SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2017 - 2018 Regular

Bill No:	AB 931	**Hearing Date:**	June 19, 2018
Author:	Weber		
Version:	June 12, 2018		
Urgency:	No	**Fiscal:**	Yes
Consultant:	GC		

Subject: ***Criminal Procedure: Use of Force by Peace Officers***

HISTORY

Source: Alliance for Boys and Men of Color; American Civil Liberties Union of California; Anti-Police Terror Project; Communities United for Restorative Youth Justice; PICO California; PolicyLink; Youth Justice Coalition

Prior Legislation: None known

Support: ACCE Action; Advancement Project; Alliance for Boys and Men of Color; Alliance San Diego; American Civil Liberties Union of California; American Friends Service Committee; Amnesty International USA; Asian Law Alliance; Bend the Arc Jewish Action; Black American Political Association of California; Black Women Organized for Political Action; California Association of African-American Superintendents and Administrators; California Calls; California Cannabis Coalition; California Faculty Association; California Immigrant Policy Center; California Minority Alliance: Inland Empire Chapter; California Nurses Association; California Public Defenders Association; California State Conference of the NAACP; Californians for Justice; Californians United for a Responsible Budget; Center on Juvenile and Criminal Justice; Center on Policy Initiatives; Chinese for Affirmative Action; City of Berkeley; Cindy and Bill Simon Technology School; Clergy and Laity United for Economic Justice (CLUE); Climate Action Campaign; Coalition for Humane Immigrant Rights (CHIRLA); Coalition for Justice and Accountability; Coleman Advocates for Children and Youth; Consumer Attorneys of California; Council on American-Islamic Relations, California; Courage Campaign; Californians United for a Responsible Budget (CURB); Drug Policy Coalition; Ella Baker Center for Human Rights; Fathers and Families of San Joaquin; Friends Committee on Legislation of California; Hispanic National Bar Association; I Am…; Immigrant Legal Resource Center; Koreatown Immigrant Workers Alliance; League of Women Voters of California; Legal Services for Prisoners with Children; Lutheran Office of Public Policy – California; Mid-City CAN; National Action Network; National Center for Lesbian Rights; National Nurses United; Oakland Privacy; Orange County Congregation Community Organization; Oscar Grant Committee; Paving Great Futures; People Acting in Community Together; PICO California; PolicyLink; Press4word; Public Health Justice Collective; Riverside Temple Beth El; Root and Rebound; San Diego Immigrant Rights Consortium; San Diego La Raza Lawyers Association; San Francisco District Attorney's Office; San Francisco Public Defender's Office; San Jose Peace and Justice

Center; Santa Ana Unidos; Santa Barbara Women's Political Committee; Santa Clara University; Service Employees International Union (SEIU), SF LGBT Center; Silicon Valley De-Bug; Showing Up for Racial Justice (SURJ), Bay Area; Showing Up for Racial Justice, Sacred Heart; Together We Will – San Jose; Transgender Law Center; True Hope Church; UAW 2865, UC Student-Workers Union; United Food and Commercial Workers (UFCW) – Western States Council; White People 4 Black Lives. Women's Foundation of California; Youth ALIVE!; Youth Justice Coalition; 85 Private Individuals

Opposition: Association of Orange County Deputy Sheriffs; California Association of Highway Patrolmen; California Association of Code Enforcement Officers; California Coalition of Law Enforcement Associations; California College and University Police Chiefs Association; California Narcotics Officers Association; California Peace Officers' Association; California Police Chiefs Association; California State Sheriffs' Association; California Statewide Law Enforcement Association; City of Oakley; City of West Covina; Cloverdale Police Department; Fraternal Order of Police; Law Enforcement Managers' Association; Long Beach Police Officers Association; Los Angeles Police Protective League; Los Angeles Professional Peace Officers Association; Peace Officers Research Association of California; Riverside Sheriffs' Association; Sacramento County Deputy Sheriffs' Association

Assembly Floor Vote: Not relevant

PURPOSE

The purpose of this bill is to revise the standard for use of deadly force by peace officers.

Existing statutory law provides that homicide is justifiable when committed by public officers when any of the following occur: (Pen. Code, § 196.)

- In obedience to any judgment of a competent court; or
- When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or
- When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.

Existing law provides that any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. (Pen. Code, § 835a)

Existing law specifies that a peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance. (Pen. Code, § 835a)

Existing law provides that homicide is justifiable when committed by any person in any of the following cases: (Pen. Code, § 197)

- When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person.
- When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein.
- When committed in the lawful defense of such person, or of a spouse, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he or she was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed.
- When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

This bill finds and declares that the authority to use physical force, conferred on peace officers by this section, is a serious responsibility that must be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life. The Legislature further finds and declares that every person has a right to be free from excessive force by officers acting under color of law.

This bill makes homicide by a peace officer justifiable only if the use of force is consistent with the provisions of this bill related to use of deadly force.

This bill provides that specified defenses to homicide including justifiable homicide shall not be available to a public officer whose conduct is such a departure from the expected conduct of an ordinarily prudent or careful officer under the same circumstances as to be incompatible with a proper regard for human life, and where an officer of ordinary prudence would have foreseen that the conduct would create a likelihood of death or great bodily harm.

This bill removes existing statutory provisions stating that officers need not retreat or desist from an attempted arrest by reason of the resistance or threatened resistance of the person being arrested in provisions allowing officers to avail themselves of the defenses of self-defense and defense of others.

This bill limits the use of deadly force by a peace officer to those situations where it is necessary to prevent imminent and serious bodily injury or death to the officer or another person.

1) *This bill* provides that "necessary" means that, given the totality of the circumstances, a reasonable peace officer would conclude that there was not reasonable alternative to the use of deadly force that would prevent imminent death or serious bodily injury to the peace officer or another person.

2) *This bill* defines "reasonable alternatives" as tactics and methods, other than the use of deadly force, of apprehending a subject or addressing a situation that do not unreasonably increase the threat posed to the peace officer or another person. Reasonable alternatives include, but are not limited to, verbal communications, warnings, de-escalation, and tactical repositioning, along with other tactics and techniques intended to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation without the use of deadly force.

3) *This bill* defines "totality of the circumstances" as including all facts reasonably known to the peace officer at the time, including the actions of the subject and the officer leading up to the use of deadly force.

This bill prohibits the use of deadly force by a peace officer in a situation where an individual only poses a risk to himself or herself.

This bill limits the use of force by a peace officer against a person fleeing when the officer has probable cause to believe that the person has committed, or intends to commit, a felony involving death or serious bodily injury, and there is an imminent risk of death or serious bodily injury to the peace officer or to another person if the subject is not immediately apprehended.

COMMENTS

1. Need for This Bill

According to the author:

> Police kill more people in California than in any other state. In 2017, officers shot and killed 162 people in California, only half of whom were armed with guns, and killed more than twenty others using other types of force. Of the fifteen police departments with the highest per capita rates of police killings in the nation, five are in California: Bakersfield, Stockton, Long Beach, Santa Ana and San Bernardino. Police in Kern County have killed more people per capita than in any other US county.
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> Current law results in officers killing civilians far more often than is necessary, leaving many families and communities devastated and the general public less safe. These tragedies disproportionately impact communities of color: Studies show police kill unarmed young black men at more than twenty times the rate they kill young white men. This has understandably created a rift between police and community members, to the detriment of public safety.
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> The power of police officers to use deadly force is perhaps the most significant responsibility we confer on any public official, and it must be guided by the goal of safeguarding human life. But current law sanctions police use of deadly force even when officers do not face an imminent threat to life or bodily security, and even when officers have reasonable alternatives at their disposal to safely address a situation without taking anyone's life.

> Some police departments in California have recognized that they need to hold themselves to a higher standard, updating their use of force policies to adopt best practices like requiring de-escalation when feasible, using force that is proportional to the law enforcement objective, and grounding their policies in the sanctity of human life. Studies show that officers in departments that have adopted such policies kill fewer people and are less likely to be killed or assaulted in the line of duty – because tactics like de-escalation can defuse potentially dangerous situations and prevent them from reaching the point when anyone, officer or civilian, is injured or killed.
>
> The Police Accountability and Community Protection Act will update California's deadly force standards to prevent Californians' unnecessary deaths at the hands of law enforcement.

2. Existing California Statues Related to Police Use of Force are Outdated

Under current California law a peace officer may kill anyone charged with a felony who is fleeing or resisting arrest. This law was enacted in 1872. California Penal Code § 196 is the single oldest un-amended law enforcement use of force statute in the country. In 1985, the United States Supreme Court decided the case of *Tennessee v. Garner*, 471 U.S. 1. In *Garner* the court held:

> *The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.*

Additionally, the United States Supreme Court decided *Graham v. Connor*, 490 U.S. 386 in 1989. In *Graham* the court held that an objective reasonableness test should be used as the standard to determine whether a law enforcement official used excessive force in the course of making an arrest, or other action. The court stated:

> *As in other Fourth Amendment contexts... the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation…[t]he "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.*

Following the decisions in *Graham* and *Garner* California has been operating in a reality where the statutes related to police use of force are outdated and unconstitutional. Currently, the California Penal Code authorizes police to use force to arrest, prevent escape, and overcome resistance – without requiring the force to be proportional. (Penal Code § 835a). It authorizes police deadly force without limiting its use to situations where killing is needed to defend against a threat of death or serious injury. On its face, the Code justifies police killing any person charged with a felony who is fleeing or resisting arrest – whether or not the person poses a danger to the officer or someone else (Penal Code § 196). The provisions of this bill are

intended to update the California Penal Code to comply with the Supreme Court's more modern approach to policing and use of force standards.

3. Self-Defense and Defense of Others and Justifiable Homicide

Every person in the State of California has the right to self-defense and to defend others. According to the California jury instructions, the right to self-defense and defense of others are explained as follows:

> Judicial Council of California Criminal Jury Instruction ("CALCRIM") 505 – Justifiable Homicide: Self-Defense or Defense of Another. "[A] defendant is not guilty of [homicide] if he or she was justified in killing or attempting to kill someone in self-defense or defense of another. The defendant acted in lawful self-defense defense of another if:
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> 1) The defendant reasonably believed that he, she, or someone else was in imminent danger of being killed or suffering great bodily injury or was in imminent danger of being raped, maimed, or robbed;
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> 2) The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and
>
> 3) The defendant used no more force than was reasonably necessary to defend against that danger.

Additionally, every person in the State of California is entitled to engage in justifiable homicide under Penal Code § 197. Penal Code § 197 provides the following:

> Homicide is justifiable when committed by any person in any of the following cases: (Pen. Code, § 197)
>
> 1) When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person.
>
> 2) When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein.
>
> 3) When committed in the lawful defense of such person, or of a spouse, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he or she was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed.

4) When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

As discussed above, California has an outdated and unconstitutional section that applies only to peace officers and whether or not their actions result in justifiable homicide. This bill seeks to amend that section. This bill makes homicide by a peace officer justifiable only if the use of force is consistent with the provisions of this bill related to use of deadly force. The bill additionally provides that specified defenses to homicide including justifiable homicide shall not be available to a public officer whose conduct is such a departure from the expected conduct of an ordinarily prudent or careful officer under the same circumstances as to be incompatible with a proper regard for human life, and where an officer of ordinary prudence would have foreseen that the conduct would create a likelihood of death or great bodily harm. The bill removes existing statutory provisions stating that officers need not retreat or desist from an attempted arrest by reason of the resistance or threatened resistance of the person being arrested in provisions allowing officers to avail themselves of the defenses of self-defense and defense of others.

Proponents argue that officers should not be able to avail themselves of defenses to homicide when the officers unreasonably place themselves into situations that cause the imminent threat of death or serious bodily injury. The proponents further utilize some fairly recent case law as the legal standard they're utilizing in this bill. They argue that the standard for criminal negligence as related to involuntary manslaughter should model the standard used in People v. Luo (2017) 16 Cal.app. 5th 663. *Luo* held:

> Criminal negligence is defined as conduct that is 'such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to the consequences.

Additionally they cite the same case for the foresight provision:

> Criminal negligence is also described in terms of objective foreseeability, that is, one acts with criminal negligence when a person "of ordinary prudence would foresee that the act would cause a high degree of risk of death or great bodily harm." Id.[1]

Opponents to this bill have concerns that this standard raises the raises the standard for self-defense and defense of others for an officer above the standard that is applicable to any other citizen. Their position is that we are requiring officers to have additional standards prior to acting in defense of themselves, or to defend others as they are often asked to do. Additionally, the opponents have concern that the bill requires them to act in a standard that a reasonable officer in their position would "foresee" that their conduct could result in a risk of death or serious bodily injury. The opponents feel that this is contrary to the ruling in *Graham v. Connor*, 490 U.S. 386 wherein the Supreme Court held that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

[1] (citing *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440, 8 Cal.Rptr. 863.)

4. Use of Deadly Force by Peace Officers

As discussed above, under existing California Penal Code authorizes police to use force to arrest, prevent escape, and overcome resistance, without requiring the force to be proportional. (Penal Code § 835a). It authorizes police deadly force without limiting its use to situations where killing is needed to defend against a threat of death or serious injury. On its face, the Code justifies police killing any person charged with a felony who is fleeing or resisting arrest – whether or not the person poses a danger to the officer or someone else (Penal Code § 196). Although the Supreme Court rulings in *Graham* and *Garner* have found effectively found these statutes unconstitutional, they remain in the California Penal Code today.

This bill would significantly rewrite these code sections as they apply to the use of deadly force. ***Under the provisions of this bill use of deadly force by a peace officer is limited to those situations where it is necessary to prevent imminent and serious bodily injury or death to the officer or another person.*** This provision is consistent with the rulings in *Graham* and *Garner*.

The bill goes on to define several terms in the above standard that impact the meaning of the statute.

1) The bill provides that "***necessary***" means that, given the totality of the circumstances, a reasonable peace officer would conclude that there was not reasonable alternative to the use of deadly force that would prevent imminent death or serious bodily injury to the peace officer or another person.

2) The bill defines "***reasonable alternatives***" as tactics and methods, other than the use of deadly force, of apprehending a subject or addressing a situation that do not unreasonably increase the threat posed to the peace officer or another person. Reasonable alternatives include, but are not limited to, verbal communications, warnings, de-escalation, and tactical repositioning, along with other tactics and techniques intended to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation without the use of deadly force.

3) The bill defines "***totality of the circumstances***" as including all facts reasonably known to the peace officer at the time, including the actions of the subject and the officer leading up to the use of deadly force.

In defining the term "necessary" the bill states that in evaluating whether an officer acted appropriately one must look to several factors. First, the officers must be viewed under a "totality of the circumstances" standard. Second, the officer must act as a reasonable peace officer. Third, there cannot have been a reasonable alternative to the use of deadly force. In evaluating these factors, it is not clear whether the reasonable officer standard articulated in the bill is the "objectively reasonable officer" standard articulated by the United States Supreme Court. The author may wish to amend the bill to clarify that "a reasonable peace officer is an objectively reasonable peace officer."

The bill goes on to define what constitutes totality of the circumstances. Under the bill the totality of the circumstances include all facts that are reasonably known to the peace officer at the time of the incident in question. This version of the bill requires that the circumstances

should be evaluated by what the officer reasonably should know, rather than what the officer actually knows. However, if this statute will attach criminal liability by invalidating a legal defense then another approach may be to evaluate the officer's actions based on what the officer actually knows. This is the approach that was actually articulated in the author's background materials, but is not the approach that is in the bill before this committee.

Also when evaluating the totality of the circumstances, the bill specifies that the actions of the officer and the subject leading up to the use of deadly force. This evaluation should naturally be included in any evaluation of the *totality* of the circumstances. The proponents of the bill want to make clear that an officer's actions leading up to any use of force, as well as the actions of any person that had force used upon them, should be considered in an evaluation of whether or not that force was necessary and appropriate. The concern here from proponents is that an officer's actions may be evaluated solely at the time the officer acted, discounting what led up to the encounter.

The bill also defines reasonable alternatives, and requires that officers engage in reasonable alternatives to the use of force in order for the force to be necessary. These include tactics and methods, other than the use of deadly force, of apprehending a subject or addressing a situation that do not unreasonably increase the threat posed to the peace officer or another person. The bill gives a number of examples such as verbal communication, warnings, de-escalation, and tactical repositioning. Opponents to this legislation have concerns that these provisions will slow the time that an officer may or may not need to act in order to defend themselves, or someone they are trying to protect. Proponents argue that if the alternatives are not reasonable, then they do not need to take those actions and can lawfully utilize deadly force. Another view is that reasonable alternatives would naturally be a part of an existing analysis if one is viewing the officer's actions through a totality of the circumstances.

The effect of this bill on the issue of use of deadly force is that it would create a standard that is roughly consistent with existing United States Supreme Court precedent. However, the bill goes on to define the standard in a manner that goes beyond the existing standard by creating a set of terms and definitions that one must use to evaluate whether an officer's use of deadly force is lawful.

5. Fleeing Felon Rule

Under California Code, our rule regarding use of deadly force is significantly outdated and non-compliant with constitutional standards under *Tennessee v. Garner*, (1985) 471 U.S. 1.

Under current California Penal Code standard is:

> Police are authorized to use deadly force on any person charged with a felony who is fleeing or resisting arrest – whether or not the person poses a danger to the officer or someone else (Penal Code § 196).

The standard as set forth in *Garner* is:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend

> him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.

The standard as set forth in this bill is:

> To limit the use of force by a peace officer against a person fleeing when the officer has probable cause to believe that the person has committed, or intends to commit, a felony involving death or serious bodily injury, and there is an imminent risk of death or serious bodily injury to the peace officer or to another person if the subject is not immediately apprehended.

The provisions in this bill are consistent with the standards set forth in both *Garner* and *Graham*. *Garner* utilizes the term "immediate" while this bill utilizes the term "imminent." However, under the progeny of *Graham* courts have generally used those terms interchangeably. Additionally, this bill does not define the term immediate, but that term is very well defined in existing case law.

6. Retreat and Desist

This bill removes existing statutory provisions stating that officers need not retreat or desist from an attempted arrest by reason of the resistance or threatened resistance of the person being arrested in provisions allowing officers to avail themselves of the defenses of self-defense and defense of others. Opponents to this legislation have expressed concern with the removal of these provisions. They argue that it is bad public policy to not expressly state that officers need not retreat or desist their actions in order to avail themselves of a self-defense or defense of others defense.

Proponents state that it is generally good policy for officers to engage in de-escalation techniques that may eliminate the need to act in a manner that could result in the need for deadly force. They point to the Los Angeles Police Department (LAPD) Policy which states, "[o]fficers shall attempt to control an incident by using time, distance, communications, and available resources in an effort to de-escalate the situation, whenever it is safe and reasonable to do so." They state that the provisions in existing law related to not needing to retreat or desist makes the justifiable homicide on the part of a peace officer a "stand your ground" statute. However, opponents argue that the public may need officers to stand their ground in many situations.

One alternative method would be to leave the language authorizing officers to not retreat or desist and instead add a proviso that the officers should act in a manner consistent with the ideals expressed in the LAPD policy. Under that approach, this provision of the existing Penal Code § 835a would be amended as follows:

> A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance. ***However, officers shall attempt to control an incident by using time, distance, communications, and available resources in an effort to de-escalate the situation, whenever it is safe and reasonable to do so.***

7. Risk to Self

The current bill prohibits the use of deadly force by a peace officer in a situation where an individual only poses a risk to himself or herself. Proponents argue that the need for this provision is because if an individual is merely risking harm to themselves and to no one else, there is no need for law enforcement to engage and use deadly force against that person. Opponents to the legislation argue that there is a blurry line between an unstable and armed person holding a firearm that they are threatening to use on themselves harming only themselves, and not the officers or a civilian bystander. However, under the current version of the bill the language does specify that the person may not pose an imminent threat of death or serious bodily injury to the peace officer or to another person. Under this version of the bill, the officer will have to reasonably determine if that threat the person poses to themselves becomes an imminent threat to cause death or serious bodily injury to another.

8. Argument in Support

According to Seth W. Stoughton, University of South Carolina Professor of Law:

> I am writing to state my support for AB 931 subject to the bill being amended as discussed below. The bill is a substantial improvement upon existing law; the way that it regulates police uses of deadly force will improve the safety of officers and community members alike.
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> I am a law professor who studies the regulation of policing, including the use of force. I am also a former police officer. For the last several years, I have written about the use of force in both academic journals and popular media publications, as well as provided subject matter expertise and expert testimony related to police procedure, tactics, and the use of force. My conditional support for AB 931 is grounded not only in my academic research, but also by my own experiences conducting stops, making arrests, and using force.
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> As it currently stands, the California statute governing justifiable homicide by public officials is painfully outdated. Penal Code 196 was enacted in 1872 and has not been amended since, making it the single oldest unamended use-of-force statute in the country.[2] In its current form, the law reflects what is known as the "fleeing felon" rule for deadly force: officers are permitted to use deadly force when the use of deadly force is "necessarily committed in overcoming actual resistance to the execution of some legal process"[3] and when "necessarily committed in arresting persons charged with [a] felony, and who are fleeing from justice or resisting such arrest."[4] Once commonly accepted, the "fleeing felon" rule has been repeatedly abrogated by the states through statute and caselaw: a

[2] The only states that enacted similar laws prior to California are Vermont (1787), Tennessee (1858) and Georgia (1863). Idaho followed suit shortly thereafter (1887). All four states have re-codified or amended their laws multiple times since, with Vermont doing so 11 times (mostly recently in 1983), Tennessee doing so twice (most recently in 1990), Georgia doing so 14 times (most recently in 2013), and Idaho doing so four times (most recently in 1987). For further comparison, 42 states have a total of 58 different statutes that regulate at least some uses of force. Almost half (28) of the statutes were enacted in the 1970s; of the 30 others, 20 were adopted prior to the 1970s and the remaining 10 were enacted after. Of the 58 statutes, only 15 have never been amended.

[3] CAL PENAL CODE § 196(2).

[4] CAL PENAL CODE § 196(3).

2016 study found that it was still clearly in effect in only twelve states.[5] More tellingly, the "fleeing felon" rule was rejected by the Supreme Court in 1985, when it held that the Fourth Amendment permits the use of deadly force only when an officer "has probable cause to believe that the subject poses a significant threat of death or serious physical injury to the officer or others."[6] California Penal Code 196 is clearly in need of revision.

The need for revision is even clearer in light of how challenging and divisive police uses of force have become. I would be remiss if I did not mention first that the use of force, especially the use of deadly force, is relatively rare. According to the best available data—which admittedly are not as robust as I would prefer—only a small percentage of police-civilian contacts every year in the United States involve a threat or actual use of force.[7] Even in the context of interactions that involve the types of inherently coercive police action that are most likely to elicit civilian resistance, such as arrests, violence is the exception, not the rule. And on those occasions when officers do use force, the vast majority of incidents involve low-level violence with little potential for injury: grabbing, shoving, and the like. But although the proportion of police-civilian encounters that involve violence are quite modest, the small percentage masks large absolute numbers. Even if force is used in only 1% of police-civilian encounters, the fact that there are, on average, more than 60 million such encounters annually in the United States means that there are at least 600,000 uses of force every year. That's more than one every minute in every hour of every day of the year. Most of the time, officers are not using force to defend themselves: according to the FBI's Law Enforcement Officers Killed & Assaulted data, there were, on average, about 56,000 assaults on officers per year over the last ten years. That suggests that, nationally, officers use force for reasons other than self-defense on at least 544,000 occasions each year. That breaks down to almost 1,500 every day, which is still more than one per minute. Those numbers are at the low end of the spectrum based on Bureau of Justice Statistics data; if more than 1% of police-civilian encounters involve the use of force or if there are more than 60 million encounters in a given year, the absolute numbers may be significantly larger.

The use of force is, and should be, of central concern to the state legislature for at least two reasons. First, police violence implicates critical questions about the relationship between government and the governed in a free society. The government's use of force against its own citizens is in tension with our most

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[5] Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After* Garner, 35 ST. LOUIS U. PUB. L. REV. 109, 124 (2015) *available at* https://bit.ly/2Jw2hP4.

[6] Tennessee v. Garner, 471 U.S. 1,3 (1985).

[7] The exact number depends on which study one relies upon. See, e.g., Shelley Hyland et al., U.S. Dep't of Justice, Bureau of Justice Statistics, Police Use of Nonfatal Force, 2002-2011, at 1 (2015), https://bit.ly/2sZ0kDz (reporting that, over a ten-year period, an average of 1.6% of the annual average of 43.9 million police contacts involved the use of or threatened use of force); Christine Eith & Matthew R. Durose, U.S. Dep't of Justice, Bureau of Justice Statistics, Contacts Between Police and the Public, 2008, at 6, 12 (2011), https://bit.ly/1bv3Ac7 (reporting that, in 2008, about 1.4% of the 67 million police contacts involved the use of or threatened use of force); Int'l Assoc. of Chiefs of Police, Police Use of Force in America 2001, at i–ii (2001), https://bit.ly/2HDqocT (finding that, in 1999, officers used force in 0.0361% of calls for service). As Brandon Garrett and I have written, "A regrettable lack of standardization makes the different numbers difficult to compare; exactly what definition of 'force' a study adopts and whether it standardizes 'calls for service' or officer-civilian encounters or the number of sworn officers can dramatically affect the end result." *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 244 N. 150 (2017), https://bit.ly/2MgTi67.

> basic democratic notions of freedom, liberty, security, and autonomy. Our system of democratic republicanism is premised on the belief that a non-tyrannical government can rule only with the consent of the governed. A sophisticated civilization must balance individuals' interest in liberty and privacy against the societal interest in order and security, but if our democratic ideals are to mean anything, that balancing must be carefully managed. The tension between protection from and the need for governmental intrusion is particularly acute in the context of police uses of force, especially considering longstanding frictions with, and disparate treatment of, communities of color.
>
> Second, the use of force plays an important—indeed, an over-sized—role in shaping public attitudes toward government generally and policing more specifically. Community trust and confidence in the police is undermined by the perception that officers are using force unnecessarily, too frequently, or in problematically disparate ways. Over time, negative perceptions of the police can reduce civilian cooperation with government authority, making it far more difficult for officers to enforce the law, maintain order, and protect the public. Worse, public distrust can be dangerous for officers and community members alike. The use of force can be a flashpoint, a spark that ignites long-simmering community hostility. Use of force incidents have had lasting reverberations, from the televised abuses of the Civil Rights Era to the beating of Rodney King in 1991 or the shooting of Walter Scott in 2015. Of the ten most violent and destructive riots in United States history, fully half were prompted by what were perceived as incidents of excessive force or police abuse.[8] The perception that police uses of force are appropriately regulated will, it is hoped, contribute to an increase in police legitimacy that can make officers safer and more effective.

9. Arguments in Opposition

According to the California Police Chiefs Association:

> The California Police Chiefs Association strongly opposes AB 931, which would establish an unprecedented legal standard of reviewing an officer's decision to use deadly force.
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> We want to make it clear, anytime there is a loss of life, it is tragic. We are willing to work on and be a part of this dialogue around use of force, and work cooperatively to find solutions. Right now, a lot of departments are already working to find ways – through education, training, and policies – to reduce the number of deadly force incidents. We all share that goal.
>
> However, AB 931 is a dangerous proposal.
>
> This legal standard is meant to judge, in hindsight, how an officer reacted in a split-second to a dangerous situation. In that case, we have to recognize the uncertainty in those moments, which is why our current standard allows the courts to measure whether the officer reacted as any *reasonable* officer would have. The U.S. Supreme Court understood in defining our current legal standard that there must be "allowance

[8] Daniel Bukszpan, *America's Most Destructive Riots of All Time*, CNBC (Feb. 1, 2011), https://cnb.cx/2MjJwQv.

for the fact that police officers are required to make split-second judgments in circumstance that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." (*Graham v. Connor, 1989*). Anything above this puts our officers in an unwinnable situation.

Should this law change as proposed, our officers' responses to emergency situations will be greatly compromised. Instead of assessing and responding instantly, our officers will be forced to satisfy a number of new requirements regardless if they are in a life or death situation. If our officers cannot respond to emergency situations until backup arrives or are forced to employ a checklist during rapidly advancing and extraordinarily dangerous situations, ***everyone involved is placed at a higher risk.***

Our society has many dangerous threats and just as our officers cannot anticipate what they will encounter, our legal standards cannot anticipate what options they will be given before using force. To be clear, the current standard is not a 'green light' for officers to use deadly force whenever they please. Our training focuses on resolving each incident with the least amount of force. We expect our officers to preserve life at every call. Policies and procedures guide officers to assess any situation they might find themselves in within imperfect time frames, and this legal standard ensures they act only as we would expect any officer to react. Our departments review the decisions and circumstances of each incident and if need be, we will seek the opinion of the courts or a grand jury. At the end of the day, none of us want to see force used – it is always a last option – but unfortunately, it is a part of keeping our communities safe.

CPCA opposes AB 931 because it will prevent law enforcement from performing our sworn duty of protecting the public.

According to the Peace Officers Research Association of California (PORAC):

On behalf of our clients, the California Association of Highway Patrolmen (CAHP) representing approximately 14,500 active and retired CHP officers, and the Peace Officers Research Association of California (PORAC), representing 70,000 public safety members and 930 public safety associations, we regret to inform you of our opposition to AB 931 relating to criminal procedure: use of force by peace officers.

PORAC opposes this bill for the following reasons:

- The legislation fails to take into account that imposing a new standard for use of deadly force would require that every police officer in the State of California be retrained. The legislation fails to take into consideration the significant time that will be require to develop new training to adjust every officer's mental and motor programs to the new standard, and fails to contain any funding mechanism for such standards.

- The legislation defines "necessary" as meaning there is "no reasonable alternative" to the use of deadly force. Whether deadly force was the only reasonable option can only be determined in hindsight, and does not embody allowance for the fact that police officers are often forced to make split-second judgments.

- The cost of a "necessary" standard will be officer hesitation. Hesitation will place our communities at greater risk as officers delay the response to a rapidly evolving and dangerous situation in order to review and evaluate a checklist of options before acting to protect the public safety.

- The existing standard already takes necessity into account. An officer can only use that amount of force that under the totality of circumstances is reasonable. For the force to be reasonable, it must be objectively necessary given everything the officer knew and believed to be true at the time the force decision was made.

- An increased level of training rather than legislation would accomplish the bill's mandate that officers consider alternatives, including de-escalation.

CAHP and PORAC agree that the use of deadly force is a serious responsibility that must be exercised judiciously and that every person has a right to be free from excessive force by officers acting under color of law. We support training on a wide-range of skills, tactics, and tools, including de-escalation tactics and mental health assessment training.

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