at the southeast corner of Wheeler in connection with the placement of barricades or new reinforcements (it is unclear which).³⁸ This confrontation included multiple baton strikes, including overhead strikes.³⁹ The sixth, and final, confirmed use came near the end of the day, when police used “push strikes” to move protestors back while placing a barricade near the northeast corner of Wheeler.⁴⁰ The PRB also found this sixth use of force unreasonable.⁴¹ These engagements and prior PRB conclusions point to the fact that the norms of the Berkeley campus consider baton use to be a very serious matter, though not entirely unacceptable.

Both prior reports are also important because they make general findings and recommendations that are directly relevant to the events on November 9:

- The UCPD had no detailed plan of action for how to respond to the protest (Bundy 58, Brazil 16, 17, 29).
 - Recommendation: Adopt detailed plans for responding to specific protest scenarios (Bundy 58-60, Brazil 125).
- There was no clear chain of command within the campus leadership, and no clear group of administrators who provided civilian oversight of the UCPD (Bundy 22, Brazil 33).
 - Recommendation: The campus leadership should develop a written protocol detailing the responsibilities of various administrators during incidents of campus protest (Bundy 58, Brazil 111).
- The campus leadership failed to successfully communicate with protestors about their response to the protest (Bundy 7, Brazil 12).
 - Recommendation: The campus leadership should develop a better means of communicating with demonstrators during incidents of campus protest (Bundy 2, Brazil 119).
- The UCPD failed to communicate with protestors about their rationale for setting up certain police lines or their intention to use force (Bundy 7, Brazil 55).
 - Recommendation: The UCPD should develop a better means of communicating with demonstrators during incidents of campus protest (Bundy 7, Brazil 127).

³⁶ *Id.* at 97.

³⁷ *Id.* at 57.

³⁸ See, e.g., <http://www.youtube.com/watch?v=6crIV0d4sIY>; <http://www.youtube.com/watch?v=RWGCnVjWRd0>.

³⁹ Brazil Report, at 69.

⁴⁰ *Id.* at 75.

⁴¹ *Id.* at 97.

- The UCPD made no apparent effort to reconsider its tactics after an initial use of police force, but instead repeated them (Bundy 26, Brazil 96–97).
- Many members of the campus leadership were new at their jobs and unfamiliar with responding to protests (Bundy 8, Brazil 25).

The repetition in these two reports of similar mistakes is cause for major concern, as is the similarity that some of those missteps have to the handling of November 9. As in the prior instances, there was little more than a generalized plan regarding how to respond to a mass protest, especially concerning the use of force to disassemble encampments. While there was a group of campus officials with clear civilian oversight of the UCPD (specifically, the CMT, whose creation was in response to the Brazil Report), that group did not have a clear chain of command nor did it supervise important details of the UCPD's activities throughout the day. As well, neither the CMT nor the UCPD adequately communicated with each other or with the protestors on Sproul Plaza. And after the afternoon's first use of force, and subsequent complaints, disconcertingly neither the UCPD nor the CMT specifically reconsidered the use of batons before again employing them in the evening. Significantly different from prior events, on November 9 the vast majority of members of the CMT were *not* new to their jobs, suggesting the campus leadership's handling of the November 9 protests was *not* better than the past, even with the benefit of greater experience.

D. Campus Leadership's New Approach

Immediately following November 9 and the Chancellor's return from Asia, members of the CMT met to discuss alternative protest response strategies. At that meeting they adopted a new approach to deal with encampments. This new approach demonstrates the senior leadership's recognition that the events of November 9 required a changed approach to protest response and that the actions of the police department and CMT on November 9 were inconsistent with what the norms of the Berkeley campus should be.

This revised plan was subsequently used on November 17, when the police removed an encampment from Mario Savio Steps in the early hours of the morning. The police made two arrests, but did not use batons or other force. Responses to subsequent Occupy protests have followed a similar pattern.

On February 21, 2012, this new approach was crystallized in an email to the campus community from Executive Vice Chancellor Breslauer and Vice Chancellor for Administration and Finance John Wilton. They are co-chairs of the Protest Response Team (PRT), which has now replaced the CMT. The email stated seven guidelines for the PRT in responding to campus protests:

1. The timing and manner of campus responses will consider the seriousness of the disruption to campus operations.
2. When possible, campus leaders will be patient and will choose the time and manner of responding to unlawful protests that will minimize the prospect of physical harm.
3. Because the form that disruptive protests take can change rapidly, decisions will be context-specific. This means that the campus's response to a given protest may differ from its response to other protests.
4. The campus's response to an unlawful or disruptive protest will never be determined by the nature of the issue the protesters are raising.⁴²
5. In some circumstances, deans, department chairs, and other faculty members may be effective communicators with protesters, and the campus will work closely with them to support their efforts.
6. The campus leadership has included additional faculty members in its deliberations about responding to protests that violate campus rules or the law. These include the chair of the Berkeley Division of the Academic Senate and two faculty administrators: the Vice Provost for the Faculty and the Dean of the Graduate Division.
7. While recognizing that police must at times respond to emergency circumstances, we will attempt to ensure that any decision to authorize police engagement, or to escalate or de-escalate police engagement, will be made only by a fully briefed senior administrator, who will be on-site during police actions.

This new approach demonstrates a marked change in response to campus protest. Though the PRT has many of the same members as the CMT, the roles and mission are quite different. First, the PRT integrates input outside of California Hall by including faculty and deans. As subsequent protests have shown, the inclusion of faculty in whom student protestors have special trust may make a difference in negotiations between students and the campus leadership. Second, the PRT's principles recognize that the campus will seek to avoid using force in student protests by exercising patience and deliberation, and waiting for the best opportunity to respond.

Of perhaps greatest significance, the transition to the PRT also signaled a change in the chain of decision-making responsibility during demonstrations on campus. Previously, the UCPD generally determined how best to implement a particular decision by the campus leadership. Although the campus leadership might place certain tactics off limits – such as pepper spray on November 9 – the UCPD could otherwise establish the strategy and level of force necessary to carry out any particular order. The PRT principles now provide that, apart from any emergency requiring immediate police action or individual officer discretion, the campus leadership will authorize any use of police force ahead of time. Associate Vice Chancellor Coley, who oversees the UCPD administratively, is now the “senior officer on [the] ground” assigned to be on-site, managing and advising police on the use of force during any student protest. To the extent possible, this person acts as a gatekeeper to escalation of police force (see Appendix C).

These improvements are significant, but the Bundy and Brazil Reports called for more. Specifically, they both recommended adoption of more detailed protocols than those so far

⁴² This would appear not to represent any change in campus policy, but rather a codification of an existing norm.

provided for the PRT. For example, should the Chief of Police immediately report any use of “less lethal force” (including batons, pepper spray, etc.) to senior administrators? Must the on-site administrator gain authorization from the Executive Vice Chancellor for any planned use of pepper spray or batons? On days of large, anticipated protests, should each member of the PRT have a handheld two-way radio transceiver (walkie-talkie) over which real time communications can take place with each other and with the police? More detailed directions, fully considered and set forth in advance, would better ensure that everyone knows their responsibilities during the moments of crisis.

The Bundy and Brazil Reports also suggested that campus leadership plan and review scenarios with the police prior to anticipated protests. This practice would help develop greater understanding between the two groups regarding how best to respond. It would also help identify gaps in existing understandings, unanswered questions about protestor intentions, and contingency plans needed for the day of protest. These pre-planning sessions are an important part of dealing effectively with problems that may arise.

The Edley-Robinson Report, which contains detailed consideration and recommendations for such issues and many more, provides a critically important source for further implementation of the PRT Principles.

III. Facts of November 9

This Section provides a factual account of the events leading up to and including November 9, as well as the views of the PRB committee.

A. Context of the Occupy Movement

Some background may be helpful in understanding the events of November 9. The protest occurred in the context of a global social movement and under very specific historical circumstances, which are only partially delineated here.

On September 17, 2011, hundreds of demonstrators gathered in Manhattan's financial district to protest against economic inequality and the influence of corporations on government. Many slept overnight in an encampment dubbed "Occupy Wall Street." The next day the demonstrations resumed and continued for weeks. This encampment grew to include hundreds of protestors and the daytime demonstration grew to many thousands of people.

Soon thereafter, other Occupy sites sprung up across the United States and the world. On October 15, 2011, demonstrators marched in 900 cities worldwide. By the end of October, that number had doubled.

The Occupy movement soon spread to San Francisco, Oakland, and downtown Berkeley. Occupy Oakland was particularly well publicized because, in the early morning of October 25, 2011, the encampment was forcibly removed by law enforcement using tear gas and flash grenades. When protestors returned that evening to retake the site, they clashed with police, resulting in multiple injuries and dozens of arrests. The protestors eventually re-occupied their site and were still there on November 9.

The November 9 protest was publicized as "Occupy Cal," and it was generally understood that students intended to set up an encampment on Berkeley's campus. The events in other cities, particularly those in Oakland, caused campus leadership considerable worry that an encampment on campus would quickly grow to large proportions, much as Oakland's had quickly grown to dozens of tents. They wanted to avoid any long-term encampment since most cities had not yet successfully cleared them. Occupy sites across the country had reportedly caused problems with sanitation, crime, and nuisance, which the campus leadership wished to avoid. Moreover, they feared that Berkeley's campus would attract "non-affiliates" from Occupy Oakland, whom they deemed more radical. While the campus leadership's concerns about non-affiliates from Oakland joining Occupy Cal were reasonable and affirmed in several emails among some members of the CMT during the day, and though appeared to directly influence the actions taken by the UCPD, videos, arrest records, and statements indicate that the vast majority of protestors on campus that day were UC Berkeley students.

B. The Chancellor's No-Encampment Policy and Days Before the Protest

In the week before November 9, Chancellor Birgeneau met with the CMT to clarify his position on the upcoming protests. The Chancellor made clear that he intended to maintain a no-encampment policy, which was communicated to students on Monday, November 7 by a campus-wide email: "Encampments or occupations of buildings are not allowed on our campus. This means that members of our community are free to meet, discuss, debate, and protest, but will not be allowed to set up tents or encampment structures." This policy accorded with the University's own regulations, which stated: "No person on University property or at official University functions may . . . camp or lodge on University property other than in authorized facilities."⁴³

The Chancellor instructed the UCPD to avoid the use of pepper spray or "chemical agents" on the protestors. Other methods of enforcement pursuant to police protocols were left to police discretion. Soon after setting this policy, the Chancellor left on a previously scheduled trip to China for the week of November 9.

During the two days prior to the Occupy Cal protest, other senior administrators collected information about the upcoming protests. Communications among them acknowledged the possibility of confrontation between police and protestors that day.

UCPD Chief Celaya, recognizing that his normal workforce was insufficient to deal with large scale civil disobedience, contracted in advance to obtain 9-10 officers from UCSF and 24 officers from the Alameda County Sheriff's office. The UCPD knew that protestors were planning to set up an encampment on campus but did not know where. Thus, officers were told to monitor the campus and look for anyone with camping equipment. Students with such equipment were to be informed of the no-encampment policy and non-affiliates with camping equipment were to be escorted off campus.

Neither the interviews with the CMT nor any other information obtained indicate that the campus leadership was aware of either how or when the no-encampment policy was to be executed, especially concerning the use of force in disassembling encampments.⁴⁴ The strategy adopted by the UCPD was to take down the tents just after they were erected, reasonably believing that this conformed to the announced policy. The UCPD undoubtedly knew that removing the tents during the demonstration itself might require the use of force generally, and the use of batons specifically. The UCPD's use of batons during prior incidents on campus, especially the 2009 events at Wheeler Hall, should also have alerted the CMT to the substantial likelihood that the UCPD would have to use batons to gain access to the tents.

While the Chancellor gave a clear instruction to the UCPD against the use of pepper spray, as the PRT Principles demonstrate, more detailed guidance was needed to ensure that the UCPD enforced the no-encampment policy according to campus norms. The Brazil Report made

⁴³ Berkeley Campus Regulations Implementing University Policies, at § 321 (n).

⁴⁴ Emails show that the leadership expected something to happen after dark, but it is not clear what.

two important recommendations in this vein. The first was to develop “detailed protocols for responding to group acts of civil disobedience,”⁴⁵ including “which courses of [police] action generally should be pursued first” and how different rules violations “would justify what levels or kinds of use of force.”⁴⁶ The second recommendation was to use the time before anticipated demonstrations “more productively by identifying specific scenarios and developing multiple detailed strategies (and tactics) for responding to each scenario.”⁴⁷

In response to these recommendations, the campus leadership, in addition to creating the CMT, developed an Incident Severity System which triggers involvement from higher levels of authority as an incident escalates in impact.⁴⁸ Following November 9, the campus leadership refined its process by establishing clearer roles for members of the PRT, including civilian oversight of the UCPD, to the extent feasible.

The absence of communication on detailed strategy between the UCPD and the CMT is addressed by PRT Principle 7, which provides that the PRT will “attempt to ensure that any decision to authorize police engagement, or to escalate or de-escalate police engagement, will be made only by a fully briefed senior administrator, who will be on-site during police actions.” In addition, Principle 2’s instruction that “campus leaders will . . . choose the time of responding to unlawful protests that will minimize the prospect of physical harm” calls for more prudent deliberation about when to clear an encampment. For example, removing tents in the middle of the night or early morning creates less risk of violent confrontation, as demonstrated by subsequent experiences on campus and at other Occupy encampments across the country.

Finally, the Edley-Robinson Committee addresses methods to implement the more detailed suggestions in the Brazil Report, all of which would help avoid future responses to confrontations such as those that took place on November 9.

C. Emergency Operations Center

The Emergency Operations Center (EOC) is designed to manage emergency operations of all kinds on Berkeley’s campus, including natural disasters and civil disturbances. But perhaps because of the perceived cost, the EOC was not activated on November 9 (although the police did activate the WebEOC, an online communications tool). On a day such as November 9 the EOC would have provided a place where police leadership and the PRT could together manage an ongoing emergency, and provide a repository of information for post-event analysis.

⁴⁵ Brazil Report, at 13.

⁴⁶ *Id.* at 112.

⁴⁷ *Id.* at 14.

⁴⁸ UC Berkeley Response Team Report: Analysis/Recommendations/Updates, Sept. 20, 2011 (e.g., in Level 3 incidents, the Emergency Policy Group is convened), p. 15.

To improve management of future campus demonstrations, a possible solution is for Berkeley to adopt a scalable EOC that does not require an expensive, all-or-nothing deployment of campus resources. If the incident is a small one, the EOC would start small, and build as necessary as the incident evolves.

D. Morning on Sproul Plaza

Demonstrators gathered on Sproul Plaza throughout the morning of November 9. A peaceful rally was held at noon in which many people spoke, including student leaders. Police distributed “Protest Safely” leaflets. Some faculty deans and some administrators mingled among the crowd and talked to protestors about the event. By their estimates, the crowd consisted of about 3,000 people, seemingly mostly students.

At around 1:30 p.m., the protestors marched down Telegraph Avenue to the corner of Durant Avenue. They returned to Sproul Plaza around 2 p.m. and began a “General Assembly,” which is a common feature of the Occupy movement and consists of a large group decision-making process accomplished through consensus and hand gestures from the crowd. No measure passes without 80% approval. Two proposals were considered on November 9: (1) an endorsement of the scheduled November 16 “mobilization” to shut down a meeting of the UC Board of Regents; (2) a decision to set up an encampment on campus and issue an initial statement. After briefly considering two amendments to the second proposal, it was adopted by a vote of 456 to 1, with 12 abstentions.

At that point the protestors began to set up tents for the first time.

E. Afternoon Confrontation

Nearly all of the incidents described took place in or near the patch of grass tucked into Sproul Hall’s northwestern elbow (hereinafter “the Corner”) (point A, in Appendix A). At around 3 p.m., the first set of tents was erected to the northwest of Mario Savio Steps, just south of the tree in the Corner. Only one tent is captured on video, but there are conflicting reports about the presence of other tents. It is clear from the video⁴⁹ that the tent(s) were taken down by UCPD officers with relatively little resistance from protestors. Three officers approached from the northwest and threaded their way through the crowd. They wore normal uniforms with no helmet or face shield and with their batons sheathed at their sides. As they disassembled the tent, protestors surrounded them and yelled “shame on you.” Two protestors had their hands on the tent as it was being disassembled, perhaps in an effort to recover it after it was taken down, but the

⁴⁹ <http://www.youtube.com/watch?v=RXvi43DRhfE>.

police easily removed those hands. The officers walked the tent out the way they came as the protestors booed them. None of the protestors made any threatening gestures towards the police, nor substantially interfered with their actions.

A short while later, a second set of tents was erected just southeast of the tree. The protestors tightly packed the entire grassy area around the tents, making it difficult to gain access to the tents. Video shows that officers, again in normal uniforms, attempted to reach the tents from a position along the north and east sides of the Corner, but there were too many protestors, and the police instead withdrew to UCPD headquarters in the basement of Sproul Hall.⁵⁰ The tents soon spread to cover the northeastern portion of the Corner (point B, Appendix A). The protestors filled nearly the entire area around the tents, blocking access along the hedges to the north, from the base of Mario Savio Steps to the south, and Sproul Plaza to the west and south (yellow area, Appendix A).

Around this time, the UCPD issued at least three warnings to the crowd. Two were issued from the north of the protestors, near the tree at the far northwest end Sproul Hall (near point C, Appendix A). One warning was given with a bullhorn, and declared that the gathering was an “unlawful assembly.” The officer said, “I demand all those at this location to immediately disperse.” The same officer also gave the second warning from the north. He first attempted the announcement with a bullhorn, but, because he was drowned out by the crowd, the protestors encouraged the officer to use the “human microphone,” in which his statements would be repeated by the crowd. He agreed and stated the following: “Please be advised that camping on UC property is illegal. Please remove your tents now.” Because this announcement was amplified by the human mic, it is likely that a greater portion of the assembled students heard it. The protestors responded with a loud “No!,” also amplified with the human mic. The officer walked away as the crowd cheered.

The same officer gave the third warning, very similar to the first, from Mario Savio Steps. The officer used a bullhorn and informed the protestors that they were unlawfully assembled and demanded the dispersal of those grouped “at the west side of Sproul Hall.” He then said that those who remained would be “subject to arrest.” In response, the protestors asked the officer what law he was using to declare the assembly unlawful. The officer advised the students that “setting up a campsite like this is considered camping, and camping is unlawful on UC property.” The protestors then responded that they were not camping, but rather standing next to empty tents. They started chanting, “We are standing!” The officer responded that they should tell the people who are putting up the tents to take them down.

There is conflicting evidence regarding whether or not the UCPD effectively communicated its intentions to the crowd. Before the afternoon and evening confrontations, the police made multiple announcements to protestors that the encampments were unlawful and that the police would arrest those who interfered with their efforts to clear the tents. Videos show that,

⁵⁰ <http://www.youtube.com/watch?v=zCUiWm69ZuU>, at 0:33.

in addition to the police warnings, at least three protestors addressed the crowd in the minutes leading up to the afternoon confrontation and specifically mentioned the possibility of arrest.⁵² At one point another student announced over the human microphone “that even though we know the risks involved, we are standing our ground,” a statement which was followed by cheers.⁵³ Another video shows a protestor using a bullhorn to state a telephone number for people to call if they are arrested.⁵⁴ On the other hand, several protestors stated at the open hearings that they could not hear the dispersal orders of the police, and videos show that protestors may have been confused about exactly what law they were violating. It seems unlikely that the protestors assembled in the Corner were not aware that they were defying police orders in setting up and protecting the tents.

Nonetheless, the afternoon dispersal orders were somewhat confusing, in that they sometimes declared the entire assembly unlawful, but other times only the no-encampment prohibition. The UCPD clarified these orders by the evening, where it made clear that the illegal activity was camping or interfering with police removal of the tents.

Responding to the Brazil Report’s suggestion, the UCPD “purchased an outdoor PA system to improve communication with demonstrators and supporters.”⁵⁵ But that loudspeaker was not used until after both the afternoon and evening confrontations, around 10 p.m. Instead, the police used bullhorns throughout the day, which can be hard to hear over crowd noise. Advance preparation for any planned demonstrations should include connecting the PA system.

Following these warnings, at around 3:38 p.m., two groups of police officers moved in from the north and south sides of the protestors. The police squads were largely separated by agency, but all were under the command of Berkeley’s UCPD. All outside officers were briefed by the UCPD upon their arrival. As will become clear, the southern group of officers had more success in accessing the tents than the northern group.

1. Southern Group

The group to the south was composed of approximately 40 officers that marched in line from the south side of Mario Savio Steps. For the first time, they had helmets on, face screens down, and 36” batons out, held with both hands across their bodies. Some of the officers had large guns drawn, which were apparently filled with paint rounds to mark fleeing subjects.⁵⁷

⁵² UCPD video E102 2-2 Side B Disk 2, Clips 1, 3, 18.

⁵³ UCPD video E102 2-2 Side B Disk 2, Clip 34.

⁵⁴ UCPD video E102 2-2 Side B Disk 2, Clip 7.

⁵⁵ Response Team Report – Analysis/Recommendations/Updates (Sept. 30, 2011), at 7, *available at* <http://administration.berkeley.edu/prb/PRBfinal10-12-11.pdf>.

⁵⁷ See, e.g., <http://www.youtube.com/watch?v=RXvi43DRhfE>, at 2:05.

The Brazil Report suggested that “when police wear riot gear they raise levels of fear and suspicion in the crowd”⁵⁸ and recommended to “try to avoid formations or modes of movement or ways of doing things that seem overly militaristic or rigid” because it may “inflame demonstrators’ emotions and needlessly provoke hostile reactions.”⁵⁹ The Brazil Report acknowledged that the UCPD is far more expert in matters of crowd control than outside reviewers.⁶⁰ Equipment-related decisions are complex and account for the officers’ safety as well as the crowd’s reaction. Still, the Brazil Report’s judgment about equipment such as types of batons and riot gear deserves careful consideration by the PRT.

The Brazil Report also mentioned that guns that shoot rubber projectiles “look to the untutored eye like machine guns [s]o their visible presence, by itself, can intensify reactive emotions and invite erroneous inferences about the measures to which the police are prepared to resort.”⁶¹ While no such gun was fired on November 9, they were present, prompting changes of “Put the guns down!” from protestors.⁶² The visual impact of these weapons should concern the PRT, as informed by the Edley-Robinson Report, in the future.

At 3:38 p.m., the first officers in the police line attempted to break through the crowd of protestors at the far southeastern edge of the Corner, near the hedge that lines the building’s wall. The remainder of the officers formed a perimeter line stretching out westward.

It took the police between 60 and 90 seconds to get through and access the tents. Protestors were tightly packed together in multiple rows. The first officer who arrived used hands and then batons soon thereafter,⁶³ but quickly switched to trying to remove protestors by separating them, one by one, from the larger group and pulling them through the police line to officers waiting on Mario Savio Steps. Some protestors who appeared to be nonresistant were pulled through the line and released without arrest, while a few who put up active resistance or attempted to rejoin the protestors were put in plastic handcuffs. Videos of this encounter show that protestors who were pulled off the line were sometimes pulled off by their head and neck and some were thrown rather roughly onto Mario Savio Steps.⁶⁴ These maneuvers appeared to be matters of expediency, and none of these protestors seemed to have been mistreated after they were pulled through the police line.

At the same time, police were still attempting to break through the southern line of protestors. At times, this resembled a pushing battle, with the police pushing to get through and the protestors linking arms together to prevent it. The large majority of protestors made no effort to resist arrest or make any threatening motions to the police, though they clearly tried to prevent

⁵⁸ Brazil Report, at 108.

⁵⁹ *Id.* at 129.

⁶⁰ *Id.* at 109.

⁶¹ Brazil Report, at 100.

⁶² E.g., UCPD video E102 2-2 Side B Disk 1, Clip 1.

⁶³ UCPD video E102 2-2 Side B Disk 2, Clip 40, at 12:25.

⁶⁴ <http://www.youtube.com/watch?v=yPztovAnIOA>, at 0:05.

the officers from reaching the tents. However, videos capture the actions of a few protestors whose movements could reasonably be deemed offensive, rather than defensive. As the police broke through the line, a small group of protestors was wedged against the hedges while the majority was pushed back westward with the remainder of the crowd. Two or three of this latter group of protestors were pushed to the ground by the police. Videos show some officers using batons on the back, sides, or buttocks of two protestors who appeared to be on their knees facing away from the officers and covering themselves for safety.⁶⁵ The campus norms, PRT Principles, as well as UCPD § DR200, seem to make such police action improper.

Of the group trapped against the hedges, one person attempted to retrieve a tent and drag it away from the police. He was then grabbed by an officer and they exchanged words. Soon afterward, one officer pushed that protestor halfway to the ground. Another protestor actively challenged the police's disassembly of the tents. He first tried to save some of the tents and was bear hugged by the police and then released into the general crowd. He then appeared to dive through the police line and was rebuffed, perhaps with a baton, though it is not clear from the videos. He then stood close to the police line in a provocative manner and walked the line in an apparent attempt to find weaknesses in it. This man was later arrested.

After about two minutes, the officers cleared a pathway of at least six feet along the hedge and began to disassemble the tents. Once the tents were broken down, they were not removed via this southern pathway, but were eventually removed through the north pathway later opened.

Part of the success of the southern group of officers seemed to result from their tactic of removing protestors from the line rather than attempting to push the line backward with batons. This had a clear advantage over the use of batons in that it reduced the use of force. Even though the police sometimes pulled protestors by their hair to get them off the line, this risked less permanent physical harm than using batons near vital interior organs. The police explained that one reason they did not want to pull people off the line in the afternoon was because of insufficient personnel for a mass arrest. If so, PRT Principle 2 clearly suggests that some delay to obtain an increased number of officers is the preferred course of action.

2. Northern Group

The northern group of police, also numbering around 40, experienced greater difficulty in breaking through the northern line of protestors and used greater force to do so. Their strategy appeared to be similar to that of the southern group, with a column of police breaking through the protestors nearest to the hedge and another police line forming a perimeter curving to the west

⁶⁵ E.g., http://www.youtube.com/watch?v=8qebivks_fE, at 1:39; <http://www.youtube.com/watch?v=yPztovAnIOA>, at 1:31.

and north. As the police advanced from the north at 3:38 p.m., the protestors linked arms and formed a human wall at least two persons deep.

The view that has been expressed by protestors is that this linking of arms was “classic non-violent civil disobedience.” The response has been that the protestors were not linking arms and walking peacefully down the street, as has occurred in many protest actions. Rather, they were linking arms to actively prevent the police from removing the tents. In other words, this interference with the police involved active resistance to direct police orders. It was not violent, but it was not compliant either.

The police here used batons almost immediately and far more consistently. Within 20 seconds of arriving at the protestor line, at least five officers used tip strikes in an effort to break up the protestors’ linked arms or to move their line back. A tip strike is accomplished by holding the long baton like a shovel and thrusting it forward into the protestor. This series of baton strikes by some officers lasted continuously for 50 seconds, and included push strikes and pushing with hands in addition to tip strikes, which were the most consistent tactic. As with subsequent periods of baton use, almost all of the tip strikes visible on the videos are made to the midsections of protestors – in their stomachs, ribs, chests, arms, sides, and outer thighs. Some of the protestors wore backpacks to protect themselves, and police sometimes struck those. These areas fall outside the prohibited areas mentioned in police regulations, but may include some of the areas not recommended for baton strikes.⁶⁶ After a pause in the use of force, some protestors can be heard taunting the police and many protestors yelled “Push back!,” although the protestor line made little forward progress.

Under the circumstances, this conduct may not have been consistent with UCPD policies at the time, which require officers to base their decision to use force on several factors, including the “proximity of weapons,” the “risk of injury to other[s],” and the “availability of other options.”⁶⁷ Even accounting for the factor of the “seriousness of the offense in question,” – which, in this instance, was interference with removal of the tents – the police response seems clearly inconsistent with PRT Principle 2, which calls for a “manner of responding to unlawful protests that will minimize the prospect of physical harm.” In particular, in this encounter, the police did not attempt to pull protestors off the line for arrest and, despite protestors’ interference with the officers’ objective to dismantle the tents, the tents did not pose any immediate danger and alternatives appeared to be available.

The legal factors used in excessive force cases are very similar. Among the factors that courts consider are the severity of the crime, whether the suspect poses an immediate threat to the

⁶⁶ UCPD General Order F-6: Use of Impact Weapons, at § 10-12.

⁶⁷ *Id.* at § 11.

safety of the officers or others, whether the suspect is actively resisting or evading arrest, and the availability of less intrusive alternatives.⁶⁸

At this juncture, the police paused and conferred for a little over a minute and then attempted to break through to the tents by going to the far (east) side of the hedge, just along the wall of Sproul Hall. Officers began to pull protestors away from the bushes with their hands,⁶⁹ but after about 15 seconds they switched to using batons. At 3:41 p.m., a protestor on the northern side was pulled through the police line and arrested. This arrestee was treated more roughly than most: one officer arresting him pulled the protestor's hair and then put his knee and seemingly his full weight on the protestor's neck or head while the protestor's hands were pinned behind his back.⁷⁰ Videos show that the protestor was not completely docile, but the officer already had the protestor by his hair and it seemed unnecessary to put his full weight upon the protestor's head. Another officer seemed to recognize this and quickly relieved the prior officer of his position atop the protestor.⁷¹ The police pulled four more protestors from the line near the hedge, including one professor. Three of these individuals were pulled through the police line by their hair. At this point, at 3:42 p.m., a line of police was able to go through the hedges to the tent area and join the southern group of officers.

Some members of the committee do not think that pulling protestors by their hair is consistent with campus norms; others believe it is effective and creates little risk of permanent injury. The committee is divided on whether this very brief period of force, which did not involve batons, was generally consistent or inconsistent with campus norms in place at the time.

As officers moved through the hedges, the protestors shifted as a group eastwards to try to once more block the police. One such protestor, who was physically blocking the police's path through the hedges, was pulled away from the group by an officer and put into a head lock (or control hold).⁷² That protestor eventually fell to the ground and kicked out at another officer who then used a downward tip strike upon him. While there may be very limited circumstances where it is appropriate to strike someone on the ground with a baton, especially when the person is in a head lock, some members of the committee believe that this tip strike fell within those limited circumstances, given the protestor's kick. The police then let him go and, though he appeared injured from the interaction, he rejoined the protest line. This incident caused outcries from surrounding protestors, who pushed in to see what was happening, and the police used tip strikes for 5-10 seconds to push them back. The lines had little confrontation for the next minute.

⁶⁸ See *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Glenn v. Washington County*, 10-35636, 2011 WL 6760348, *6 (9th Cir. Dec. 27, 2011).

⁶⁹ <http://www.youtube.com/watch?v=4zIGqnLyDSc>, at 1:35.

⁷⁰ <http://www.youtube.com/watch?v=NSat-nRefXY>, at 3:21.

⁷¹ UCPD video E116 1-1 Side A, Clip 8, at 20:08.

⁷² A "head lock" is use of the full arm to surround a suspect's neck, using the crook of the elbow to pressure the throat and gain compliance. <http://www.youtube.com/watch?v=P8qP0hMF9nY>, at 1:40.

At 3:46 p.m., the northern group of officers began their second, and most publicized, major use of batons. The apparent purpose was to push back the group of protestors to reopen the path through the hedges that had closed during the head-lock incident. Besides the initial dispersal orders, the officers gave no instructions to the protestors immediately prior to beginning this coordinated use of force, although after the strikes began, officers gave repeated commands to “Move!” In addition to tip strikes, at least two officers used batons in an overhead downward chopping motion.⁷³ Others appeared to tip strike a protestor who had half-fallen to the ground. The police hit some students while they seemed bent over in pain from prior strikes to the gut. This use of force lasted 30 seconds. For the following 30 seconds, individual officers intermittently used batons in a less coordinated manner. In particular, four officers repeatedly tip struck a trio of protestors clumped near the hedges. The vigor of these baton thrusts is most distressing and should not be repeated under PRT Principles, which accurately express the norms of the Berkeley campus.

When the police stopped using force, many officers moved through the reopened pathway into the Corner. This is also when one arrestee from the Corner was removed through the hedges and taken to the basement of Sproul Hall.

At 3:47 p.m., the police yelled for protestors to “Move back!” They continued to shout this and use some hands to push for about 15 seconds, but the line of protestors did not move back. The northern group of officers then began their third major use of force, the apparent purpose being to open a pathway for the police to carry out the tents northward. Within 20 seconds they cleared a pathway of about 6–10 feet wide. At one point during this period, one protestor clearly pushed an officer with offensive force, which is one of the few offensive uses of force by protestors caught on video.⁷⁴ The coordinated use of police batons was called off after about one minute, when a senior officer instructed the police to “hold the line.”

This period of force included some vigorous overhead strikes chopping downwards at protestors. Although some officers appeared to use hands before resorting to tip strikes, most used tip strikes as their main tactic. Videos clearly indicate that some police officers had been walking back and forth through the hedges for a few minutes, thereby allowing the northern and southern groups of officers to communicate. This communication should have yielded alternatives to the use of force. The tents might have been brought out through the south exit. In addition, the northward route through the hedges appeared to be open, while not wide, and had been used to remove a protestor previously arrested on the southern line. Even if the police did wish to clear a wider path, the videos show that the southern group of officers had formed a line along the western edge of the Corner that was adjacent to the back of the northern facing protestor line. Both police lines thus appeared to be in positions to pull protestors off the lines and arrest them.

⁷³ According to the UCPD, “chop strikes” are usually used as a defensive maneuver.

⁷⁴ UCPD video E1161-1 Side B, Clip 1, at 3:49.

Under the PRT Principles, such baton use should not ordinarily be repeated in the future in such situations.

Within minutes, the tents were removed and the officers withdrew to the basement of Sproul Hall. The protestors reclaimed the Corner and followed the retreating officers northwards, eventually surrounding the stairs out of Sproul's basement, where the police had set up a perimeter.

F. Afternoon Interim

Approximately 5 ½ hours elapsed between the afternoon and evening confrontations. Protestors quickly reoccupied the Corner and hundreds stayed to “protect” it.

Most of the members of the CMT were attending a scheduled CMT meeting when the first confrontation occurred. They were informed that the first set of tents had been taken down without significant incident and that a second set of tents had been erected. During this meeting, UCPD Chief Celaya received word that there had been a “confrontation” in taking down the second set of tents, but he did not receive the details at that time, including the use of batons. Thus, while the Chief informed CMT members that the second set of tents was removed, he did not pass along information regarding the confrontation between police and protestors to the other members of the CMT. Soon thereafter, the meeting adjourned when Vice Chancellor for Student Affairs LeGrande received a text message from the Graduate Assembly President. The message said something about the confrontation that had just occurred and also requested to meet. The Vice Chancellor, as well as some other CMT members, left to meet with students in Anthony Hall.

At this meeting, student leaders, who say that they described the confrontation, encouraged senior administrators to reconsider their no-encampment policy and to compromise. Vice Chancellor LeGrande, after consulting with several other CMT members, presented a compromise offer to student leaders sometime in the five o'clock hour. The proposal was that protestors would be allowed to stay on Sproul Plaza 24 hours per day and seven days per week, but could not use camping equipment, sleeping bags, fires, or cooking equipment. The proposal also allowed for one symbolic, but uninhabited, tent. This proposal was offered to the General Assembly at approximately 6:30 p.m. and was rejected.

The CMT did not reconvene after its 3 p.m. session on November 9. Internal emails show that some CMT members were closely tracking social media that day, including Twitter. Videos of the use of batons were posted on YouTube and Twitter within minutes of the afternoon confrontation. In addition, the Daily Cal's live blog, which some CMT members had also been tracking, first reported the use of batons at 3:55 p.m. At 4:15 p.m., a faculty member reported to Chancellor Birgeneau that he “observed repeated incidents of baton jabbing and overhead baton hitting of students whose apparent crime was to be physically present on the lawn” At 4:29 p.m., Executive Vice Chancellor Breslauer sent Chancellor Birgeneau an email stating that police

had “used batons to gain access to the tents.” In addition, several members of the CMT were in regular email contact during the day with each other and with the Chancellor. Thus, while at least some members of the CMT knew about the use of batons, the full impact of this action can only be conveyed by seeing it on site or on video, and the CMT members reported at their interview with the PRB committee that, on that day, they had not seen any available video footage of the incident.

Under the new PRT structure, certain members are charged with keeping thoroughly informed of developments and for being in regular communication with the UCPD. Had the PRT Principles (as expanded with the benefit of the Edley-Robinson recommendations) been in place on November 9, we expect they would have also prevented the repeated use of batons during the evening confrontation.

G. Evening Confrontation

At some point during the evening, another encampment was erected in the same grassy corner next to Sproul Hall. At 9:22 p.m., a UCPD officer gave dispersal orders to the protestors with a bullhorn: “Please be advised, camping on UC property is unlawful. Please take down your tent now. Do not interfere with the actions of the police.” He repeated this message a few times over the next 90 seconds, although some of these announcements were drowned out by the protestors’ chants. At 9:24 p.m., police emerged from the basement of Sproul in formation, once more with helmets, face screens, and long batons. They formed an L shape running south and then east from the tree near the steps to Sproul’s basement, but were still about 15 feet from the northern line of protestors. In unison, they then yelled “Move!” and kept stepping ahead with their batons thrusting forward in the motion of tip strikes. This tactic was repeated several times, ostensibly to clarify how the protestors should comply and what the consequences would be for noncompliance.

This demonstration of force proceeded without major confrontation along the majority of the police line. But, as before, the principal use of force took place on the portion of the police line along the hedges closest to Sproul Hall (see maps in Appendix B). There the police used consistent force to move protestors, employing mostly tip strikes but also pulling many protestors off the line. The use of batons continued, with greater and lesser frequency, for the next 12 minutes. During that time, the police line wrapped first southwards, then swept eastwards into the Corner and then moved southwards again, eventually meeting up with another line of police positioned on Mario Savio Steps. When officers were told to “hold the line,” and stopped the coordinated use of batons, the police line encompassed the entire grassy area to the northeast of Sproul Plaza, including the Corner and the strip of grass running along northern Sproul Hall’s far western wall to the entrance of Sproul’s basement.

Once again, like the confrontation with the Northern Group of officers just after 3:30 p.m. that afternoon, this coordinated use of batons, to access the tents and establish a perimeter around the Corner, may well have been contrary to UCPD policies at the time and yet more plainly contrary to the PRT Principles when there was no immediate threat to the safety of officers or others or any active resistance to or evasion of arrest. The protestors were resistant to being moved, but not violent. They yelled constantly at the police but were never overtly threatening so far as could be perceived on videos. Still, many officers struck powerfully with their baton tips in rapid succession, strong enough to inflict injuries. Tip strikes appeared to be the first resort of some officers, even though others seemed to use their hands or push strikes.

Some aspects of the evening confrontation bear separate mention. First, the police took a different approach and were more willing to separate protestors from the line and arrest them – thirty-two protestors compared to six in the afternoon. With two exceptions, videos of these arrests show relatively little rough handling by the police. Arrestees were generally forced to the grass and told to put their hands behind their back. They were then cuffed with plastic handcuffs and brought to the basement of Sproul, where they sat in the hallway for processing. Because this approach involved less force, it adhered more closely to the norms now clarified by the PRT Principles than did the use of batons.

One exception shows an officer holding down an arrestee with his knee on the back of the protestor's neck, ostensibly because the protestor had turned back over after being forced to the ground.⁷⁵ A second exception involved another arrestee who was repeatedly struck with a baton while lying on the ground, surrounded by five officers. The video footage does not show why the protestor was arrested or why he was surrounded by so many officers.⁷⁶ It is not clear from the footage whether the arrestee is squirming or resisting arrest either. What is clear from the video is that at least one of the officers repeatedly struck the protestor with the tip of his baton while the protestor was lying on the ground.

Another observed incident occurred approximately one minute after the police began to use batons, when officers near the hedges appeared to be jabbing someone on the ground, and someone screamed, "You're trampling us! We can't breathe!"⁷⁷ It's not clear what happened next, but about 15 seconds later, the police seemed to pause and allow someone on the ground to exit westward along the police line. In fact, the videos show that numerous protestors were allowed to leave through the gap between the police line and the line of protestors. The vast majority of these protestors were untouched during their exit, although one was shown being pushed by an officer on the southern line.⁷⁸

⁷⁵ UCPD video E114 1-1 Side A, Clip 6, at 7:10.

⁷⁶ UCPD video E114 1-1 Side A, Clip 6, at 11:55.

⁷⁷ UCPD video E114 1-1 Side A, Clip 6, at 3:50.

⁷⁸ <http://www.youtube.com/watch?v=xDNpNq5qzGo>, at 5:38.

The videos do not show the circumstances leading up to these incidents. Still, as noted earlier, there are very limited circumstances where it would be reasonable to strike a person with a baton while they are on the ground. This is especially true in the case of arrestees, as police regulations recognize: “[Arrestees] should not be subjected to physical force other than as may be required in subduing violence, assuring detention, or as reasonable in overcoming physical resistance offered in disobedience to a lawful order.”⁷⁹ Thus, it is questionable that these particular incidents were consistent with campus norms.

Near the end of the evening confrontation, when the police line had pushed almost all the way to Mario Savio Steps, a particularly dense group of protestors was wedged between the two police lines near the hedges. A video shows vigorous confrontation in that area, though it is not clear exactly what happened. Numerous officers clearly jabbed protestors with batons. Someone appeared to grab an officer’s baton and the officer wrestled it away with spirited motions back and forth. Other officers tried to remove a protestor in the hedges by pulling the protestor by the hair for extended periods, but the officers did not succeed for some time. Meanwhile, a woman let out a series of screams over the course of 50 seconds, but it is not clear exactly why. Overall, at least some of the protestors did appear to resist being moved, but at the same time, they appeared to be pinned in place by the crowd and the police lines.

At 9:37 p.m., the police held their line and stopped the use of force. Several hundred more protestors joined the crowd on Sproul Plaza over the course of the next hour. At 9:53 p.m., the police used a much louder public address system for the first time that day, advising protestors to “please leave the steps.” This message was repeated on the loudspeaker several times over the next hour, although there is no video of police declaring the assembly unlawful. At 10:52 p.m., by which time the crowd had swelled to more than 1,500, the police line withdrew from most of Mario Savio Steps, allowing protestors to fill the steps. As the night wore on, the crowd dispersed and the police fully withdrew to the basement of Sproul.

At 1:19 a.m., UCPD Chief Celaya sent his first update to the CMT via email since the afternoon confrontation, describing the entire day’s events. His report of the afternoon confrontation stated that there “was significant confrontation trying to break through the human chain” and that officers “used their hands and batons to break through the line[s], no use of [pepper spray] or other less lethal force was used.” His report of the evening confrontation stated that there “was great resistance and officers used [their] hands and batons to back the protesters up in order to get to the area of the tents. No [pepper spray], teargas, or other less lethal force was used.”

A video from around 3:00 a.m. on November 10 shows approximately five tents set up on the plaza and 50 to 100 people gathered or sleeping nearby.

⁷⁹ UC Berkeley Police Department, General Order F-1: Use of Less Lethal Force, at § 15; *see also* Universitywide Police Policies and Administrative Procedures, at § 902(3) (“No officer shall strike an arrestee or suspect except in self-defense, to prevent an escape, or to prevent injury to another person.”).

IV. Concluding Observations

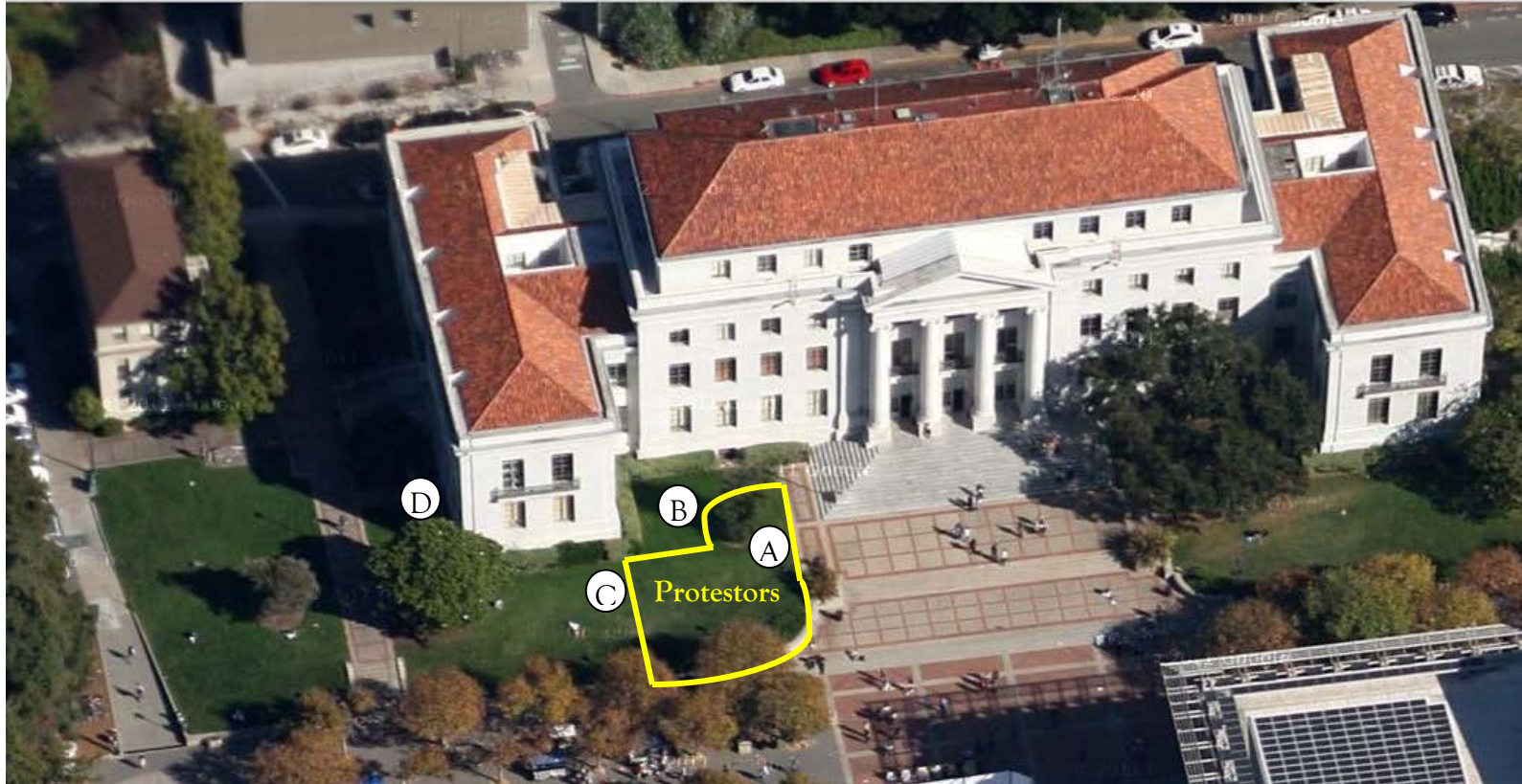
Not all members of the committee agree on the number of instances in which police conduct on November 9 was inconsistent with the campus norms, but all were disturbed by the use of batons against the student protesters captured on video and described in person. We are in agreement that specific campus processes and procedures in the future must be in place to make it clear to the entire campus community when those norms may be crossed.

Specific tactics for all combinations of campus events cannot be fixed in advance. No matter how comprehensive, detailed, and well analyzed reports may be, both earlier ones and those now forthcoming, deviations from these guidelines will occur. Nonetheless, history and ongoing experience must continue to clarify and improve future responses to student demonstrations and protests on campus. The Berkeley campus – its leaders and police force – should review this report and its Brazil and Bundy predecessors to improve planning for and handling of campus demonstrations as well as communication with students and faculty prior to and during particular events.

The PRT Principles are a positive first step, but should be clarified and expanded in significant detail. In doing so, careful attention should also be paid to the series of well-considered and thoughtfully detailed recommendations of the Edley-Robinson Report.

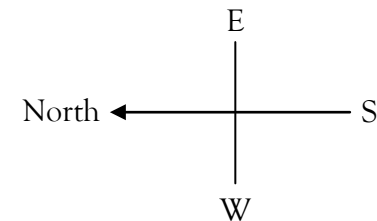
Finally, one thing is most clear: strictly confined limits, as precise as possible, should be articulated regarding the use of force by law enforcement during any protest events.

Appendix A – Afternoon on Sproul Plaza



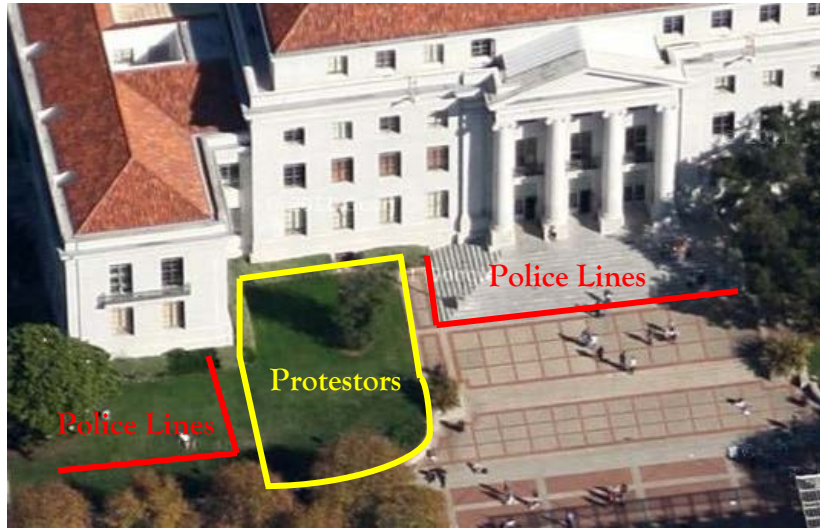
Key Locations

- A = location of first set of tents
- B = location of second and third sets of tents (the Corner)
- C = location of most of the confrontations
- D = entrance to UCPD headquarters

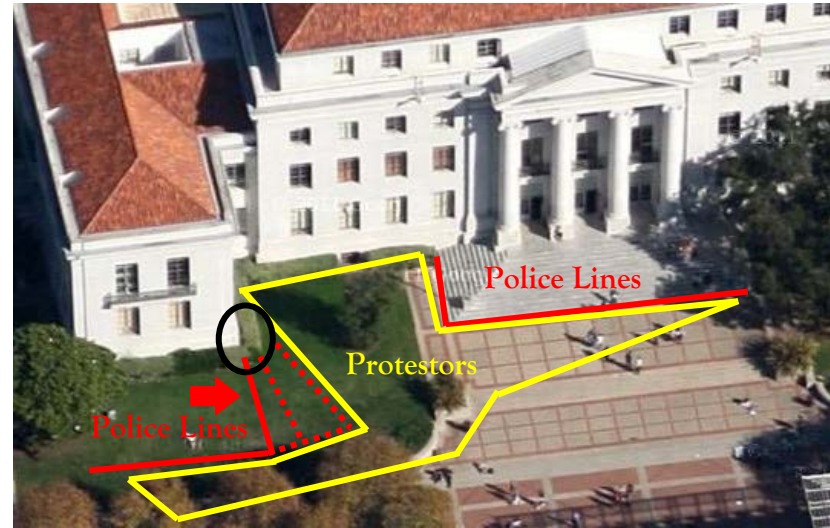


Appendix B - Evening on Sproul Plaza

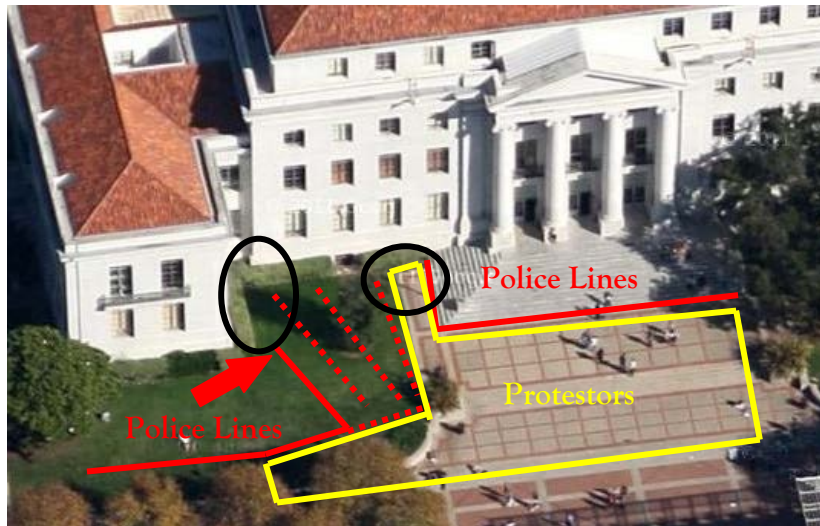
(black circles indicate areas where greatest force was used)



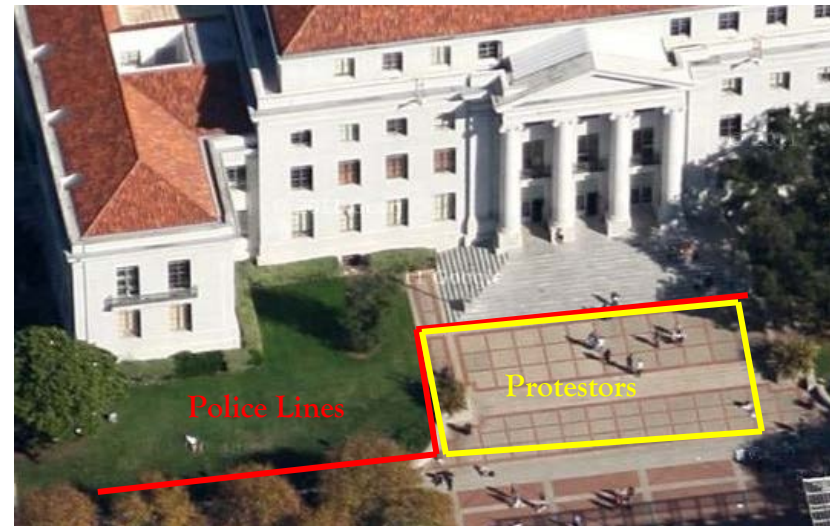
Starting positions



Police move south



Police move east into Corner then south again



Ending positions

Appendix C - PRT Roles

Protest Response Team at UC Berkeley

April 2012

Protest Response Team (PRT)

Group Charter

- Provide executive oversight and direction during protests or similar events causing campus disruption.
- Coordinate communications and decisions during protests or similar events.
- Stay apprised of emerging issues and monitor campus climate topics that may disrupt regular operations.
- Provide context specific advice/counsel to key leaders and decision-makers across campus and serve as a connection point for issues.
- Conduct regular assessments of campus practices with regard to protest response and planning.
- Keep Chancellor apprised of key areas of concern.

Meeting Frequency

- Quarterly or as needed to plan for or respond to emerging situations
- Any team member can recommend activation of the group by contacting one of the co-chairs.
The decision to activate rests with the co-chairs.

Team Members

Member	Roles/Responsibilities	Designated Alternate(s)
John Wilton , Vice Chancellor Administration and Finance	CO-CHAIR	
George Breslauer , Executive Vice Chancellor Provost	CO-CHAIR	
Linda Williams , Associate Chancellor	Link to GCR, public records, and risk management	
Ron Coley , Associate Vice Chancellor, BAS	Link to major operational departments ; senior officer on ground (Backup to John Wilton)	
Gibor Basri , Vice Chancellor, Equity and Inclusion	Campus climate link	Liz Halimah, Chief of Staff
Mitch Celaya , UCPD Chief	Campus safety	Margo Bennett, Captain Steve Roderick, Captain
Beata Fitzpatrick , Associate	Messaging for Chancellor,	

Police Review Board Report on Nov. 9, 2011

Chancellor and Chief of Staff	executive advising	
Claire Holmes , Associate Vice Chancellor of University Communications	Internal and external communications	Dan Mogulof, Executive Director, Public Affairs
Harry LeGrande , Vice Chancellor Student Affairs	Link to student government and student life	
Jonathan Poullard , Dean of Students	Link to students	
Chris Patti , Chief Campus Counsel	Legal counsel	David Robinson, Associate Campus Counsel
Andrew Szeri , Dean Graduate Division	Link to graduate students and faculty	Rosemary Joyce, Associate Dea, Graduate Division
Janet Broughton , Vice Provost for the Faculty	Link to faculty (Backup to George Breslauer)	Angy Stacy, Associate Vice Provost for Faculty Equity
Bob Jacobsen , Academic Senate Chair	Link to Academic Senate and faculty	Christina Maslach, Incoming Academic Senate Chair
Ann Jeffrey , Chief of Staff, Vice Chancellor Administration and Finance (VCAF)	Responsibility for tracking issues, convening discussions and executive advising	
Phyllis Hoffman , Assistant Chancellor and Chief of Staff, for the EVCP	Responsibility for tracking issues, convening discussions and executive advising	
Felicia Lee , Chief of Staff, Student Affairs	Responsibility for tracking issues, convening discussions and executive advising	

Additional Notes

- **Communications alternates are included for support during actual event management calls/meetings at the discretion of the AVC of University Communications.**
- **UCPD alternates included in planning and actual even management at the discretion of the Chief of Police.**
- **Other alternates or guests permitted with approval of the co-chairs.**
- **Administrative support from VCAF Immediate Office.**

Addendum by Eve Weissman, Graduate Student Representative, Police Review Board

This Report regarding November 9, 2011 is the result of extensive deliberations and significant compromise of five members of the UC Berkeley Police Review Board. With respect and appreciation for the work of my colleagues on the PRB, I sign on to the final Report, but write separately to further articulate my views and note information that is not conveyed in the Report. This is necessary because the Report does not clearly communicate my judgment regarding the response of UC Berkeley campus leadership and law enforcement on November 9.

Given past and recent political activity on UC Berkeley's campus, the detailed suggestions in prior PRB reports, and advance notice concerning large-scale protest activity on November 9, campus leadership's preparation for and response to the day's action was unjustified, inadequate and irresponsible.

First, in preparing for November 9, campus leadership was heavily influenced by their unfounded belief that "non-affiliates" – presumably more prone to disruptive behavior than members of the UC Berkeley community – had a central role in planning and carrying out the day's actions. Similar beliefs were held by campus leadership during the 2009 Wheeler occupation. Then, as now, such fears proved to be unfounded. It is distressing that campus leadership continues to *assume* that "outside elements" pose an imminent threat, despite evidence to the contrary. Campus leadership should not prepare for protests based on the faulty assumption that individuals from outside the UC Berkeley community will be present – not without concrete evidence that this is the case and that such individuals will ferment disruption.

Second, and as another threshold matter, the Report does not address whether the campus leadership and police had a legal basis to remove the tents. This is a significant omission. The investigation into the much publicized pepper spray incident at our sister campus UC Davis concluded that "it was not clear what legal authority existed for the campus police to remove the tents and arrest those who opposed them," and that "if there was no legal basis for deploying the police to take down the tents, the operation should never have taken place." *See* Reynoso Task Force Report (March 2012) at 15.⁸⁰ Students at UC Davis had camped out for one night when the police used pepper spray to remove protesters. At UC Berkeley, by contrast, students had not camped out a single evening on November 9. If the legal authority to remove tents was lacking or unclear at UC Davis, it was all the more so at UC Berkeley. Just as campus leadership should not respond to protests based on faulty factual assumptions, they should not respond on the basis of unclear or erroneous legal premises.

⁸⁰ Available at <http://reynosoreport.ucdavis.edu/reynoso-report.pdf>.

Third, simply articulating a “no encampment” policy without discussing *how* that policy would be enforced (beyond instructing law enforcement not to use chemical agents) was insufficient, at best. Given past protests at UC Berkeley and then-recent police confrontations with the Occupy movement across the country, campus leadership could and *should* have recognized that sending police squads clad in riot gear and armed with batons and bean-bag guns into Sproul plaza to remove tents would escalate tension and likely lead to violence against unarmed and generally peaceful protestors.

Undoubtedly, the seven Protest Response Team principles articulated by campus leadership *after* November 9 and repeatedly cited in the PRB Report represent an improved approach to campus protests, which emphasizes de-escalation and thoughtful planning. The PRB members generally agree that promulgation of the PRT principles demonstrates that campus leadership believes the response on November 9 did not comport with campus norms. However, even *without* the PRT principles, it is clear, based on both legal standards and the campus’s own written policies (detailed in the PRB Report), that the responses of campus leadership and law enforcement on November 9 were inconsistent with campus norms *existing at that time*.

Campus leadership and law enforcement *should* have known that removing tents from Sproul Plaza in the middle of the day at the height of the protest would require use of force and likely the use of batons. Despite the no-encampment policy, it is unclear why they chose to take such action. Not only did this strategy increase the likelihood that protestors would suffer physical harm, it stifled protected speech. Dispersal orders sometimes declared the entire assembly unlawful, while on other occasions the orders were limited to the actual encampment and interference with police. Additionally, this strategy contained no plan to prevent the *further* erection of tents after the first encampment was dismantled. Surely, clearing the tents in the middle of the night, rather than in the middle of the day, would have reduced the risk of confrontation, as demonstrated by the prior experiences of other Occupy encampments. It is troubling given the Wheeler occupation in 2009 and attempts to dismantle Occupy encampments across the country that the campus leadership did not anticipate and work more diligently to prevent the use of force.

Fourth, apart from the lack of foresight and planning around the *first* use of batons on Sproul Plaza earlier in the day, campus leadership’s failure to take steps following the afternoon confrontation to prevent or mitigate a similar occurrence in the evening is inexplicable. Crisis Management Team (CMT) members, informed the PRB that they did not attempt to intervene and/or modify police tactics during the six-hour period between the afternoon and evening confrontations because they had not yet seen the video footage that depicted the use of force by police. In light of the facts uncovered by the PRB during its investigation, that claim seems highly implausible. Internal emails confirm campus leadership was closely tracking social media on November 9. Videos depicting the use of batons were posted online within minutes of the afternoon confrontation. In addition, the Daily Cal’s live blog, which campus leadership also tracked, first reported the use of batons at 3:55 p.m. At 4:04 p.m., the Daily Cal blog quoted UC

spokesperson Janet Gilmore as confirming five arrests from the “clash near the Sproul steps.” Also, Vice Chancellor George Breslauer sent Chancellor Robert Birgeneau an email regarding the use of batons at 4:30 p.m. Further, student government leaders met with members of the CMT in Anthony Hall following the afternoon confrontation and described the events that had transpired.

The CMT, as a group, was charged with managing the campus’s response to student protest. This was their primary, if not their *only* duty, on November 9. It appears the CMT met only once as a group on November 9. During this meeting, at around 3:30 p.m., Chief Celaya informed CMT members that tents had been removed from Sproul plaza and that *some* “confrontation” had ensued. According to the CMT, they did not request additional information and shortly after disbanded so that some CMT members could meet student leaders in Anthony Hall. It is disconcerting that members of the CMT did not *actively* seek out more information about the events that transpired on Sproul Plaza.

CMT members acknowledged that *had* they been fully aware of the afternoon encounter, they would have tried to prevent a similar evening occurrence. But the responsibility for obtaining this information was squarely within their purview and their collective failure to do so was inexcusable. In any case, CMT members knew or should have known about the now-infamous use of batons on Sproul Plaza around 3:30 p.m. Their failure to intervene and prevent a second occurrence is highly problematic.

Remarkably, nearly all members of the CMT went home for the evening by 9:00 p.m. with instructions to Chief Celaya (the only remaining CMT member) to remove the tents without the use of chemical agents. According to the CMT no further discussion regarding tactics or strategy for removing the tents took place. This too seems improbable, given their internal emails and communication. For example, a 7:41 p.m. email from Associate Vice Chancellor Clair Holmes, to Birgeneau and Breslauer states: “Our message is widely distributed, and it is very clear that we will not tolerate any encampments. All media outlets and the protestors know this. Now, for *the execution of that strategy which will happen when the sun goes down of course...*” Unanswered is the “strategy” Holmes is referring to in this email. Needless to say, the level of planning and the information gathered by CMT members during the day and into the evening on November 9 appear to have been inconsistent with the gravity of the situation confronting them and the breadth of their responsibilities.

Fifth, the PRB Report focuses exclusively on the afternoon and evening confrontations between police and protestors. In my view, at least two other events that transpired on November 9 should also have been investigated and reported by the PRB. First, in the afternoon police detained two Latino students outside of Berkeley Law School, near the intersection of Bancroft and College Avenues. Both students allege that they were improperly stopped pursuant to the UCPD’s campus monitoring policy. In one incident, officers put a law student carrying protest signs into a “stronghold” and asked him for identification. Eventually, the student was allowed to leave. As the student walked away, one of the officers allegedly asked whether he was sure that he spoke English.

The second incident involved another student also returning to the law school from Sproul Plaza. She had a bullhorn borrowed from the law school tucked beneath one arm. An officer approached, stood very close to her, and requested identification. Stepping back from the officer she said that she was a law student but did not have identification on her. When asked to give her name she was at first hesitant and inquired why she was being stopped. The officer stated that she could not have a bullhorn on campus. The student explained it belonged to the law school. Ultimately three more officers arrived on the scene. The student was handcuffed and placed in the back of a police car while bystanders contacted law school administrators, who persuaded police to release her.

Additionally, lingering questions about the processing of arrestees and the use of student medical records remain unanswered. For example, a group of individuals who were arrested around 3:45 p.m. and booked by the Berkeley Police Department allegedly were not released after receiving citations. In addition, they were initially informed that they would be required to post bail, even though Penal Code § 853.6 requires misdemeanor arrestees be cited and released on their own recognizance unless unusual circumstances apply. According to the Berkeley Police Department, the decision not to cite and release was made by UCPD. It seems that this decision was ultimately reversed, after numerous complaints and prolonged detention of misdemeanor arrestees. Students have also voiced concern that their medical records have been misused to identify protestors and even assist the Alameda County District Attorney in filing criminal charges months after November 9. Pursuant to state law, the Tang Health Center must turn over medical records involving incidents of assault to law enforcement. The UCPD (and campus leadership) deny using these records in any untoward manner, including assisting the District Attorney. However, the timing and nature of arrests and subsequent charges raise questions that warrant further investigation.

Sixth, the PRB's investigation was hampered by several factors, including the possibility of criminal charges being filed against participants in the protest. The very individuals most likely to have information relevant to our investigation were also potentially imperiling themselves by assisting our investigation. Students and faculty expressed concern about participating in public hearings given the prospect of criminal charges. While the PRB tried to allow people to anonymously submit evidence and testimony, many members of the campus community did not feel that they had a full and adequate opportunity to participate in the investigation given these concerns. Further, the fact that criminal charges were actually issued against some individuals *after* they publically testified at PRB hearings, reinforced the belief that there was a connection between the filing of criminal charges and the extent of one's involvement in (legal) protest activity and the PRB investigation. Regardless of whether there was an actual connection, the criminal prosecutions have fostered distrust and possibly chilled participation by members of the community in future investigations.

Seventh, it is important to recognize that the PRB does not have a clear protocol for conducting effective, timely, and transparent investigations regarding the response of police and

campus leadership to protest activity. When the Chancellor requested that the PRB investigate the November 9 incident, the Board Chair, with assistance from Board members, began to design the investigation procedure. Considerable time and energy was spent by PRB members negotiating over the contours of the investigatory process. This prolonged the investigation and ultimately the publication of a final Report. The failure to have an investigatory procedure in place resulted in confusion and miscommunication with faculty members and others asked to participate in the investigation. Additionally, certain hearings and testimony were not recorded or transcribed even though some Board members believed recordings and transcriptions would enhance the investigation. Accordingly, written guidelines for PRB procedures should be developed before the next investigation. Such guidelines should be established through a transparent process that encourages student, faculty, Administration, and police input. The guidelines should specify the role of individual PRB members including the Board Chair.

The lack of protocols was also reflected in the way campus leadership communicated with the Board. On a number of occasions, campus leadership refused to answer questions or speak directly with Board members, other than the Chair. The Board Chair had conversations with UC Berkeley Counsel Chris Patti and perhaps with other members of the Administration, to which members of the Board were not privy, compromising the transparency and reliability of the investigation. Also of concern is the fact that campus leadership paid private outside counsel to prepare testimony on behalf of UCPD, while comparable resources were not available for students or faculty participating in the investigation process. The PRB process was intended as a search for the truth, but the campus leadership assisted only one set of stakeholders in presenting its story to us.

In conclusion, the University's use of force on November 9 was unjustified because it rested on faulty factual assumptions and questionable legal premises. Establishing a blanket "no encampment" policy days before November 9, while making no attempt to engage in a meaningful and constructive dialogue with students and faculty about the substantive issues underlying the protest, was a thoroughly ineffective approach to the announced protest action. Going forward UC Berkeley campus leaders should carefully consider how to *promote* and *encourage* an atmosphere in which free speech and expression is valued and supported. Campus leadership should recognize that they share many of the same goals as the protestors – sustaining and growing a premier *public* university. Accordingly, the response of the Administration to protests should be crafted with an eye toward collaborating with students and faculty to achieve common ends and not simply to squelch peaceful assembly and speech because it may violate a "no encampment" policy. Further, if campus leadership is serious about curtailing the use of force by law enforcement, an independent, transparent, and sufficiently staffed PRB must be in place, guided by clear written protocols. Most importantly, never again can there be a recurrence of the type of uncalled-for violence by campus police that we witnessed on November 9, 2011.