
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: AB 1022 **Hearing Date:** August 7, 2020
Author: Holden
Version: July 30, 2020
Urgency: No **Fiscal:** Yes
Consultant: GC

Subject: *Peace Officers: Use of Force*

HISTORY

Source: Author

Prior Legislation: AB 392 (Weber), Ch. 170, Stats. of 2019
SB 230 (Caballero), Ch. 285, Stats. of 2019

Support: The Arc; Asian Americans Advancing Justice – California; California Department of Justice; California Nurses Association; California Public Defenders Association; City of Alameda; Claremont Change; Consumer Attorneys of California; Planned Parenthood Affiliates of California; United Cerebral Palsy Collaboration

Opposition: Assoc. of LA Deputy Sheriffs; Assoc. of Orange County Sheriffs; Assoc. Probation Supervisors LA County; CA Association of Highway Patrolmen; CA Coalition of Law Enforcement Assoc.; CA State Lodge of Fraternal Order of Police; CA State Sheriffs' Association; Corona Police Officers Assoc.; Deputy Sheriffs Assoc. of San Diego; El Segundo Police Officers Assoc.; Fresno Police Officers Assoc.; Hawthorne Police Officers Assoc.; Long Beach Police Officers Assoc.; LA Airport Peace Officers Assoc.; LA County Deputy Probation Officers Union, Local #685; LA County Probation Professional Managers Assoc. AFSCME Local #1967; LA County Professionals Peace Officers Assoc.; LA County Sheriff's Department; LA School Police Management Assoc.; LA School Police Officers Assoc.; Peace Officers Research Association of California (PORAC); Pomona Police Officers Assoc.; Riverside Police Officers Assoc.; Riverside Sheriffs' Association; Sacramento County Deputy Sheriffs Assoc.; Sacramento County Probation Assoc.; Sacramento Police Officers Assoc.; San Bernardino County Sheriffs Employees' Benefit Assoc.; San Diego County Probation Officers Assoc.; San Diego Police Officers Assoc.; San Francisco Police Officers Assoc.; Santa Ana Police Officers Assoc.; Santa Monica Police Officers Assoc.; Torrance Police Officers Assoc.

Assembly Floor Vote: Not relevant

PURPOSE

The purpose of this legislation is to; 1) clarify and strengthen policies related to law enforcement officers' duty to intervene when force is used, 2) prohibit retaliation for reporting on a fellow officer and 3) impose additional penalties for specified uses of force and for failure to intervene when excessive force is used.

Existing law defines “deadly force” as any use of force that creates a substantial risk of causing death or serious bodily injury. Deadly force includes, but is not limited to, the discharge of a firearm. (Gov. Code, § 7286, subd. (a)(1).)

Existing law defines “feasible” means reasonably capable of being done or carried out under the circumstances to successfully achieve the arrest or lawful objective without increasing risk to the officer or another person. (Gov. Code, § 7286, subd. (a)(2).)

Existing law requires that each law enforcement agency shall, by no later than January 1, 2021, maintain a policy that provides a minimum standard on the use of force. Each agency’s policy shall include all of the following: (Gov. Code, § 7286, subd. (b).)

- A requirement that officers utilize de-escalation techniques, crisis intervention tactics, and other alternatives to force when feasible.
- A requirement that an officer may only use a level of force that they reasonably believe is proportional to the seriousness of the suspected offense or the reasonably perceived level of actual or threatened resistance.
- A requirement that officers report potential excessive force to a superior officer when present and observing another officer using force that the officer believes to be beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances based upon the totality of information actually known to the officer.
- Clear and specific guidelines regarding situations in which officers may or may not draw a firearm or point a firearm at a person.
- A requirement that officers consider their surroundings and potential risks to bystanders, to the extent reasonable under the circumstances, before discharging a firearm.
- Procedures for disclosing public records in accordance with Section 832.7.
- Procedures for the filing, investigation, and reporting of citizen complaints regarding use of force incidents.
- A requirement that an officer intercede when present and observing another officer using force that is clearly beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances, taking into account the possibility that other officers may have additional information regarding the threat posed by a subject.
- Comprehensive and specific guidelines regarding approved methods and devices available for the application of force.
- An explicitly stated requirement that officers carry out duties, including use of force, in a manner that is fair and unbiased.
- Comprehensive and specific guidelines for the application of deadly force.
- Comprehensive and detailed requirements for prompt internal reporting and notification regarding a use of force incident, including reporting use of force incidents to the Department of Justice in compliance with Section 12525.2.
- The role of supervisors in the review of use of force applications.

- A requirement that officers promptly provide, if properly trained, or otherwise promptly procure medical assistance for persons injured in a use of force incident, when reasonable and safe to do so.
- Training standards and requirements relating to demonstrated knowledge and understanding of the law enforcement agency's use of force policy by officers, investigators, and supervisors.
- Training and guidelines regarding vulnerable populations, including, but not limited to, children, elderly persons, people who are pregnant, and people with physical, mental, and developmental disabilities.
- Comprehensive and specific guidelines under which the discharge of a firearm at or from a moving vehicle may or may not be permitted.
- Factors for evaluating and reviewing all use of force incidents.
- Minimum training and course titles required to meet the objectives in the use of force policy.
- A requirement for the regular review and updating of the policy to reflect developing practices and procedures.

Existing law requires that each law enforcement agency shall make their use of force policy adopted pursuant to this section accessible to the public. (Gov. Code, § 7286, subd. (c).)

Existing law mandates that the Commission on Peace Officers Standards and Training (POST) shall implement a course or courses of instruction for the regular and periodic training of law enforcement officers in the use of force and shall also develop uniform, minimum guidelines for adoption and promulgation by California law enforcement agencies for use of force. The guidelines and course of instruction shall stress that the use of force by law enforcement personnel is of important concern to the community and law enforcement and that law enforcement should safeguard life, dignity, and liberty of all persons, without prejudice to anyone. These guidelines shall be a resource for each agency executive to use in the creation of the use of force policy that the agency is required to adopt and promulgate pursuant to Section 7286 of the Government Code, and that reflects the needs of the agency, the jurisdiction it serves, and the law. The course or courses of the regular basic course for law enforcement officers and the guidelines shall include all of the following: (Penal Code, § 13519.10)

- Legal standards for use of force.
- Duty to intercede.
- The use of objectively reasonable force.
- Supervisory responsibilities.
- Use of force review and analysis.
- Guidelines for the use of deadly force.
- State required reporting.
- De-escalation and interpersonal communication training, including tactical methods that use time, distance, cover, and concealment, to avoid escalating situations that lead to violence.
- Implicit and explicit bias and cultural competency.
- Skills including de-escalation techniques to effectively, safely, and respectfully interact with people with disabilities or behavioral health issues.
- Use of force scenario training including simulations of low-frequency, high-risk situations and calls for service, shoot-or-don't-shoot situations, and real-time force option decision making.

- Alternatives to the use of deadly force and physical force, so that de-escalation tactics and less lethal alternatives are, where reasonably feasible, part of the decision making process leading up to the consideration of deadly force.
- Mental health and policing, including bias and stigma.
- Using public service, including the rendering of first aid, to provide a positive point of contact between law enforcement officers and community members to increase trust and reduce conflicts.

This bill requires that any peace officer who has been found by a law enforcement agency that employs them to have either used excessive force that resulted in great bodily injury or death of a member of the public or to have failed to intercede in that incident are disqualified from holding office as a peace officer or being employed as a peace officer.

This bill defines “excessive force” as a level of force that is found to have violated Section 835a of the Penal Code, the requirements on the use of force required by this section, or any other law, statute, regulation, or policy of the employing law enforcement agency.

This bill defines “intercede” as, including but not being limited to, physically stopping the excessive use of force, recording the excessive force and documenting efforts to intervene, efforts to deescalate the offending officer’s excessive use of force, and confronting the offending officer about the excessive force during the use of force and, if the officer continues, reporting to dispatch or the watch commander on duty and stating the offending officer’s name, unit, location, time and situation, in order to establish a duty for that officer to intervene.

This bill defines “retaliation” as a demotion, failure to promote to a higher position when warranted by merit, denial of access to training and professional development opportunities, denial of access to resourced necessary for an officer to properly perform their duties, or intimidation, harassment, or the threat of injury while on duty or off duty.

This bill clarifies that the existing reporting requirement that agencies must adopt for potential uses of force must be done immediately.

This bill specifies that law enforcement agency policies must make clear that there is a prohibition on retaliation against an officer that reports a suspected violation of a law or regulation of another officer to a supervisor or other person of the law enforcement agency who has the authority to investigate the violation.

This bill requires that law enforcement agencies adopt a policy to prohibit an officer from training another officer for a period of at least three years from the date that an abuse of force complaint against the officer is substantiated.

This bill requires that law enforcement agencies adopt a policy to mandate that an officer that has received all required training on the requirement to intercede and fails to intercede shall be disciplined in the same manner as the officer that committed the excessive force.

This bill specified that any peace officer who is present and observes another peace officer using excessive force and fails to intercede is an accessory in any crime committed by the other officer during the use of excessive force. Punishment for an accessory under Penal Code, § 33 is an alternate felony/misdemeanor.

COMMENTS

1. Need for This Bill

According to the author:

In 2019, Governor Newsom signed SB 230 (Caballero) and AB 392 (Weber) requiring each law enforcement agency to provide a minimum standard on the use of force and redefine circumstances under which the use of deadly force is deemed justifiable.

On May 25, 2020, George Floyd was arrested for allegedly using a counterfeit bill. During the arrest, the supervising officer knelt on Floyd's neck for over eight minutes while he was handcuffed with two additional officers further restraining him. A fourth officer stood watch to ensure that the gathering crowd did not become involved.

During his restraint, Floyd continued to plead that he could not breathe. After nearly six minutes, Floyd became motionless. One of the officers checked his pulse and informed the supervising officer (still kneeling on Floyd's neck) that he did not feel Floyd's pulse and asked the supervising officer if Floyd should be placed on his side, to which the supervising officer replied, "no." In fact, the supervising officer kept his knee on Floyd's neck for nearly a minute after the paramedics arrived as Floyd was motionless. Floyd died at the Hennepin County Medical Center emergency room.

While the public was outraged by the supervising officer's disregard for Floyd's life, what was equally troubling was that the other three officers failed to stop the supervising officer, despite Minnesota's "Duty to Intervene" law.

Currently, California law requires that an officer intercede when present and observing another officer using force that is beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances. However, current law does not indicate universal measures used to establish that an officer has in fact interceded. This is highly subjective and leaves each law enforcement agency with the ability to decide what level of intervention was deemed appropriate. In the case of George Floyd, a lawyer for one of the accused junior officers argues that because the junior officer asked the supervising officer if they should turn Floyd on his side that was intervention.

This bill specifies that a peace officer's "Duty to Intercede" shall include, but is not limited to, physically stopping the excessive use of force, recording the excessive force, and reporting the incident in real time to dispatch or the watch commander on duty in order to establish that officer has attempted to intervene.

AB 1022 prohibits an officer from training other officers for a three-year period if an abuse of force complaint is substantiated, disqualifies a person from holding office as a peace officer if, on three separate occasions, was found by a law enforcement agency that employs them to have either used

excessive force or failed to intercede, and makes a peace officer who is present and observes another peace officer using excessive force, and willfully fails to intercede an accessory in any crime committed by the other officer during the use of excessive force.

2. Duty to Intercede

This bill makes clear the responsibilities of officers to intercede in incidents when they witness another officer using excessive force. Additionally, this bill creates new consequences for an officer who fails to intercede when another officer is using excessive force. The author seeks to define two very important concepts related to use of force by law enforcement.

Definition of Intercede

The author defines “intercede” as, including but not being limited to, “physically stopping the excessive use of force, recording the excessive force and documenting efforts to intervene, efforts to deescalate the offending officer’s excessive use of force, and confronting the offending officer about the excessive force during the use of force and, if the officer continues, reporting to dispatch or the watch commander on duty and stating the offending officer’s name, unit, location, time and situation, in order to establish a duty for that officer to intervene.”

This definition gives guidance on what constitutes intervention, but does not limit the methods by which an officer may intervene. Additionally, the definition incorporates recent common methods of dealing with use of force incidents such as employment of “de-escalation” techniques.

Replacement of the Requirement of When to Intercede

The former requirement, imposed under SB 230 (Caballero) from 2019 on what agency policies should state on the duty to intervene provided a minimum standard that “an officer intercede when present and observing another officer using force that is clearly beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances, taking into account the possibility that other officers may have additional information regarding the threat posed by a subject.”

Opponents to this legislation argue that by removing the requirement that the officer be judged as an “objectively reasonable officer” under the same circumstances the proposal is holding officers to an unfair standard. Under common legal principles, when looking to see whether any person has acted in a reasonable manner, one would examine the facts and circumstances known to the officer and look at the reasonableness through an objective lens.

This bill would instead specify that an agency policies state that an officer has a duty to intercede when present and observing another officer using excessive force.

3. Consequences for Not Interceding

This bill creates a number of negative consequences for an officer who fails to intercede when another officer is using excessive force. In addition for any regular punishment that could be applied for failure to comply with agency policy, officer would face the following consequences under this bill:

- Any peace officer who has been found by a law enforcement agency that employs them to have either used excessive force that resulted in great bodily injury or death of a member of the public or to have failed to intercede in that incident are disqualified from holding office as a peace officer or being employed as a peace officer.
- A requirement that an officer be disciplined in the same manner as the officer that committed the excessive force if they fail to intervene.
- A requirement that an officer who observes another officer using excessive force and willfully fails to intercede is an accessory in any crime committed by the other officer during the use of excessive force. That conviction could result in a misdemeanor or a felony on the officer's record.

Accessory Criminal Liability

In addition to specifying that any department discipline that is handed out to the officer who uses excessive force must also be imposed on an officer who fails to intercede, this bill would specify that any failure to intercede that results in criminal liability by an officer who uses force faces would result in the officer who fails to intercede being criminally liable as an accessory under Penal Code, § 33. Convictions for Penal Code, § 33 can result in a misdemeanor or a felony carrying 16-months, 2, or 3 years in county jail.

4. Prohibition on Retaliation

This bill takes great effort to try and prevent an officer that must intervene under the provisions of the bill from being retaliated against by the agency that employs them, as well as fellow officers.

The bill defines “retaliation” as a “demotion, failure to promote to a higher position when warranted by merit, denial of access to training and professional development opportunities, denial of access to resourced necessary for an officer to properly perform their duties, or intimidation, harassment, or the threat of injury while on duty or off duty.”

The bill prohibits retaliation against an officer that reports a suspected violation of a law or regulation of another officer to a supervisor or other person of the law enforcement agency who has the authority to investigate the violation.

5. Argument in Support

According to Asian Americans Advancing Justice – California:

Asian Americans Advancing Justice – California (Advancing Justice – CA) writes in support of AB 1022, which establishes clear guidelines for police accountability and responsibility while demonstrating a duty to intervene and report when witnessing excessive force by another member of law enforcement.

Advancing Justice - CA, a partnership of Advancing Justice - Asian Law Caucus and Advancing Justice - Los Angeles, advocates for the civil and human rights of Asian American, Native Hawaiian, and Pacific Islander and other underserved communities to promote a fair and equitable society for all.

We advocate for transformation of the criminal justice system to reduce the overreliance on our inhumane and ineffective punitive carceral system, and to reinvest these resources in addressing the root causes of crime and criminalization.

On May 25, 2020, George Floyd was arrested for allegedly using a counterfeit bill. During the arrest, the supervising officer knelt on Floyd's neck for over eight minutes while he was handcuffed with two additional officers further restraining him. A fourth officer stood watch to ensure that the gathering crowd did not become involved. While the public was outraged by the supervising officer's disregard for Floyd's life, what was equally troubling was that the other three officers failed to stop the supervising officer, despite Minnesota's "Duty to Intervene" law.

Currently, California law requires that an officer intercede when present and observing another officer using force that is beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances. However, current law does not indicate universal measures used to establish that an officer has in fact interceded. In the case of George Floyd, a lawyer for one of the accused junior officers argues that because the junior officer asked the supervising officer if they should turn Floyd on his side that was intervention.

AB 1022 incorporates additional measures the strengthen and enforce the requirement of a peace officer's "Duty to Intercede," including: providing certain outcomes for failure to intercede and requiring that law enforcement procedures for disclosing public records of peace officers, as specified to be made available via internet search.

6. Argument in Opposition

According to PORAC:

Last year, PORAC was a part of a working group that negotiated issues that made comprehensive changes in the area of use of force. In that legislation, we created a mandate that an officer intercede when they feel another officer is using excessive force. The new law also requires an officer to report what they believe to be excessive force to the department. AB 1022 not only addresses those issues again, but redefines excessive force. Also, this legislation states that if an officer fails to intercede, that they be disciplined in the same matter as the officer who used the excessive force. Oftentimes, when an officer is not the first, or even second, person to arrive on the scene, they will observe actions being taken with a suspect without knowing what led up to the actions they are observing. For example, an officer may arrive at a scene and witness two or three officer wrestling or in a fight with a suspect on the ground. The arriving officer may not know that the suspect has a weapon, or has potentially used, or attempted to use, that weapon on the officers prior to their arrival on the scene. Without the arriving officer having full knowledge of the situation, that officer's intercedence could be dangerous to both the officers and the public.

Finally, this bill eliminates a national standard relating to “an objectively reasonable officer” and replaces that with a level of force that is “not reasonably believed” or “reasonably perceived level of actual or threatened resistance.” These terms are not defined in the legislation and, again, change the standard negotiated with the leadership of both houses last year.

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